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Department of Justice

"KEEPING THE BALANCE TRUE"

AN ADDRESS OF

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BEFORE THE

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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Thirty-seven years ago Mr. Justice Benjamin Cordozo wrote an opinion which contained a memorable warning:

"Justice," he said, "though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Had this warning been more widely heeded, we would not be facing today a serious imbalance in the scales of justice. For as most of you are painfully aware, a preoccupation with fairness for the accused has done violence to fairness for the accuser. In the process, fairness as a concept has often been strained to a meaningless shred.

You know, from first hand, that in our adversary court system the prosecutor already has an inherent disadvantage. He has to show proof beyond a reasonable doubt, while the defense has only to raise a reasonable doubt. Is justice served now by shackling the prosecutor and giving more weapons to the defense?

I refer to the extravagant means by which evidence is often disallowed.

I refer to the overweening attention to proceduralisms, far beyond the meaning of the Constitution--almost all of it benefiting the accused.

I refer to the astonishing extremities that some courts have reached in demanding proof of guilt.

I refer to the fatuous argument that because Americans read the newspapers and watch television, it is impossible for us to get impartial juries.

And I refer to the interminable post-trial devices which rob justice of any finality.

Little wonder that, as the record tells us, only one crime in a hundred is actually punished.

Little wonder that, as we often hear, the public is losing confidence in the ability of the courts to dispense justice.

Most of you need no convincing on this subject. But I would like to cite just two recent examples--both of them within Federal jurisdiction in the District of Columbia--to leave no doubt how far the scales have swung from the balance true. I might add that these are examples, not of jury determinations, but of appellate reversals.

Case No. One: A defendant accused of robbery was told his rights by the police, and all requirements in conformity with the Miranda decision were observed. The defendant said he understood his rights and did not want a lawyer, and in fact signed a written Waiver

of Rights form. He made a complete verbal confession, but because he objected to a written summary, the appellate court threw out his conviction on the ground that he might not have understood that his oral confession could be used against him.

This is directly opposed to the concept of the Miranda decision, which was avowedly made to establish a clear-cut constitutional procedure that would eliminate such second-guessing by the courts. In fact, this case bears out the observation made by Mr. Justice Byron White in his dissent in the Miranda case. The overtone in the Miranda ruling, he wrote, is that "it is inherently wrong for the police to gather evidence from the accused himself." And he warned that the ruling "is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty..."

Case No. Two: A defendant was convicted of housebreaking on undisputed evidence that 300 pounds of coins had been stolen, that four separate fingerprints of the defendant had been found on glass jars in which the coins had been kept, and that these jars were stored in the second-floor closet of a private home to which the defendant has no lawful access. In reversing the conviction the appellate court held

that "with evidence so inconclusive a reasonable person must have a reasonable doubt" of the defendant's guilt.

I am pleased to say that a member of that appellate court, Judge Warren Burger, now Chief Justice of the United States Supreme Court, dissented vigorously, and his dissenting opinion contains language that applies to much of this type of courtroom pettifoggery:

> I suggest that the kind of nit-picking appellate review exhibited by reversal of this conviction may help explain why the public is losing confidence in the administration of justice. I suggest also that if we continue on this course we may well come to be known as a society incapable of defending itself--the impotent society.

That, I believe, eloquently states the problem. Let me turn to a brief discussion of solutions. I believe that the Federal Government can and should provide the leadership in restoring the balance true. President Nixon called attention to many of the existing travesties of justice in a major address in Williamsburg calling for judicial reforms. And in the areas of its jurisdiction, the Department of Justice has taken and is taking meaningful steps to strengthen the prosecutor in order to balance the scales of justice.

First, we have brought stronger enforcement of existing laws. One example is the use of court-authorized wiretapping as a means of getting evidence in certain criminal offenses that was almost impossible to get before. Though sanctioned with every explicit guidelines by Congress in 1968, such wiretapping had not been used by the previous Administration. We have used it very effectively in getting evidence against hundreds of members of organized crime. Through wiretapping we were able to make 340 arrests in breaking up the two largest narcotics rings ever brought to justice.

Second, through the Law Enforcement Assistance Administration we have provided funds for strengthening state and county prosecution systems. Most of this has been applied to improving the effectiveness of prosecutors' offices and to give broader training to prosecutors. In fiscal 1970 and 1971 to date, more than $12 million of LEAA funds have been provided for these purposes. For example, only six days ago LEAA granted more than $280,000 to the National College of District Attorneys in Houston. The funds will be used for a series of four-week training courses for prosecutors.

In addition, LEAA is sponsoring a number of studies on the causes of court delays, on the exclusionary rule, and other subjects that should give support to the prosecutor.

Third, we have drafted and promoted the passage of Federal legislation that strengthens the prosecutor and thus helps to bring the scales of justice into balance.

One of these was the Organized Crime Control Act of 1970. Among other features, it provides stronger measures to compel testimony and to protect witnesses, both of which are particularly useful in organized crime cases. It also provides tougher sentencing of dangerous special offenders, and makes it a Federal offense to obstruct state or local law enforcement against illegal gambling.

Another new law is the District of Columbia Court Reform and Criminal Procedure Act of 1970. Among some of its lesser known provisions, it extends the use of prior convictions to challenge a defendant's testimony, it puts the burden of proof on the defense in an insanity plea, and it requires mandatory sentencing for certain crimes of armed violence. Also, when a defendant who has been convicted and sentenced to prison is appealing his conviction, the law puts upon him the burden of showing why he should not be jailed pending appeal.

On the basis of successes in some of these measures, we are continuing our efforts to help restore the balance of justice, and we have proposed some further reforms to the 92nd Congress.

I would like to make it clear, to avoid any chance of misinterpretation, that in all these efforts there is not the slightest intention of taking from the accused any right that constitutionally belongs to him.

There is, however, a very serious intent to bring real meaning to our adversary court system--to assure justice to the accuser as well as to the accused. There is a serious intent to make the courtroom a place where fact is determined and innocence or guilt decided, rather than a place where fact is obscured and justice frustrated through the triumph of sophistry over common sense. There is a real intent to "keep the balance true," as Mr. Justice Cardozo so eloquently charged us a generation ago. If we can accomplish this at all levels of jurisdiction, judicial fairness will never be a lean and scraggly filament, but a full-bodied concept that Americans believe is synonymous with their halls of justice.