Annual Address:

State of the Judiciary

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Remarks by

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Eighty days ago, I stood in this rotunda and was sworn in as Chief Justice of the Supreme Judicial Court. I return today to address you regarding the State of the Judiciary, and it is fitting that I do so together with Trial Court Chief Justice Paula Carey and Court Administrator Harry Spence, because in keeping with the legislative design of the new court administration statute, we sing in three part harmony. Shortly after my swearing-in, I met with Chief Justice Carey and Court Administrator Spence and discussed how we would work together. We quickly came to the answer: we would each run as fast as we could and, if we bumped into each other, we would stop and work it out. That strategy works only because we are all running in the same direction. And, as I hope you will see today, we are running swiftly.

I speak to you today about four new initiatives that I hope will bear fruit in the next year. I choose the word "hope" rather than "promise" because the judiciary can achieve none of them alone; each requires collaboration with and the support of the Legislature, the Executive branch, and the Bar. I know well that Article 30 of the Declaration of Rights to the Massachusetts Constitution explicitly provides for a separation of powers and, as a justice, that I must preserve and protect that provision of our Constitution, as I must every provision. But I also know that we in the judiciary increasingly are recognizing that our role is not only to do justice but to solve problems, and that the sensible resolution of problems often is how we do justice. Once we recognize that every court is a problem-solving court, we see that the problems that come to us cannot effectively be solved without the funding and legislation that only the Legislature can provide, without the drug and mental health treatment programs that only the Executive branch can establish and administer, and without the legal advocacy that only the Bar can offer. If we are to succeed in solving the problems that confront the residents of our Commonwealth, we

must heed the words of Benjamin Franklin, who said, "We must, indeed, all hang together, or most assuredly we shall all hang separately."

Our first initiative is to take a hard and honest look at how we sentence those convicted of crimes. I shall ask every trial court department with criminal jurisdiction to convene a working group comprised of judges, probation officers, prosecutors, and defense attorneys to recommend protocols in their department that will incorporate best practices to ensure individualized, evidence-based sentences. We need our sentences not merely to punish and deter, but also to provide offenders with the supervision and the tools they will need to maximize the chance of success upon release and minimize the likelihood of recidivism. And we need to ensure that our sentences are hand-crafted to accomplish that. This means harnessing the social science that can provide us guidance, taking advantage of the knowledge and experience of our judges and probation officers, and learning from the successes and failures of the Federal government and the other 49 states. I hope to partner with the newly-reconstituted Sentencing Commission in this effort.

My call for individualized, evidence-based sentencing hardly seems controversial. After all, who would support a sentencing system that ignores the circumstances of the crime, the role of the offender in the commission of the crime, and the background of the defendant? And why would we require judges to impose sentences that are not informed by the social science evidence regarding what sentences reduce the risk of recidivism and what sentences may increase that risk? But sadly, in drug cases where the law provides a mandatory minimum sentence, that is precisely the sentencing system we now have.

Mandatory minimum sentencing in drug cases has had a disparate impact upon racial and ethnic minorities. In fiscal year 2013, 450 defendants were given mandatory minimum sentences on governing drug offenses. In that year, which is the most recent year for which data are available, racial and ethnic minorities comprised 32% of all convicted offenders, 55% of all those convicted of non-mandatory drug distribution offenses, and 75% of all those convicted of mandatory drug offenses. I do not suggest that there is intentional discrimination, but the numbers do not lie about the disparate impact of mandatory minimum drug sentences.

The impact of mandatory minimum drug sentences is far greater than the number of defendants who are actually given mandatory sentences. Prosecutors often will dismiss a drug charge that carries a mandatory minimum sentence in return for a plea to a non-mandatory offense with an agreed-upon sentence recommendation, and defendants often have little choice but to accept a sentencing recommendation higher than they think appropriate because the alternative is an even higher and even less appropriate mandatory minimum sentence. For all practical purposes, when a defendant is charged with a drug offense with a mandatory minimum sentence, it is usually the prosecutor, not the judge, who sets the sentence.

I have great respect for the prosecutors in this Commonwealth, and for the exercise of prosecutorial discretion that comes with the job; I was a prosecutor myself for eight years. But where there is a mandatory minimum sentence, a prosecutor's discretion to charge a defendant with a crime effectively includes the discretion to sentence a defendant for that crime. And where drug sentences are effectively being set by prosecutors through mandatory minimum sentences, we cannot be confident that those sentences will be individualized, evidence-based sentences that will not only punish and deter, but also minimize the risk of recidivism by treating the root of the problem behind many drug offenses -- the problem of addiction.

The end of minimum mandatory sentencing for drug offenses would not mean the end of punishment and deterrence in drug sentencing. It would simply mean that sentences would not be higher than a judge thought appropriate in accordance with the best practices that we will incorporate into an individualized, evidence-based sentencing model. In many cases, sentences might well be lower than the current mandatory minimums, but that would not be true in all cases because even now, in drug cases where the defendant or the crime demands it, judges are imposing sentences that are higher than the mandatory minimum sentence. But overall, I expect that the abolition of mandatory minimum sentences in drug cases would likely result in some reduction in the length of incarceration in drug cases. And since the annual cost of incarcerating a defendant in state prison is more than $47,000, this reduction would free up a considerable amount of money that could be reinvested in programs proven to reduce the rates of recidivism, in drug and mental health treatment programs, and in long overdue increases in the salaries of assistant district attorneys and CPCS attorneys.

The public is far ahead of us in recognizing the benefits of smart sentencing over mandatory sentencing. In a survey of Massachusetts residents published by Mass. Inc. in April, 2014, when asked, "Which is the best way for judges to sentence convicted offenders?," only 11% favored mandatory minimum sentences, while 44% favored having judges use sentencing guidelines while still having some discretion, and 41% favored letting judges decide the punishment each time on a case-by-case basis.

To those who favor the status quo in the so-called war on drugs, I ask: How well is the status quo working? Heroin is cheaper, more easily available, and more deadly than it has been in my lifetime. In 2013, roughly twice as many of our residents died of unintentional opioid-related overdoses as died in 2000: an estimated 674 in 2013, compared with 338 in 2000. They are

dying not only in our inner cities, but in our suburbs and rural villages. Drug overdose is now the leading cause of accidental death in Massachusetts, exceeding motor vehicle accidents.

I recognize that the Legislature has made some important strides in recent years in curtailing the scope of mandatory drug sentencing. But for all the reasons I have stated, I will work with the Legislature, sharing with them all we are doing and all we have learned, to assist them in taking another hard look at mandatory minimum sentences for drug offenses, because I am confident that, after doing so, the Legislature will decide to abolish mandatory minimum drug sentences in favor of individualized, evidence-based sentencing.

Our second initiative involves our civil justice system. With the help of the Bar, we will develop a menu of options in civil cases that will ensure litigants the opportunity to have a cost-effective means to resolve their dispute in a court of law. I shall ask every trial court department with jurisdiction over civil cases to convene a working group of judges, plaintiffs' attorneys, and defense attorneys to devise a menu appropriate to the cases adjudicated by that department. That menu will include the usual three course meal of full discovery, a jury trial (in cases where there is a right to jury trial), and full rights of appeal, but, just as not every diner has the money or time for a three course meal, it will also include less costly and more expeditious options that might offer, for instance, limited discovery, a bench trial, and, perhaps, limitations on the right or scope of appeal. We hear cases in our courts where millions of dollars are at stake and where thousands of dollars are at stake; there is no reason to believe that all of these cases can be cost-effectively adjudicated in the same way. With a menu of options in each department, litigants can agree on the option that makes most sense in their case, with the three course meal the fallback option if they are unable to reach agreement.

In short, we will compete with private arbitration. I have nothing against private arbitration; some of my wonderful former colleagues on the Superior Court are now private arbitrators. But I do not want a Commonwealth where those with a civil dispute think that they can resolve it efficiently and sensibly only through private arbitration rather than in our civil courts, where those who think they need to leave their personal care physician for concierge medicine also think they need to leave our civil courts for concierge justice. For those who think they need private arbitration to get limited discovery, we can offer you limited discovery. For those who think they need private arbitration to get a prompt hearing by a single factfinder, we can offer you a prompt hearing by a judge. For those who want finality with limited rights of appeal, we can offer you such finality. We will provide a forum where a complex international business dispute can be ably and efficiently adjudicated in the business litigation session of our Superior Court, and where a family dispute with a few thousand dollars at stake can be ably and efficiently adjudicated in our District Court or in the Boston Municipal Court.

We need to compete against arbitration not only to ensure that our civil courts provide a high quality of justice for everyone, and to ensure that everyone recognizes they have a stake in the success of our courts, but also to ensure that our courts through our published decisions, especially our appellate decisions, continue to create the common law that is the legal infrastructure of our civil society. For every dispute that comes to court, there are dozens that are resolved without coming to court because of the common law principles that made clear how those issues had to be decided. Arbitrators generally do not publish their decisions; they make use of our common law but they generally create none of their own. If complex and difficult cases no longer come to our courts, our common law does not adapt and evolve, and our legal infrastructure becomes as old and outdated as our railroad and bridge infrastructure. In short, we

need a vigorous and healthy civil court system not only to resolve those disputes that come to our courts, but to resolve those disputes that do not.

Our third set of initiatives is focused on access to justice. In a Commonwealth dedicated to equal justice in our courts, it is not enough to establish legal rights; we need our residents to know their rights, to know how to invoke them, and to know how to find the legal assistance that can help them to do so. We have a great deal of information available to those who cannot afford attorneys: we have information on the Judiciary's website at mass.gov/courts, our court-based law library website, and the Massachusetts Law Reform Institute's masslegalhelp.org; we have law librarians who will answer questions by telephone, online chat, and text message; we have an instructional video in eight languages that will help litigants learn how to prosecute and defend a small claims case. But the availability of information means little unless litigants attempting to represent themselves know where to find the information. We will soon make available to all litigants a one-page, two-sided information sheet that will help self-represented litigants find the resources that are already available to them. And I do not mean just informational resources. It is equally, if not more, important that self-represented litigants know the legal resources and advice that are available to them: the lawyer for the day programs and voluntary mediation services in many of our courthouses, the possibility of retaining an attorney to perform limited assistance representation at a modest fixed price from a bar association referral program, and the court service centers in Boston and Greenfield.

Our first two court service centers have only existed for a few months, and already I hear judges wondering how we managed to live without them. The fact of the matter is that we should not live without them; we plan to add four in the coming year, and by 2017 plan to have one in each of our fifteen largest courthouses, which serve half the litigants in the Commonwealth.

Right now, nearly one-third of our residents have no access to a Housing Court, which means that they have no access to Housing Court judges who are experts in the complexities of housing law, no access to housing specialists who help resolve the majority of cases by mediation, no access to the Tenancy Preservation Program that attempts to spare those with disabilities from homelessness, no ability to transform condemned three-deckers into renovated apartments through receiverships, and no forum to enforce building and safety codes efficiently. I urge the Legislature in the coming year to enact the legislation we shall propose that will give every resident of Massachusetts access to a Housing Court. It is neither fair nor sensible that residents of Boston and Boylston have access to a Housing Court, but residents of Brookline, Braintree, and Burlington do not.

I also urge the Legislature to carefully consider the findings and recommendations of the Report of the Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts, which was issued yesterday. The Report demonstrates that investing in civil legal aid is not only an investment in equal justice, but also a sound fiscal investment, generating savings in public expenditures greater than its costs.

Fourth, and finally, I want to speak of an initiative that I know is close to the heart of the Massachusetts Bar Association -- jury voir dire. Through the efforts of our SJC Committee chaired by my colleague, Justice Barbara Lenk, which includes judges, law professors, and attorneys, including former MBA President Doug Sheff, we will improve the quality of jury voir dire in our trial courts to ensure the selection of fair and impartial juries. By February, 2015, when the new statute takes effect, there will be a provisional Superior Court standing order that will establish protocols for attorney voir dire, and the Superior Court, hand in glove with the Committee, will learn from our experience with the provisional standing order before issuing a

more permanent one. We will make attorney voir dire work, which means we will give attorneys a meaningful role in the selection of a fair and impartial jury, protect the privacy and dignity of our jurors, and complete voir dire within a time frame that allows for the efficient management of our case load. The work of our Committee is not limited to the Superior Court; we shall improve the quality of voir dire in every court department, recognizing that a method of voir dire that may be sensible in one trial court department may not be sensible in all.

Before I pass the baton to the extraordinary Paula Carey and the equally extraordinary Harry Spence, I reiterate what I said when I was sworn in: "If we are willing to search for new ways to solve old problems, if we are willing to put our egos aside and remember that it is not about us, if we are willing to work our tails off, if we are willing to work together, I know that we can build a justice system that will not only dispense fair, sensible, and efficient justice, that will not only help to address the formidable problems faced by so many of the residents of this Commonwealth, but that will be a model for the nation and for the world." Thank you.