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Voice of the Judiciary

Creating Courts Where All Are Truly Equal

By Ralph D. Gants, former Chief Justice of the Supreme Judicial Court, and Paula M. Carey, Chief Justice of the Trial Court

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Our beloved colleague and friend Ralph Gants was passionately committed to the ideal of providing equal justice for all and, in pursuit of that goal, as Chief Justice he worked tirelessly and persistently to eradicate racial and ethnic inequities from our legal system. His dedication to this cause is evident in the following essay and the circumstances surrounding it. In response to the call in our June 3, 2020 letter to members of the judiciary and the bar to “look afresh at what we are doing, or failing to do” to address bias and inequality, Chief Justice Gants undertook this essay with Trial Court Chief Justice Paula Carey to review what the Massachusetts courts have done, and to consider what more we must do, to tackle these problems. Despite his heart attack and subsequent surgery, he returned to revising this essay on the morning of September 14, 2020, shortly before his death. It was his last act on behalf of the people of Massachusetts. The text published here is the version that he was working on at that time, and it incorporates his last revisions, with minor additional edits for accuracy and completeness.

– the Justices of the Massachusetts Supreme Judicial Court

In a recent letter to members of the Massachusetts judiciary and the bar, the justices of the Supreme Judicial Court called for a far-reaching reexamination of our legal system to address the chronic problem of racial inequity:

“[W]e must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans is the same that is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal. . . . [W]e must also look at what we are doing, or failing to do, to provide legal assistance to those who cannot afford it; [and] to diminish the economic and environmental inequalities arising from race. . . . [W]e need to reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all. This must be a time not just of reflection but of action.”^[1]

This is a journey with renewed urgency, a need to travel faster and farther toward the imperative of true equality for all persons of color, but it is important to recognize that this is a journey we began many years ago, and that we are far from where we need to be. So we look back at our successes and our failures for guidance as we look ahead. As Maya Angelou once said, “If you don’t know where you’ve come from, you don’t know where you’re going.”

More than 25 years ago, the SJC issued a 200-page report on racial and ethnic bias in the Massachusetts court system.^[2] It concluded that discriminatory behavior based on racial bias or stereotypes existed throughout the courts, and recommended, among other improvements, unification and standardization of interpreter services; making court forms more widely available in translation; ensuring that minorities are fairly represented in jury pools; studying sentencing patterns to determine whether there is any disparity related to race or ethnic bias; mandating diversity and cultural sensitivity training for all court employees; establishing a rule governing fee-generating appointments to improve access to opportunities for minority

attorneys; and taking steps to increase hiring and appointment of minority candidates in the court system. Since that time, our court system has made substantial progress toward many of those goals, thanks in large part to the efforts and examples of many trailblazing court leaders of color, such as former SJC Chief Justice Roderick Ireland. And yet we must also acknowledge with humility that many of these recommendations still remain relevant today, and that much remains to be done to fulfill them.

In this article, we will endeavor to describe where we in the courts have come in the past five years in attempting to address racial bias, and where we intend to go in the immediate future. In describing our path forward, we recognize that we do not have all the answers, and we emphasize that we remain open to new ideas and to all points of view, particularly from our colleagues of color; our path is not written in stone. We intend to listen, to learn from our mistakes, and to adapt to changing circumstances on this journey.

Eliminating racial and ethnic disparities in our criminal justice system. Over the last decade, numerous studies have documented how racial disparities and high rates of incarceration in our nation’s criminal justice system have had a devastating impact on communities of color. Massachusetts has one of the lowest overall incarceration rates in the nation.^[3] But, as Chief Justice Gants pointed out in his 2016 State of the Judiciary speech, Massachusetts has some of the highest rates of disparity: as a nation, in 2014, the rate of imprisonment for African-Americans was 5.8 times greater than for Whites; in Massachusetts, it was nearly eight times greater. As a nation, in 2014, the rate of imprisonment for Hispanics was 1.3 times greater than for Whites; in Massachusetts, it was nearly five times greater.^[4] In that speech, he announced that he had asked Harvard Law School to convene a team of independent researchers to analyze the data and “find out why.”

The results of that study, after four long years of research and review, have recently been released. Based on the data available from 2014-2016, the Harvard study concludes that “Black and Latinx people sentenced to incarceration receive longer sentences than their White counterparts, with Black people receiving sentences that are an average of 168 days longer and Latinx people receiving sentences that are an average of 148 days longer.” Even after accounting for factors such as criminal history and demographics, charge severity, court jurisdiction, and neighborhood characteristics, “Black and Latinx people are still sentenced to 31 and 25 days longer than their similarly situated White counterparts.”^[5] This disparity is unacceptable; the length of a defendant’s sentence should not differ due to the color of a defendant’s skin or to a defendant’s national origin.

According to the Harvard study, the disparity in the length of sentences for Black and Latinx defendants is primarily explained by differences in initial charge severity. “[T]he evidence is most consistent with Black and Latinx defendants receiving more severe initial charges than White defendants for similar conduct.”^[6] “Black and Latinx defendants tend to face more serious initial charges that are more likely to carry a mandatory or statutory minimum sentence,” even though “Black and Latinx defendants in Superior Court are convicted of offenses roughly equal in seriousness to their White counterparts” and “Black defendants in particular who are sentenced to incarceration [in state prison] are convicted of *less* severe crimes on average than White defendants despite facing more serious initial charges.” The Harvard researchers conclude that “racially disparate initial charging practices lead[] to weaker initial positions in the plea bargaining process for Black defendants, which then translate into longer incarceration sentences for similar offenses.”^[7] The impact of this disparity is particularly significant for drug and weapons charges, which carry significant mandatory minimum sentences.

In short, prosecutors are more likely to charge Black and Latinx defendants with offenses that carry a mandatory minimum sentence, and use the threat of a lengthy mandatory minimum sentence to induce a defendant to plead to a lesser offense and agree to the prosecutor’s recommended sentence, which is less than the mandatory minimum sentence but still severe. A defendant who is charged with an offense with

no mandatory minimum sentence can argue to the judge that the prosecutor's sentencing recommendation is too harsh; a defendant who pleads to avoid a mandatory minimum sentence usually needs to agree to the prosecutor's recommendation as the price for the prosecutor dismissing the offense with the mandatory minimum sentence.

The good news is that the Legislature can greatly diminish the racial disparity in the length of sentences simply by abolishing mandatory minimum sentences in firearm and drug cases, and for those with prior firearm and drug convictions or juvenile adjudications. The criminal justice reform legislation enacted in 2018 eliminated mandatory minimums for certain drug offenses, but many remain, and it did not touch mandatory minimum sentences in firearms cases. Abolishing these remaining mandatory minimums would allow judges in these cases to determine the appropriate length of a sentence based on an individualized evaluation of the circumstances of the crime and of the offender in accordance with the best practices we have established, which they cannot do when the sentence is determined by a statutory mandatory minimum.

The bad news is that, where prosecutors use the leverage they can gain from mandatory minimum sentences by agreeing to dismiss those charges only in return for an agreed-upon sentence, there is little that a judge can do other than accept that recommendation; rejecting the agreement would force the defendant to trial, where he or she would face a longer mandatory minimum sentence if convicted.

In cases where judges are free to exercise their discretion in determining an appropriate sentence upon conviction, we have taken steps to ensure that each sentence is appropriately tailored to the circumstances of the offense and the individual defendant. In 2014, we asked our criminal courts – the Superior Court, the District Court, the Boston Municipal Court, and the Juvenile Court – to convene working groups to develop sentencing best practices to guide our judges. These guidelines emphasized the importance of individualized, evidence-based sentences, taking into account the nature of the offense and the unique circumstances of each particular defendant. For example, the Superior Court's report on best practices recognized that “[s]entencing practices over the last quarter century have led to a dramatic increase in incarceration without reducing recidivism.”^[8] It stated that imprisonment is certainly necessary and appropriate in cases involving serious crimes, but incarceration may be counterproductive if imposed for low-level offenses: “Studies show that, rather than reducing crime, subjecting low-level offenders to periods of incarceration may actually lead to an increase in crime based on the prisoner's adoption of criminogenic attitudes and values while incarcerated, and based on the legal barriers and social stigma encountered after release.”^[9] The guidelines also highlighted the importance of setting individually tailored conditions of probation that consider the risk-levels and needs of each probationer.

Although the discretion of judges is limited where the Legislature has imposed mandatory minimum sentences, we will be reconvening our working groups on sentencing best practices to focus specifically on preventing any disparities that might arise from a defendant's race, ethnicity, and class. We will take a fresh look at these sentencing best practices through the lens of race, ethnicity, and class.

We will also look at our bail practices with this same lens. Although bail was not the focus of the Harvard report, it noted that bail is set in a slightly higher percentage of cases involving Black and Latinx defendants as compared to White defendants, and that Black and Latinx defendants are slightly more likely than White defendants to be unable to pay bail for the duration of the case, thus increasing their time in jail. Additionally, a slightly higher percentage of Black and Latinx defendants are detained without bail as compared to White defendants.^[10]

Improving our data collection to identify and remedy racial and ethnic disparities in judicial decision-making. The Harvard study was limited by the data on race and ethnicity that was available from our court database in 2014-2016. Many of these limitations no longer exist because of improvements in our data collection, but we recognize that we can do better. For fiscal year 2019, we

have race data for 82 per cent of criminal defendants and ethnicity data (Hispanic/non-Hispanic) for 59 per cent of criminal defendants.^[11] We will strive to continue making improvements as quickly as possible.

We are also beginning to keep data regarding race and ethnicity in show cause hearings and in certain types of civil cases, beginning with eviction cases in our Housing Court. This information is essential to determine whether racial and ethnic disparities exist in the outcomes of show cause hearings and civil cases.

Rooting out bias and promoting equity and inclusion within our court system. More broadly, we must strive to eliminate bias in all aspects of our court system, to ensure that all court users are treated respectfully and fairly, and to provide a supportive and inclusive work environment for all court employees.

Since 2015, the Trial Court, in collaboration with the SJC, has been engaged in a comprehensive initiative to address issues of bias in our court system. As a first step in this process, we held a mandatory day-long all-court conference in September 2015 to open a dialogue among Massachusetts judges to consider the impact of implicit bias on the work we do in courthouses across the Commonwealth. Based on what was learned at that conference, each Trial Court department developed implicit bias benchcards, which were shared with all judges and magistrates. Additionally, follow-up events were held by subject matter, such as civil or criminal matters where scenarios were reviewed to identify issues of bias.

Subsequently, the Trial Court established a Race and Implicit Bias Advisory Committee, which oversees related committees in each department, and created an Office of Diversity, Equity, Inclusion and Experience, headed by Chief Experience and Diversity Officer John Laing. The Trial Court also retained two nationally recognized consultants from Columbia Law School's Center for Institutional and Social Change (CISC) to help develop strategies to address racial bias.

Working together, Trial Court leadership, the Trial Court Race and Implicit Bias Advisory Committee, the Office of Diversity, Equity, Inclusion and Experience, and CISC have sought to transform Trial Court culture by integrating diversity, equity, and inclusion efforts into all aspects of court operations, including recruitment and hiring, training, staff meetings, conflict resolution, and strategic planning; by developing and implementing a system-wide, evidence-based curriculum and methodology that bring together employees with different roles and identities, and build the capacity of employees throughout the court system to discuss race and bias openly and constructively, intervene constructively when issues involving race and bias arise, and hold each other accountable; and by building a self-sustaining infrastructure so that, going forward, the Trial Court continually trains employees and develops leadership in addressing race and bias.

The Trial Court has sought to implement these strategies through a number of programs administered by the Office of Diversity, Equity, Inclusion and Experience. More than 130 Trial Court judges and staff members have participated in Leadership Capacity Building Workshops designed to support judges and court staff in leading difficult conversations on race and identity and addressing issues involving diversity, equity, and inclusion when they arise. Approximately 90 percent of Trial Court personnel have engaged in Signature Counter Experience training — a customer service course that is designed to ensure that all court users are treated respectfully and professionally throughout the courthouse. The Office of Diversity, Equity, Inclusion and Experience has created a program entitled “Beyond Intent,” which seeks to educate court members about the harmful impact that words and actions can have on colleagues and court users even though no injury was intended. And Superior Court Judge Angel Kelley Brown and Chief Diversity and Experience Officer John Laing are also preparing a video for all judges and court staff urging them to be “upstanders” — to stand up against acts or words reflecting bias, conscious and unconscious, whenever they see them.

Another important step we have taken in our Trial Court is to promulgate a new and comprehensive anti-discrimination policy and establish a new Office of Workplace Rights and Compliance to enforce the new policy. This Office addresses and investigates concerns and complaints of discrimination, harassment, or retaliation involving protected categories such as race, gender, or disability.

We are also educating ourselves on the tragic history of racism in this country and how to combat it more effectively. In April 2019, 50 judges travelled together (paying our own way) to Montgomery, Alabama to visit the Legacy Museum and the National Memorial for Peace and Justice commemorating victims of lynching, both created by Bryan Stevenson's Equal Justice Initiative. In October 2019, Bryan Stevenson in turn visited us and spoke to more than 140 judges at a forum sponsored by the Flaschner Judicial Institute. And in July 2020, more than 115 judges heard Professor Ibram X. Kendi, author of *How to Be an Antiracist*, via Zoom, again courtesy of the Flaschner Institute. The Flaschner Institute, through the leadership of its new Chief Executive Officer, retired Appeals Court Justice Peter Agnes, has also planned programs on race and the criminal justice system. The thirteen judges on the Superior Court's Race and Implicit Bias Committee are participating in, and invited other judges to participate in, the "21-day challenge for racial equity," which consists of reading, watching and/or listening to one or more pieces about racism every day, using a syllabus put together by a section of the American Bar Association.^[12]

Despite these efforts, we recognize that we still have much work to do to root out bias in all aspects of our court operations. For example, our recent discussions with attorneys of color have alerted us to the racial profiling they too often experience from our court officers when they attempt to enter our courthouses or our courtrooms, where they are not treated as attorneys doing their jobs, but are mistakenly profiled as criminal defendants, or the family members or friends of criminal defendants. The Trial Court Security Department has instituted implicit bias training to address this concern. And we have established a hotline in the Trial Court's Office of Workplace Rights and Compliance – 617-878-0411 – that attorneys and members of the public can call either to lodge a complaint about acts of bias by judges and court staff, or simply to call out such conduct and request that it be corrected.

Increasing diversity in our court system. Another means of fighting racial and ethnic inequity in our legal system is by increasing the diversity of court personnel. A more diverse workforce brings a broader range of perspectives into the courts and thereby helps to educate us all about the experiences of people who are different from us in race and ethnicity, as well as gender identification, sexual orientation, or class background. A court workforce that mirrors the diversity of our Commonwealth also promotes litigants' trust in the equity of our judicial system. As stated in the Trial Court's Strategic Plan 3.0 (July 2019), "we want our workforce to reflect the diversity of our users and to be culturally competent and welcoming." Accordingly, we have made it a strategic priority to increase the diversity of our workforce through recruitment, outreach, career development, and promotion.

Of course, many positions in the court system are not subject to the courts' control. Judges and clerk-magistrates are appointed by the Governor, with the advice and consent of the Governor's Council, while certain other clerks of court and registers are elected. But where the courts have the authority to make their own employment decisions, we can use this power to increase the diversity of our court personnel by hiring and promoting qualified candidates of color.

To measure progress toward this goal, the Trial Court has instituted an annual Diversity Report. The initial Diversity Report, issued for Fiscal Year 2017, showed that overall 23% of Trial Court employees were members of racial/ethnic minority groups, which was consistent with the overall race/ethnic percentage (21%) of the Massachusetts Labor Market as reported in the 2010 census.^[13] Since then, the Trial Court has continued to move forward, and as of Fiscal Year 2019, the percentage of race/ethnic minority Trial Court employees had increased to 26% of all Trial Court employees.^[14] The Trial Court has also made improvements in the percentage of race and ethnic minorities employed in its managerial ranks. Between Fiscal Year 2017 and Fiscal Year 2019, the percentage of race/ethnic employees has

increased from 16.1% to 23.6% of officials and administrators, and from 23.2% to 24.6% of professionals.^[15]

Each year, we celebrate our increased diversity with annual cultural appreciation events that encourage court staff to share and learn more about each other's cultural heritage. What began as a day of cultural appreciation events has evolved into a week of such events, celebrated throughout our courts.

But as in other areas, our efforts to improve the diversity of our workforce must continue. In particular, as Chief Justice Carey recently noted, “[t]he number of Black employees and employees of color is insufficient in the judicial and clerk-magistrate ranks.” While we do not have control over these appointments, we do have an “obligation to hire people of color in leadership roles and do more to mentor our diverse talent and create pathways that would enable them to move up in the organization” and “build the skills to obtain a judicial or clerk-magistrate appointment and other positions within the court system.”^[16]

Becoming “more proximate” with communities of color. We recognize the need, in the words of Bryan Stevenson, to get more “proximate” with communities of color, so that we better understand the experience of these communities with our courts and can attempt to address their concerns. Massachusetts was among six states chosen nationally by the National Center for State Courts to participate in a pilot community engagement program to increase public trust and confidence in the courts. Through this program, the Office of Diversity, Equity, Inclusion and Experience has worked with local court and community leaders to hold a variety of public forums designed to educate participants about court procedures, answer their questions, and address their concerns. Judges and justices have also participated in town halls and listening sessions, in person and virtually, in communities of color throughout the Commonwealth. And we shall continue to do so in the coming months.

Conclusion. We recognize that we have miles to go in addressing the effects of systemic racism and bias in our courts. But it is also important to recognize that we have already begun this journey and that we are deeply committed to continuing to make progress as quickly as we can, for failure is not an option. To paraphrase the old civil rights song, we will not “let anything turn us around” as we march down that road. And as we do so, we invite your observations, your suggestions, your engagement, and, yes, your constructive criticisms, to help us see the way forward more clearly.

[1] Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar, June 3, 2020.

[2] Equal Justice: Eliminating the Barriers, Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, Sept. 1994.

[3] See The Sentencing Project, State-by-State Data(showing Massachusetts as having the second lowest rate of incarceration among all states, based on U.S. Bureau of Justice Statistics data for 2018).

[4] Annual Address: State of the Judiciary, Ralph D. Gants, Oct. 20, 2016, at 5, citing Selected Race Statistics,

Massachusetts Sentencing Commission, Sept. 27, 2016, at 2.

[5] Racial Disparities in the Massachusetts Criminal System, A Report by The Criminal Justice Policy Program, Harvard Law School, Sept. 9, 2020, at 1.

[6] Id. at 63.

[7] Id. at 64.

[8] Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing, March 2016; updated October 2019, at iv.

[9] Id. at v.

[10] Racial Disparities in the Massachusetts Criminal System, at 23-24.

[11] Altogether, we have we have data on the race or ethnicity, or both, of nearly 93 per cent of criminal defendants.

[12] See www.americanbar.org/groups/labor_law/membership/equal_opportunity/?fbclid=IwAR11HvCxX9RzWp0u7FarSzDm3JhPEHS6GRK76uwtKSgL2pCOMSGcbqVkJTZY or www.americanbar.org/groups/public_contract_law/leadership/21-challenge/.

[13] Massachusetts Trial Court Annual Diversity Report Fiscal Year 2017, at 1, 3.

[14] Annual Diversity Report, Massachusetts Trial Court, Fiscal Year 2019, at 6.

[15] Massachusetts Trial Court Annual Diversity Report Fiscal Year 2018, at 12; Annual Diversity Report Fiscal Year 2019, at 12.

[16] Paula M. Carey, Reflections on a ‘particularly symbolic’ Juneteenth, Massachusetts Lawyers Weekly, June 25, 2020.

The Chief's Challenge

By Martin Murphy

Chief Justice Ralph D. Gants' death on September 14 left a gaping hole in the fabric of the Massachusetts legal community. For many lawyers—myself included—the news we received that Monday afternoon seemed simply unworthy of belief. Chief Justice Gants was just too full of energy and optimism and life to be gone so suddenly. We knew, of course, that he'd suffered a heart attack ten days earlier. But we expected a full recovery. After all, we knew he had much left to do.

Now, nearly three months later, that terrible news has begun to sink in. And so we dedicate this special issue of the *Boston Bar Journal*—one the BBA wishes it had no need to publish—to Chief Justice Gants. Appreciating the full scope of anyone's legacy, and certainly the legacy of someone so deeply dedicated to justice as Chief Gants, is no easy task only 90 days after his death. But we can at least *begin* to appreciate that legacy now, for there is no doubt he left an extraordinary mark on our law, our courts, and on the thousands of Massachusetts residents who feel their impact every day.

Nowhere was the Chief's impact felt more deeply than in his work on the Massachusetts criminal justice system, particularly his outspoken advocacy against minimum mandatory sentences and systemic racism—issues that have also been at the center of the BBA's work.

After being sworn in as Chief in 2014, Chief Justice Gants jumped into the controversy about minimum mandatory sentences with both feet. He made his first **State of the Judiciary** address on October 16, 2014—just 80 days after being sworn in as Chief Justice—and made his priorities plain, calling for “individualized, evidence-based sentences.” Mandatory minimum sentences, the Chief noted, interfered with sentencing judges' ability to impose what he called “hand-crafted sentences.”

This was not about guarding judicial prerogative. The Chief Justice made clear that a primary concern was about the *effects* of mandatory minimum sentences. As he wrote: “Mandatory minimum sentencing in drug cases has had a disparate impact upon racial and ethnic minorities.” He marshalled the statistics, noting that racial and ethnic minorities accounted for less than one-third of convicted offenders, but comprised “75% of all those convicted of mandatory drug offenses.”

Chief Justice Gants' 2014 address was remarkable, but it was only the beginning of his work on racial justice in the criminal justice system. First, he made sure the judiciary's own house was in order by directing the Trial Court to develop and make public a comprehensive set of **best practices in sentencing based on social science data and research**. In 2015, he joined Governor Baker and the state's legislative leaders in inviting the Council of State Governments to do what he described in his **State of the Judiciary** address that year as a “deep dive” into the State's criminal justice system, and he committed publicly, “Follow the data and allow it to drive the analysis, letting the chips fall where they may.” And in 2016, Chief Justice Gants **announced** that he had asked Harvard Law School Dean to “gather an independent research team to explore the reasons for racial and ethnic disparity in the incarceration rate in Massachusetts.” “We need to learn the truth behind this troubling disparity,” the Chief said, “and once we learn it, we need the courage and commitment to handle the truth.”

Chief Justice Gants' commitment to criminal justice reform has already produced results. In 2018, following the Council of State Governments report that Chief Justice Gants had called for—and a **report by the BBA** we were proud to see Chief Justice Gants praise in his **2017 State of the Judiciary address**—Massachusetts eliminated a number of mandatory sentences in drug cases, reduced penalties for others, and enacted other reforms. But the Chief characteristically refused to rest on his laurels. “The

landmark legislation enacted this year is an impressive beginning to criminal justice reform,” he said, “but it is only a beginning.”

On September 9, the day after Chief Justice Gants announced that he had had a heart attack, and less than a week before his death, Harvard Law School’s Criminal Justice Policy Program released the **study of racial disparities in the Massachusetts criminal justice system** Chief Gants had called for in 2016. The study paints an extraordinarily disturbing portrait of our criminal justice system in action. Here are five of the report’s key findings:

- “The Commonwealth significantly outpaced national race and ethnicity disparity rates in incarceration, imprisoning Black people at 7.9 times that of White people and Latinx people at 4.9 times that of White people.”
- “Among those sentenced to incarceration, Black and Latinx people sentenced to incarceration receive longer sentences than their White counterparts.” For Black people, the average is 168 days longer; for Latinx individuals, an average of 148 days longer.
- “[O]ne factor—racial and ethnic differences in the type and severity of initial charge—accounts for over 70 percent of the disparities in sentence length.”
- Black and Latinx people charged with drug and weapons offenses are more likely to be incarcerated and receive longer sentences than White people charged with similar offenses. “This difference persists after controlling for charge severity and other factors.”
- “Black and Latinx people charged with offenses carrying mandatory minimum sentences are substantially more likely to be incarcerated and receive longer sentences than White people facing charges carrying mandatory minimum incarceration sentences.”

Much of this comes as no surprise to anyone with experience in the Massachusetts criminal justice system. But, thanks to Chief Justice Gants, we now have data, not just anecdotes, to use as tools to fight minimum mandatory sentences and charging decisions that deepen the impacts of systemic racism.

Chief Justice Gants’ challenge to each of us as lawyers, and to organizations like the BBA, is simple: the data proves the system is broken; what will we do to fix it? To honor Chief Justice Gants’ legacy, we need to do more than spot the issues. It’s time for action.

Marty is a partner at Foley Hoag LLP where he represents individuals, companies, educational institutions, non-profits, and law firms in complex civil litigation, criminal investigations, and regulatory proceedings. He is President of the BBA and has chaired a number of BBA Committees, including the COVID-19 Response Working Group, Immigration Working Group, Working Group on Criminal Justice Reform, Death Penalty Working Group and the Task Force to Prevent Wrongful Convictions.

Voice of the Judiciary

Truth and Justice with Capital Letters

By Hon. Margaret H. Marshall and Marina Pullerits

*Human reason is beautiful and invincible.
No bars, no barbed wire, no pulping of books,
No sentence of banishment can prevail against it.
It establishes the universal ideas in language,
And guides our hand so we write Truth and Justice
With capital letters, lie and oppression with small.
It puts what should be above things as they are,
Is an enemy of despair and a friend of hope. . . .*

Czeslaw Milosz, *Incantation*. Translated by Czeslaw Milosz and Robert Pinsky.

January 9, 2020: The question comes near the end of oral argument. “What is the obligation of the Court,” asks the Chief Justice, when defense counsel reports allegations of racism in jury deliberations that may have changed some votes to guilty? The Chief Justice repeats the question: “What’s a judge’s obligation” in such circumstances? The answer comes on September 24, 2020, ten days after his death. It is the obligation of a judge to address promptly any allegation that racial or ethnic bias may have infected the jury deliberations, the Chief Justice wrote. ***Commonwealth v. McCalop*, 485 Mass. 790, 791 (2020)**. “A guilty verdict arising from racial or ethnic bias not only poses a substantial risk of a miscarriage of justice,” he continued, “but also, ‘if left unaddressed, would risk systemic injury to the administration of justice.’” *Id.* (quoting *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017)).

Ralph D. Gants served as Chief Justice of the Supreme Judicial Court from 2014 to 2020. *McCalop*, and several more of his final opinions, are exemplars of the tenets he held for guiding the Massachusetts judiciary. Each opinion is beautifully written, carefully reasoned. Each holds in equipoise the resolution of the case at hand, and the articulation of broader principles, signposts to ensure future decisions will be fair, just, and sensible. Each is a painful reminder of how much we have lost by his untimely death. Chief Justice Gants wrote to establish universal ideas in language; human reason guided his hand to write Truth and Justice with capital letters.

In two of Chief Justice Gants’ last opinions, the Court recommended changes to the **Model Jury Instructions on Homicide**.^[1] In ***Commonwealth v. Castillo*, 485 Mass. 852 (2020)**, released on October 6, the Court set aside a conviction of murder in the first degree and reduced the degree of guilt to murder in the second degree because, the Chief Justice wrote, the Model Jury Instructions on the meaning of “extreme atrocity and cruelty” did not adequately distinguish between murder in the first and second degree. *Id.* at 854. “The defendant’s conduct—firing a single shot into the victim’s back—was stupid, senseless, and cowardly,” he wrote. *Id.* at 867. “Indeed, where it tragically caused the death of a young man, it was atrocious and cruel. . . . But extreme cruelty means that the defendant caused the person’s death by a *method* that *surpassed* the cruelty inherent in any taking of human life Nothing about the facts of this case suggests that the defendant’s conduct met that standard.” *Id.* at 867–68 (emphasis in original) (quotation and citation omitted). The Court included a new provisionally revised model jury instruction to better distinguish conduct that warrants a conviction of murder in the first degree from conduct that should result in a conviction of murder in the second degree. *Id.* at 865–66, 869.

In ***Commonwealth v. Dunphe*, 485 Mass. 871 (2020)**, released on October 7, Chief Justice Gants again authored an opinion vacating a conviction of murder in the first degree because of inadequate jury instructions, this time regarding the defendant’s criminal responsibility for the killing. The defendant, suffering from hallucinations and a false belief that the victim was his abusive father, had killed a fellow

patient in a psychiatric ward. *Id.* at 872. The trial judge instructed the jury in a way “that closely tracked” the Model Jury Instructions. *Id.* Nevertheless, the Chief Justice wrote, there was a “significant risk” that the jury could misunderstand those instructions. *Id.* at 889. “What our case law declares, but our model jury instructions do not, is that if a defendant has a mental disease or defect, its origins are irrelevant: it does not matter whether the disease or defect arose from genetics, from a childhood disease or accident, from lead poisoning, from the use of prescription medication, or from the chronic use of alcohol or illegal drugs. . . . A drug-induced mental disease or defect still constitutes a mental disease or defect for purposes of a criminal responsibility defense.” *Id.* at 880–81 (citation omitted). “Intoxication from alcohol or the high from drugs is not a mental disease or defect where the loss of capacity ends when the effects of the alcohol or drug wear off; a mental disease or defect is something more enduring, reflecting something about the person’s brain chemistry that, although perhaps not permanent, is more than the transient effect of the person’s substance use,” he wrote. *Id.* at 880. The Court again included provisionally revised model jury instructions “to address what we conclude is a potential and problematic risk of confusion.” *Id.* at 873, 884–89.

As a final example, a district court judge’s ruling that a defendant violated a condition of probation by reporting on a sex offender registration form that his work address was his home—without also reporting as a work address a home in Lynn where he was doing repair work—came under scrutiny in *Commonwealth v. Harding*, 485 Mass. 843 (2020), released on October 5. The Court reversed in an opinion authored by the Chief Justice, where his search for what he would term “sensible” outcomes is clear: “The interpretation [of ‘work address’] that the Commonwealth asks us to adopt would suggest that a registrant who is self-employed might not be self-employed at all, because each client for whom the registrant provided services for the requisite time period would be deemed the employer, whose address the registrant would be required to record. No reasonable registrant filling out this form would understand the form to ask for this information. Nor would the Commonwealth’s interpretation make practical sense.” *Id.* at 847. “[I]f the defendant, or other self-employed registrants like him, were required to provide a client’s address as a ‘work address,’” he continued, “many clients who might otherwise hire him might refrain from doing so because they might not want their home address listed on SORB’s website as the sex offender’s place of employment. As a result, the otherwise self-employed sex offender might soon be functionally unemployed.” *Id.* at 849.

Ralph Gants ended his tenure as Chief Justice as he began it. In **remarks delivered** when he took the oath of office on July 28, 2014 he said: “I firmly believe that our judicial system will be in a better place in the next three, five, ten years. My confidence does not rest in my belief in me, because I know that I can accomplish none of this alone. My confidence rests in my belief in we, in what I call our justice team. . . . 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.”

Ralph Gants searched for new ways to solve old problems. He worked his tail off. He put aside his ego and worked with others to build a model judicial system. In oft-cited remarks, Oliver Wendell Holmes, Jr., then an Associate Justice on the Supreme Judicial Court, said: “The law is the calling of thinkers. But to those who believe with me that not the least godlike of man’s activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable. . . .” Chief Justice Ralph D. Gants wore his heart out seeking to address the formidable problems faced by so many. He wreaked himself upon life. Why? He was simply being Ralph.

[1] The Justices first approved and recommended the use of Model Jury Instructions on Homicide in 1999. The Court issued revised Model Jury Instructions in 2013. In April 2018, the Supreme Judicial Court again released revised Model Jury Instructions on Homicide.

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Viewpoint - Clerks' Remembrances

Reflecting On The Chief

By Abrisham Eshghi

“Imagine a world.” Some of the Chief’s greatest questions began with these three words. Sometimes, they prefaced a thought-provoking hypothetical where the Chief would alter the facts. Other times, they required thinking through the broader implications of a potential ruling that initially seemed straightforward. But, most often, these words were an invitation to imagine a world that is better than ours, and to imagine what we need to do to get there.

I had the extraordinary privilege of clerking for Chief Justice Gants in the 2017-18 term. It was a year spent trying to reason like him, react like him, probe like him, and simply keep up with him.

He welcomed disagreement. A cherished mantra of his was “when you point out that my reasoning does not make sense, there are only two possible outcomes: Either you have allowed me to avoid making a mistake, or you have identified that there must be a better way to articulate this.” In fact, he assigned his clerks homework on this topic, such as a chapter from Malcolm Gladwell’s *Outliers* discussing a theory of why Korean airlines experienced a disproportionately high rate of plane crashes. The theory begins with the fact that when signs of danger appear during a flight, the pilot who spots the signs must alert the other pilots. Yet in cultures that value deferential communication styles with authority figures, this may translate to a cockpit where instead of the lower-ranking pilot unequivocally communicating imminent danger to the higher-ranking pilot, the lower-ranking pilot instead meekly suggests that something may not be quite right. My takeaway – yell at the Chief so he does not crash the plane!

He welcomed compassion. He truly never lost sight of the people that were governed by the cases that came before the Court. While other judges might start and end a case with the routine application of a statute or precedent, in the Chief’s hands, the case blossomed into an opportunity to examine how citizens of the Commonwealth live and experience the world around them. Standards of how a “reasonable person” would act or think are baked into almost every area of the law, and “common sense” is routinely invoked by courts as grounds for choosing one argument over another. But the Chief cautioned his clerks against blindly accepting words like “reasonableness” and “common sense,” as they were often shorthand for the convenient status quo. “Reasonable for whom?” he would ask. “Common sense for whom?”

He welcomed accessibility. The Chief never wanted to “hide the ball” in his work and habitually requested that his clerks craft judicial opinions so that “even an intellectually curious fourteen-year-old” could understand what he was trying to say. If, in the course of drafting an opinion, we encountered a tortuous precedent, he would insist that we “say it better” without replicating the difficulties. He had a knack for homing in on the occasionally muddled or misguided ways in which parties to a case framed issues, and then crafting a cleaner explanation of what the case was really about. The ease with which he exercised this last skill was particularly admirable.

It pains me to think about how much more he had in him to give. My only comfort is in sifting through my myriad memories of the time I was lucky enough to share with him. I will miss his brilliant questions, and his even more brilliant solutions. I will miss his antiquated cultural references that went over my head. I will miss his Red Sox metaphors that also went over my head. I will miss him addressing the trio of himself, my co-clerk Maia, and me as “us gals.” I will miss the intense swell of pride I felt during his 2015 speech at the Islamic Society of Boston Cultural Center when he said “[y]ou do not stand alone.” I will miss him spontaneously making up new lyrics to the song “The Impossible Dream” from *Man of La Mancha*. I will miss our rejuvenating “mental health walks” as we meandered through Boston Common. I will miss watching him absentmindedly devour an entire baguette in one sitting. I will miss seeing the two sizeable portraits of

Justice Louis Brandeis and Justice Thurgood Marshall looming over his desk and thinking to myself that, with room on the wall for a third, a portrait of the Chief would complete this triptych of legal giants. I will miss the sparkle in his eye when he knew there was challenging work to be done. I will miss his infectious fits of giggles. And I will sorely miss him next year at my wedding, where he had promised to officiate.

I recently found the copy of *The History of the Law in Massachusetts* that the Chief gifted me on the last day of my clerkship. His parting words to me, penned on the front cover in his quirky doctor's scrawl, were "believe in yourself as I believe in you." Prior to his death, these words brought me great comfort. But in death, his words take on a different form. I feel them almost vibrating off of the page. Demanding that I believe in myself. Demanding that the time is now to take action. Demanding that I pick up the baton and continue his work.

Chief Justice Gants was inimitable. But we must now try our hardest to step into his magnificent mind so that we may carry on his extraordinary legacy.

I hope you're still getting in good trouble, Chief.

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Appreciation of Chief Justice Gants

By Larisa Bowman and Mike Kaneb

We had the enormous privilege and pleasure of serving as law clerks to Chief Justice Gants during his first full year on the Supreme Judicial Court (2009-2010). He was an extraordinary teacher and mentor, and the year we spent in his chambers fundamentally shaped how we view the law and our role and responsibilities as lawyers.

Law clerks, when they are able to be helpful at all, tend to treat every case as a purely legal problem that can be solved by identifying the perfect case citation, judicial doctrine, or other legal tool. Chief Justice Gants took a broader view: all cases presented legal problems to solve, but most cases also required a judgment that weighed considerations of policy, administrability, and equity. In deciding a case, the Chief was always grateful for a clerk's cogent legal analysis and the best citations available, but it was usually clear that — having been pretty sure from the start what the law was likely to provide — he had been spending his own time thinking through what the real-world consequences of the Court's decision would be for lawyers, judges, and most particularly, everyday people.

He loved people — all sorts of people, including the two of us, a couple of strangers he found already hired and deposited with him even before he was confirmed. His law clerks were special to him, and he taught us with humor and affection. "You're not a Jedi Knight yet, but you show great promise" is how he began his gentle review (and quiet wholesale restructuring) of the work we produced for him in the earliest months of the term, when we knew the least. He liked to take us on working walks across the Common to talk through cases that would be helpful to him as he worked out the shape of his decisions in his mind. This met his need for constant activity in days that were always too short for everything he wanted to get done: work, mentoring, and a little light exercise all combined in one outing. He was a brisk walker, but halfway across the street, we sometimes found we had left him on the corner: he never jaywalked, not even on the margin.

Every few weeks, the Chief would invite us to a sit-down lunch at his favorite Chinatown cafe. For the first few lunches, we expected that he had set the occasion to impart some great piece of wisdom or to let us know of some important development on the Court, but actually he just wanted noodles, a friendly chat, and a short break from his work. During our year at the Court and in all the years that followed, the Chief kept up with

our personal and professional news and also with the accomplishments of our spouses and children. We never could figure out how he had the time or head space to manage this.

The Chief's deep interest in people was at the heart of his work as a judge, and he was dogmatic only in his drive to deliver more justice to more people, inject more fairness into society, and bring more good to the world. The clearest expression of his judicial philosophy is the statement he made in a 25th anniversary Harvard class report, that deciding cases required him to balance the "sometimes conflicting obligations of following the law and ensuring fairness." Worrying about the fairness of a legal rule requires a judge actually to see and consider the rule's consequences for the individuals affected by it. The Chief put all of his intelligence and experience and wisdom into seeing those consequences clearly and weighing them fairly. First as an associate justice of the Court, then as its leader, the Chief believed the Court's mission was not to hand down the law to the people but rather to make the law serve the people.

Early on, his decisions took on this mission in smaller cases like *Papadopoulos*, where he dispensed with the Commonwealth's unique "natural accumulation" rule for liability claims involving snow and ice, a legal doctrine that gave no consideration for people injured in falls and that had long survived only on the basis of its repetition in the case law. Later, when he had reached the height of his own Jedi powers, he and the Court executed on this mission in much bigger cases, like *Adjarney*, which delivered a clear-eyed and comprehensive view of the systemic inequality and inequity that can arise in housing court, where most tenants are without counsel. The Chief's opinion in *Adjarney* made the problems of people who must rely on the housing court seen and heard for the first time, and made the judicial system responsible for addressing those problems. Eleven years into our careers as lawyers, this challenge — to discern not only what the law allows, but also what fairness demands — is the most valuable, continuing lesson we take from our year working with the Chief.

The Chief never achieved his first great ambition, to play shortstop for the Red Sox, but as a judge, he had made it to the major leagues. That is what is so deeply tragic about losing him now. Six years into his role as the chief justice and with four years left before hitting the Court's mandatory retirement age, he was really just rounding second base. He had established himself as one of the great jurists in the history of the Supreme Judicial Court, and he was focused on making permanent his mark on the justice system writ large. A hugely important report he had commissioned on racial disparities in the Massachusetts criminal justice system was published five days before his death. The morning he died, he was hammering out details of a statewide eviction diversion initiative, which aims to address the civil justice gap across the Commonwealth's housing courts as they brace to manage the economic fallout from the COVID-19 pandemic. His heart was in the work of reform. As we grieve, it is in large part for the work he leaves undone.

Also, we miss him.

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Legal Analysis

Chief Justice Gants and the Power of Concurrence

By Tad Heuer

Judges are often remembered for either their landmark opinions or their incisive dissents, and Chief Justice Ralph Gants wrote both. But over his twelve terms on the Supreme Judicial Court, he wielded adroitly a third option, more frequently than any of his fellow justices. On forty-three occasions — first as an Associate Justice and then as Chief — Justice Gants authored a concurrence.

Concurrences are a legal curiosity. Unlike a dissent, where a judge explains why his colleagues got it wrong, a concurring judge believes the opposite: that his colleagues got it *right*. Moreover, with each SJC justice writing roughly the same number of majority decisions each term, a concurring justice is voluntarily taking on additional and avoidable work. Yet it is precisely because concurrences are arguably unnecessary that they are so valuable. Concurrences can signal the potential limits of the majority opinion, indicate whether the majority reached the right result but for the wrong reason, or warn where a statute — while clear — creates an unintended result. And when used wisely, and unencumbered by the formal strictures of a majority opinion, a concurrence can illuminate a judge’s perspective on how the law could be more fair and more just.

With a nod to his beloved Boston Red Sox, Chief Justice Gants’ penchant for concurrences is best illustrated by turning to the SJC’s own box score. Chief Justice Gants served with fourteen other justices during his time on the Court and authored 260 opinions, 17 dissents, and 43 concurrences (including six instances when he added further nuance by concurring in part and dissenting in part). While Chief Justice Gants dissented on average about as frequently as his fellow justices (8% of his decisional writings, versus an average of 5% for his colleagues), 13% of his decisional writings were concurrences, compared with only 5% of those of his colleagues. With an average of nearly four concurrences per term, Chief Justice Gants nearly *doubled* the average of his next closest colleague, while more than *tripling* the one-concurrence-per-justice-per-term average of his colleagues generally. In raw numbers, he wrote 17 more concurrences than his next-closest colleague, Justice Robert Cordy, who served for four more years than Chief Justice Gants. Indeed, as of the time of his passing he had penned more concurrences than eight of his 14 colleagues *combined*.

While Chief Justice Gants concurred at least once in every year on the Court, his concurrences became more frequent in recent years with six each in 2017 and 2018, and eight in 2020. Yet he had a knack for attracting company. Of his 43 concurrences, only eleven were on his own: Thirteen brought along one other justice, sixteen brought along two other justices, and one even brought along three others. With 30 concurrences in criminal cases and 13 in civil, his topics ranged widely from homicide instructions and trial procedure to child custody and spendthrift trusts. But examining *why* he concurred so frequently provides a window into the jurist Chief Justice Gants was.

He used concurrences to point out where the Legislature may wish to revise statutes that compelled counterintuitive results that he perceived as unintentional. In a pair of cases involving the state wiretap statute, *Commonwealth v. Tavares*, **459 Mass. 289** (2011) and *Commonwealth v. Burgos*, **470 Mass. 133** (2014), he discussed the problematic practical consequences arising from the statutory requirement of a “connection with organized crime” as a prerequisite for its use, noting:

electronic surveillance is unavailable to investigate and prosecute the hundreds of shootings and killings committed by street gangs in Massachusetts, which are among the most difficult crimes to solve and prosecute using more traditional means of investigation.

“If the Legislature wishes to avoid this result,” he suggested, “it should amend [the statute] to delete those words.” *Tavares* at 305; *Burgos* at 149. Similarly, in *Commonwealth v. LeBlanc*, **475 Mass. 820** (2016), Chief Justice Gants used his concurrence to encourage the Legislature to harmonize contradictory statutory

provisions (about when a driver needed to remain at the scene after causing an accident), while in *Commonwealth v. Almonor*, **482 Mass. 35** (2019) he wrote separately to “underscore the need for the Legislature to give careful consideration to amending G. L. c. 276, § 2B, to permit warrants to be applied for and approved remotely through reliable electronic means.” *Id.* at 69.

He used concurrences to signal the direction he felt the common law should go. This approach was most prominent in his four-member concurrence in *Commonwealth v. Brown*, **477 Mass. 805** (2017). In that case, the Court unanimously agreed that the felony-murder rule (permitting a conviction of murder in the first degree for the commission of an underlying violent felony resulting in a death) was constitutional. Chief Justice Gants nonetheless saw the opportunity through concurrence to narrow prospectively the scope of the rule to require actual – not constructive – malice inferred from the underlying felony:

When our experience with the common law of felony-murder liability demonstrates that it can yield a verdict of murder in the first degree that is not consonant with justice, and where we recognize that it was derived from legal principles we no longer accept and contravenes two fundamental principles of our criminal jurisprudence, we must revise that common law so that it accords with those fundamental principles and yields verdicts that are just and fair in light of the defendant’s criminal conduct.

Id. at 836.

This attention to ensuring that the development of the common law reflect the practical reality of the contemporary world pervaded other concurrences as well. In *Commonwealth v. Berry*, **466 Mass. 763** (2014), then-Justice Gants concurred to identify “an apparent inconsistency in our common law of homicide that we should confront when the issue next arises, *i.e.*, whether a defendant’s state of mind must be considered in determining whether a murder is committed with extreme atrocity or cruelty.” *Id.* at 778. And in *Miller v. Miller*, **478 Mass. 642** (2018), involving a contentious child custody dispute, Chief Justice Gants concurred to argue that in future, the Court should consider discarding what he termed the “artificially binary decision-making framework” cobbled together from prior cases, and establish a “single, uniform standard — the best interests of the child — to be applied to all [custody] removal cases,” *id.* at 659. He expressed concern that the existing “formalistic approach” could have “serious consequences for the parties involved.” *Id.* at 662.

And in a technical mortgage foreclosure case, *U.S. Bank National Association v. Schumacher*, **467 Mass. 421** (2014), then-Justice Gants’ concurrence was arguably more important than the majority opinion. The *Schumacher* Court held that because the statutory pre-foreclosure requirement (notice and a cure period) was not part of the exercise of the power of sale and foreclosure, failure to comply with the statute could not be raised as a defense in a post-foreclosure eviction action. Justice Gants agreed that the statute controlled the facts of the case, but wrote separately to express his concern about the “practical consequences of this opinion.” *Id.* at 431. His concurrence laid out his view of when it *was* appropriate to raise the statute as a defense: if the failure to comply with the statute “rendered the foreclosure so fundamentally unfair that [the defendant] is entitled to affirmative relief, specifically the setting aside of the foreclosure sale.” *Id.* at 433. This “fundamental unfairness” standard is now applied routinely in post-foreclosure actions.

He used concurrences to provide guidance to the lower courts. Sometimes his concurrences signaled that lower courts should be cautious about applying a majority decision too broadly. For example, he concurred in *Flagg v. AliMed, Inc.*, **466 Mass. 23** (2013), primarily to “emphasize the limited scope of [the majority] holding, because I fear that ‘associational discrimination’ might otherwise be interpreted more broadly than the court’s opinion intends.” *Id.* at 39. Similarly, he concurred in *Commonwealth v. Lopez*, **458 Mass. 383** (2010), to clarify the “distinction between a search of a home and entry into a home, which, although it does not affect the outcome of this case, may have bearing on the validity of consent in other search cases.” *Id.* at 399.

In other instances, his concurrences provided frameworks for how lower courts might evaluate rapidly-changing areas of the law, particularly involving technology. These ranged from offering detailed thoughts on “how electronic automatic license plate reader data could be used by law enforcement consistent with constitutional rights to a reasonable expectation of privacy” (*Commonwealth v. McCarthy*, **484 Mass. 493**, 512-13 (2020)), to clarifying his view that the law provides no “safe harbor to conduct a search incident to arrest of text messages or electronic mail messages” found on a cell phone (*Commonwealth v. Phifer*, **463 Mass. 790**, 799 (2012)). Chief Justice Gants used concurrences to encourage his former trial court colleagues — faced with applying existing laws to new and novel factual scenarios — to think thoughtfully about how the Court might view those efforts on appeal.

He used concurrences to give voice to both the challenges and humanity inherent in the complex work of getting justice right. In *Schumacher*, he began his concurrence by acknowledging that “many mortgage borrowers who will claim such violations will not have the benefit of legal representation, and that our jurisprudence in this area of law is difficult for even attorneys to understand.” **467 Mass. at 431.**

In *Commonwealth v. Williams*, **481 Mass. 443** (2019), concurring in a case involving race and jury selection, Chief Justice Gants admitted that from his own experience as a trial judge “there are times, with the benefit of additional thought and the wisdom of hindsight, in which a judge will recognize that a discussion with a juror could have been handled more artfully.” *Id.* at 458. And he concurred to urge the Court to ensure that its decisions would be understood by the public as being consonant with justice. As he wrote in his concurrence in *Commonwealth v. Johnson*, **461 Mass. 1** (2009), “[w]e neither ensure that we do justice in a case of murder in the first degree nor ensure the public’s confidence that justice is done where we fail to address on the merits an issue that was never fairly considered because the underlying facts were mistakenly presented by the court on direct appeal.” *Id.* at 9.

Perhaps most importantly, he used concurrences to highlight what he saw as unfairness. In *Commonwealth v. Baez*, **480 Mass. 328** (2018), he concurred “to encourage the Legislature to consider the wisdom and fairness of the mandatory minimum aspect of [certain] enhanced sentences, especially where the predicate offenses were committed when the defendant was a juvenile.” *Id.* at 332. In *Deal v. Massachusetts Parole Board*, **484 Mass. 457** (2020), he used his concurrence to levy forceful criticism of the failure of the Parole Board to provide “meaningful individualized consideration” to the “distinctive attributes of youth offenders” when making parole decisions. While concurring in the denial of parole because such guidance did not exist at the time of Deal’s hearing, he warned that in future, “we would expect meaningful individualized findings that are far less conclusory and perfunctory than here.” *Id.* at 470. While only a concurrence, it signaled a disapproval for the Parole Board to ignore at its peril. And it was not only litigants whom Chief Justice Gants sought to protect from unfairness. In *Commonwealth v. Leiva*, **484 Mass. 766** (2020), he agreed with the Court’s revision of the protocols governing the conduct of defense counsel when their clients intend to testify falsely, but took issue with the majority’s “assumption . . . that defense attorneys will not abide by their ethical obligations to the court when hard decisions have to be made. . . .” He concurred to emphasize that such an assumption “is unfair to the defense bar.” *Id.* at 798.

Chief Justice Gants concurred up to the very end. Indeed, his last concurrence came in *Commonwealth v. Long*, **485 Mass. 711** (2020), released just days after his passing. *Long* addressed the charged issue of racial profiling in traffic stops, and although unanimous, generated multiple concurring opinions. Chief Justice Gants used his four-paragraph concurrence in *Long* to do three different things. First, he wrote as a justice, to emphasize that the motive of a law enforcement officer matters, and to reiterate that an officer cannot conduct an “inventory” search as a pretext for a more invasive “investigatory” search. *Id.* at 736. In so doing, he signaled that he would be watching closely in future cases for whether form was being exalted over substance. Second, he wrote as a colleague, explaining why he agreed in part with the more expansive concurring opinion of a colleague, but felt it unnecessary for the Court to reach certain additional constitutional questions identified therein. *Id.* And third, he wrote as the Chief Justice, in an effort to prevent intramural disagreements over the details from clouding the legal importance of the majority opinion in the eyes of the public:

“[D]espite our jurisprudential differences reflected in the various opinions in this case, the court is unanimous in concluding that a motor vehicle stop that arises from racial profiling is unconstitutional . . .” *Id.* This keen awareness of the subtle power of the concurrence—from the legal to the practical—demonstrates Chief Justice Gants’ acumen for the form at its finest.

In 1822, Thomas Jefferson complained **in a letter** to Supreme Court Justice William Johnson that the trend of the collective majority opinion disguised “whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another’s sleeve.” Chief Justice Gants was never at risk of such remonstrations: his numerous concurrences reveal a justice who took the trouble to understand cases, who investigated cases minutely, and who took seriously his responsibility to offer the bench, bar, Legislature, and general public his own insights on how to do better justice.

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Viewpoint

Coming Together for Change; Coming Together To Remember

By Radha Natarajan

The sudden loss of Chief Justice Ralph Gants shook this community, even in a year when we faced a deluge of losses. The number of people affected by the news and the outpouring of stories about his impact underscore the many dimensions of his work, commitments, and leadership. While there is so much I could say about Chief Justice Gants – including his kindness, accessibility, and humor – I want to focus here on his approach to correcting and preventing wrongful convictions. Specifically, Chief Justice Gants should be remembered not only for *what* causes he chose to champion but *how* he pursued change.

Eyewitness Misidentifications & Wrongful Convictions

Moved by stories of exonerations, such as that of **Bobby Joe Leaster** in Boston, Chief Justice Gants was troubled by the number of wrongful convictions caused by eyewitness misidentifications. Almost a decade ago (even before he was Chief Justice), he referenced the now-well-known statistic that over 70% of wrongful convictions overturned through DNA evidence involved at least one mistaken eyewitness identification.

Chief Justice Gants recognized that making progress toward reducing wrongful convictions caused by eyewitness misidentifications was more complicated than the Supreme Judicial Court simply setting down new rules. Real change would necessitate a diverse set of stakeholders, rigorous study, and ultimately consensus recommendations. He appreciated, probably because of his own humility, that even the seemingly awesome power of the Court was insufficient to initiate and sustain the kind of changes that were necessary to tackle such a complex issue. The creation of the Study Group on Eyewitness Identifications (Study Group) followed.

Through the Study Group, then-Justice Gants brought together people in traditionally adversarial roles to undertake research, come to a common understanding, and develop guidance for the Court. This two-year voluntary undertaking by judges, prosecutors, police officers, defense attorneys, and researchers led to a Report with consensus recommendations. The recommendations were comprehensive, addressing everything from techniques to interviewing witnesses without contaminating memory, to administering non-suggestive identification procedures, assessing an identification's reliability, determining its admissibility, and considering what information jurors required for the adequate evaluation of identification evidence. Justice Gants then sought public comment on the Report, again ensuring that various perspectives were involved and heard. Like other reports or endeavors he directed, Justice Gants had no intention of leaving this Report on a shelf to collect dust. To the contrary, Chief Justice Gants took the Report's findings and implications seriously: he diligently studied the research referenced, carefully considered its recommendations as well as the public comments, and then used the Report to guide the Court's approach to addressing eyewitness identification cases in the future.

Chief Justice Gants was committed to following where the evidence took him, even if it meant that there needed to be a radical shift in the law. This commitment was especially important in this area because, as he often said, the law had previously been guided by misconceptions or "common sense" that was at odds with scientific study. As a result, Massachusetts became a national leader in its approach to eyewitness identification evidence. He spoke often at conferences about the changes heralded by the creation of the Study Group. He was proud that the process involved so many people, recommended such transformational changes, and had the potential to avert the injustice of wrongful convictions. He had hoped that the Study Group would not only impact real people, and prevent tragedies like what happened to Bobby Joe Leaster, but that the process could be replicated to tackle other seemingly intractable issues within the criminal legal system. In short, it represented the culmination of so many of his deeply held values.

Tried & True

The Study Group was not the only example of how Chief Justice Gants chose to tackle issues of injustice. He believed that bringing people together toward a common understanding, based on diligent research and data, was necessary for change. He understood that education was an essential, but not sufficient, part of the process. It is why he held a mandatory implicit bias training for the judiciary, why he commissioned Harvard's Criminal Justice Policy Program to undertake an in-depth study on the stark racial disparities found in the Massachusetts criminal legal system, and why he tasked a Standing Committee to develop science-based jury instructions on implicit bias. In each instance, he brought people together to study carefully and thoughtfully the issues that required the most significant changes, and in each instance, it was meant to be only a starting point. He did not want to push people to accept change; he wanted to bring people along until there was momentum behind change.

Chief Justice Gants was committed not only to raising the awareness of, and bringing evidence and data to, the bench or bar generally; he was committed to learning himself. For example, in 2018, he accepted an invitation to attend a dinner of faculty who had recently presented at a New England Innocence Project Litigation conference. The faculty included judges, prosecutors, defense attorneys, scientists, and "innocence advocates." Despite suffering from a recent concussion, Chief Justice Gants attended the gathering and gave a few remarks, mostly to emphasize his commitment to correcting and preventing wrongful convictions. He also expressed his gratitude to the faculty for creating such an incredible opportunity to hear from so many people who, despite playing adversarial roles in litigation, had come together for this purpose. The rest of the night he spent listening, one by one, to what everyone had to say and to our ideas for creating meaningful change. Subjects ranged from the more mundane evidentiary questions to the profound areas of judicial culture and finality. And last year, when the New England Innocence Project held an event at which exonerated men and family members told stories about the impact of their wrongful convictions, Chief Justice Gants came to listen then too. He never tired of learning.

What Now?

Chief Justice Gants believed that change was possible by bringing people together, having them learn together, and asking them to build toward consensus. In that way, he was a great leader because transformational change did not depend on him alone. It was his inspiration and vision, more than his position, that laid the foundation for these efforts, and there are others who share that same commitment. What Chief Justice Gants started does not need to end with his passing; that was the true genius of his process and the true measure of his humility. We must sustain and continue the things he started, and with him in mind, we must do them together.

Radha Natarajan is the Executive Director of the New England Innocence Project (NEIP), an organization whose mission includes correcting and preventing wrongful convictions and supporting exonerees upon release. Prior to joining NEIP in 2015, Radha spent twelve years as a public defender, most recently at the Roxbury Defenders. She teaches a seminar on Wrongful Convictions at Boston University School of Law.

Voice of the Judiciary

Giver Gants: A Tribute to Chief Justice Ralph D. Gants

By Hon. Karen F. Green

[1]When I think of Ralph Gants, I think “giver.” Ralph made this world a better place by giving everything he had to everyone and everything he touched. From my perspective, that’s his lasting legacy.

Ralph’s predisposition to give all that he had was reflected in his impressive resume. I suspect that you are familiar with that, so I would like to focus on the man I knew behind the resume.

I knew Ralph both personally and professionally for more than thirty-five years. Our personal friendship remained constant as our professional paths repeatedly crossed.

We first met in 1984, when we were both working for Bill Weld as Assistant U.S. Attorneys. Ralph was handling a high-profile arson case. He also had fallen hopelessly in love with my best friend, Debbie Ramirez. Unfortunately, Debbie had not yet been bitten by the same bug. Ralph enlisted my assistance in helping Debbie to appreciate his finer qualities. Suffice it to say that he did not need much. Ever a zealous advocate, Ralph gave it his all, Debbie fell hard, and my husband, Mark, and I smiled widely as the two joyously wed three years later.

Mark and I had children and Debbie and Ralph had children, first, Rachel, and then, Michael. Life whirred as the four of us sought mightily to balance our personal and professional lives. Debbie, our friend, Joy Fallon, and I started a tradition of walking on Saturday mornings and sharing birthdays together. I still fondly remember a 1993 call I received from Ralph suggesting that I take his wife away. It’s not nearly as bad as it sounds. Rachel was about a month old and the ever-thoughtful Ralph thought Debbie could use a long girls’ weekend for her birthday. Debbie, Joy and I headed to Florida, where we did nothing but enjoy each other’s company, while Ralph assumed full responsibility for Rachel.

Eventually, each of us left the U.S. Attorney’s Office. Debbie entered academia and Ralph and I went to the DPS, that is, the “dreaded private sector.” I got to work with Ralph again, first as a fellow member of Governor-Elect Weld’s transition team, and later, defending corporate clients in federal criminal investigations. I was struck by his intellect, tenacity, and pragmatism. When I wrestled with a particularly thorny problem, I called Ralph, we talked, and the path forward seemed obvious. It was never about Ralph and always about solving the problem.

Debbie, Joy and I continued to walk on Saturdays whenever we could. In 1997, Mark was nominated to the Land Court. He requested Ralph’s help in the confirmation process. As always, Ralph immediately stepped up to the plate. Several months later, Ralph’s nomination to the Superior Court was confirmed. We celebrated with him and Debbie then, when Ralph was appointed to the SJC in 2008, and again when he was named Chief Justice in 2014. With family and friends, we also cheered when Ralph threw the first pitch at Fenway Park after his swearing in.

Fast forward more years. After Mark’s 2017 appointment as Chief of the Appeals Court, he and Ralph worked closely together on a myriad of challenges, including the pandemic confronting the court system. I continued to admire Ralph’s capacity to dig in and to solve whatever problem came his way. And Debbie and I talked, on our walks, about how we never would have predicted, when we were still in law school, that life would turn out the way it did.

Others have already described Ralph, now affectionately known as RDG, as a brilliant jurist and empathetic leader. He certainly was. The Ralph I knew was a leader who listened carefully and put the interests of others

before his own. He had high standards that he applied most rigorously to himself. He cared deeply about the rule of law and equal access to justice. He was a judge's judge who wrote clear and concise opinions on significant legal issues that others could follow. He got things done by working hard and collaboratively with others. He worked to provide equal access to justice right up until the moment he died.

For me, though, Ralph's most endearing quality was the unconditional love he gave to his family while shouldering all of his other responsibilities. One of the best measures of a man's character is the way he treats those closest to him. When his own Dad died swimming at age 90, Ralph immediately flew to New York to take care of his mother. He then personally moved her and all of her belongings to Massachusetts. When Helaine's health declined, Ralph visited her nearly every weekend at the assisted living facility he found for her. At Helaine's memorial service, Ralph lovingly delivered a tribute to her that made me cry.

Together with Debbie, Ralph also saw his children through serious medical challenges when they were younger. By his daily example, he showed Rachel and Michael what it means to be a "giver" rather than a "taker." Today, both are paying it forward by giving their best to others. Rachel spent the past summer at the Harvard Legal Aid Bureau assisting tenants threatened with evictions and took the Bar exam in October. Michael returned to Massachusetts from Stanford Business School in September and, like his father, is now focused on helping his mother.

Ralph was an equally thoughtful and caring friend. He, Debbie, Mark, and I shared many happy moments, as well as a few sad ones, over the years. We were fellow travelers in life. We traveled along the same roads not only to judges' conferences, but also to swim at the beach, to ski in New Hampshire (including during one very scary snowstorm), to bicycle in Italy, and to learn about civil and human rights in places like Israel and Alabama. Ralph took the time to get to know our parents and children, to share in our traditions and celebrations, and to provide a listening ear and comforting words when they were most needed. Whenever I called to request his help, he quickly responded, no matter what else he had on his plate.

And Ralph made me laugh. When Ralph was still in the DPS, I laughed when he delivered an impassioned closing argument in defense of Sweeney Todd at a mock trial at a Boston theater. I recall being struck then by the obvious care that Ralph had devoted to crafting Todd's defense and the skill with which he had delivered his remarks. Ralph cracked a joke as I nervously joined him in a waiting room outside the White House Counsel's Office in 2003 that instantly put me at ease. And, in 2013, he sang and danced with a tambourine so unabashedly before all of the patrons at an Italian restaurant that I laughed so hard, I cried. (No, Ralph was not impaired at the time, he rarely drank; he was just once again giving it his all.)

Like many others, I will miss Ralph's friendship and unfailing kindness, as well as his keen intellect and extraordinary leadership. To paraphrase the poet, Mary Oliver, Ralph died "not simply having visited this world," but "hav[ing] made of [his] life something particular, and real."

Let us honor his memory by continuing to be "givers," rather than "takers" and by continuing to ensure equal access to justice. And just as Ralph would, let us hold ever close to us the people we love.

[1] These remarks were originally given orally by Judge Karen F. Green on November 10, 2020. They have been edited minimally for formatting purposes.

Karen F. Green is an Associate Justice of the Massachusetts Superior Court. She handles serious felonies in criminal trial sessions and complex civil disputes in the Business Litigation-1 Session. She also is a member of the Executive Board of the American Bar Association's Center for Human Rights, the Advisory Board of UMass Law School's Justice Bridge, and a Criminal Justice Task Force chaired by Professor Deborah Ramirez of Northeastern Law School. Prior to her 2016 appointment to the bench, Judge Green was a litigation partner at WilmerHale.

Legal Analysis

Aligning Science and Law in the Realm of Eyewitness Identification Evidence

By Eric A. Haskell*

This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

On February 6, 2009, eight days after then-associate Justice Ralph Gants joined the Supreme Judicial Court, the court heard argument in Commonwealth v. Silva-Santiago, an appeal from a murder conviction in which the defendant challenged the reliability of photographic arrays that had led several eyewitnesses to identify him as the killer. Although not apparent at the time, Silva-Santiago marked the first step of an effort that would transform the relationship between scientific knowledge and the law of identification evidence in Massachusetts. That effort was the work of Chief Justice Gants, and it forms a remarkable part of his legacy.

The rudiments of that effort were visible in Justice Gants's opinion for the court in Silva-Santiago, which was released later that spring.^[1] That opinion rejected the defendant's contention, for which there had been expert evidence at trial, that the identifications were unreliable and should not have been admitted into evidence because the photographs used in the arrays were shown to the eyewitnesses simultaneously rather than sequentially. Citing two law review articles and an article published by the American Psychological Association, Justice Gants acknowledged a "debate among scholars and practitioners [as to] whether the sequential showing of photographs leads to greater accuracy" over a simultaneous showing, and concluded that, "[w]hile that debate evolves," identifications produced through either procedure would be admissible.

This rationale was both curious and significant. The legal issue in Silva-Santiago was whether the identifications were so "unnecessarily suggestive" as to offend due process. Why look to an academic debate to resolve that legal issue, especially when expert evidence bearing on the answer was present in the record? And why seek conclusiveness in that academic debate before declaring an answer as a matter of law? In retrospect, Justice Gants's reasoning in Silva-Santiago hinted at his ambition to align the law with the science behind identification evidence.

Two years later, in Commonwealth v. Walker, Justice Gants wrote for the court to again reject the argument that the court had rejected in Silva-Santiago.^[2] But Justice Gants's opinion in Walker also took the next step: characterizing identification evidence as "the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions," it announced that a study group would be charged, among other things, with considering a new model jury instruction on "evaluating eyewitness testimony.

The SJC had adopted a model instruction on identification evidence in 1979,^[3] and had periodically modified it thereafter.^[4] That instruction exhorted the jury, when evaluating whether the government had proven the defendant's identity as the perpetrator, to take into account certain abstract and neutral considerations such as the identifying eyewitness's opportunity to observe the perpetrator, the circumstances surrounding the identification, and the eyewitness's overall credibility.

The study group created after Walker returned its report in the summer of 2013.^[5] The report urged the SJC to take "judicial notice" of certain "psychological principles" concerning the mechanisms of memory and recall, as well as of factors that were said to diminish the reliability of those mechanisms. It also proposed a new jury instruction that, beyond reciting abstract considerations, would instruct the jury as to many of the same scientific principles and factors of which judicial notice was urged.

It is important to appreciate the nature of the study group’s proposal. Juries, of course, deal with science all the time, in the form of expert evidence that the court has deemed likely to be helpful in determining the facts of the particular case.^[6] But what the study group proposed was qualitatively different: its proposal was, in effect, to adopt certain scientific knowledge as legal precepts to be applied in all cases. That the scientific principles urged by the study group were well-established in the literature perhaps obscured a lurking tension: while scientific knowledge is factual in nature, iterative, and falsifiable, jury instructions are legal in nature, immutable, and to be accepted by the jury as true.

Justice Gants was promoted in the summer of 2014 and, on September 2 of that year, presided over his first arguments as Chief Justice. Featured on the calendar that day were four appeals concerning aspects of eyewitness identification. Chief Justice Gants wrote the opinion of the court in each of them.

Three of those opinions invoked and relied upon the science urged by the study group.^[7] But it was the fourth opinion, in Commonwealth v. Gomes,^[8] that transformed the relationship between the science and the law of eyewitness identification evidence, for Gomes presented the issue of what jury instruction ought to be given concerning such evidence.

In Gomes, Chief Justice Gants adopted a highly modified version of the study group’s proposal. The resulting jury instruction, which was appended to the Gomes opinion, continued to exhort the jury to consider things such as the witness’s opportunity to view the perpetrator and the quality of the witness’s perception. But it additionally limned a three-stage scientific “process of remembering,” and identified situation-specific factors—such as “the visible presence of a weapon . . . if the crime is of short duration,” “high levels of stress [felt by the eyewitness], compared to low to medium levels,” and “information the [eyewitness] received between the incident and the identification, as well as after the identification”—that, juries were to be instructed, would diminish the reliability of the identification. Chief Justice Gants explained that it was appropriate to incorporate these precepts into the “judge’s instructions of law, which the jury generally must accept,” because “there is a near consensus in the relevant scientific community”

The Gomes instruction represented an unprecedented infusion of scientific principles into the judge’s instructions of law. But it could not be said to perfectly align the science with the law because, as noted, science is dynamic and is susceptible of being disproven. Chief Justice Gants was mindful of these limitations, acknowledging that “even a principle for which there is near consensus is subject to revision based on further research findings, and that no principle of eyewitness identification should be treated as if set in stone.” Anticipating the possibility that the principles embodied in the Gomes instruction might be disputed or overtaken by later research, his opinion authorized litigants to offer expert evidence to challenge, and potentially supersede, the instruction. And, acknowledging that, “as the science evolves, we may need to revise our new model instruction[],” his opinion reconstituted a committee on eyewitness identification to monitor the development of the science and recommend updates.

The influence of Chief Justice Gants’s efforts to align the law with the science of identification evidence is visible in later SJC decisions that:

- Presumptively required an instruction that “people may have greater difficulty in accurately identifying someone of a different race than someone of their own race,” unless all parties agreed that no such instruction is appropriate;^[9]
- Going beyond identification evidence, deemed advances in scientific understanding of the “shaken baby syndrome” as potential grounds for granting a new trial;^[10] and
- Looked to “the latest advances in scientific research on adolescent brain development and its impact on behavior” to inform the definition of cruel and unusual punishment vis-à-vis late-teenaged offenders.^[11]

Chief Justice Gants’s efforts on this score not only changed the law, they changed the relationship between science and the law in the Commonwealth. As the influence of these changes continues to reverberate, they

showcase Justice Gants’s wisdom in recognizing both the promise and the limitations of science in helping to improve justice.

Eric A. Haskell is an Assistant Attorney General whose practice encompasses both civil and criminal matters. He recalls fondly his argument before Chief Justice Gants in Boston Globe Media Partners LLC v. Chief Justice of the Trial Court, No. SJC-12681. That argument lasted approximately forty minutes, despite having been scheduled for fifteen—and it was not the longest argument presented in that case that morning!

*This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

[1] 453 Mass. 782 (2009).

[2] 460 Mass. 590 (2011) (“[I]t is still too soon to conclude that sequential display is so plainly superior that any identification arising from a simultaneous display is unnecessarily suggestive and therefore must be suppressed.”).

[3] Commonwealth v. Rodriguez, 378 Mass. 296 (1979).

[4] Commonwealth v. Cuffie, 414 Mass. 632 (1993); Commonwealth v. Santoli, 424 Mass. 837 (1997); see also Commonwealth v. Pressley, 390 Mass. 617 (1983).

[5] <https://www.mass.gov/files/documents/2016/08/ql/eyewitness-evidence-report-2013.pdf>.

[6] See generally Mass. G. Evid. § 702.

[7] Commonwealth v. Crayton, 470 Mass. 228 (2014); Commonwealth v. Collins, 470 Mass. 255 (2014); Commonwealth v. Johnson, 470 Mass. 389 (2015).

[8] 470 Mass. 352 (2015).

[9] Commonwealth v. Bastaldo, 472 Mass. 16 (2015).

[10] Commonwealth v. Epps, 474 Mass. 743 (2016).

[11] Commonwealth v. Watt, 484 Mass. 742 (2020).

Voice of the Judiciary

Superior Court Judge Ralph Gants

By Chief Justice Judith Fabricant

Ralph Gants took the oath as a judge of the Superior Court on November 12, 1997. At age 43, he had outstanding educational achievements and an extensive background in high-level federal law enforcement and large firm practice, but relatively little experience in the more rough-and-tumble environment of state court. His new colleagues were ready to welcome him as we do everyone who joins us. At the same time, some may have wondered what mindset he would bring, and how he would make the transition. Chief Justice Robert Mulligan conducted Ralph's induction ceremony on November 13, 1997, in the high-rise building on Thorndike Street in Cambridge later known as the Edward J. Sullivan Courthouse. The Chief recited the standard induction speech, pledging to our new colleague "our collective and individual fellowship, assistance and cooperation," and reciting that "each of your colleagues stands ready to assist you in any way you may need, and we know that we can depend on your help when we need it."

I never had occasion to talk with Ralph about that ceremony, but I know that he heard those words and took them seriously – or that his natural inclinations led him to do exactly what those words call for. When I was ill for several months, he called regularly, and sent me his favorite novels, which provided comfort through both the mental diversion of reading and the expression of his caring. When the media criticized any judge's decision, Ralph was among the first to call. Long before we had our current structured orientation program, Ralph would offer new judges support and consultation, including the fruits of his remarkably well-indexed resource library. Ralph would consult colleagues as well, always doing his own research first, so that his questions reflected full awareness of established law and focused on what remained open to interpretation or discretion.

From the beginning, Ralph recognized the value of showing up, in times of celebration and fellowship, as well as times of loss. He came to retirement receptions, birthday parties, wakes, and funerals, not just for judges, but also for assistant clerks, court officers, court reporters, and others who were part of our day-to-day work family. He played softball; recited baseball statistics; told funny stories at his own expense; sang silly songs; asked about family members; and, more generally, was good company.

He did all of that while handling the most challenging cases in every field, civil and criminal, jury and non-jury, all smoothly and skillfully. His opinions were thorough, scholarly, wise, and witty, sprinkled with references to sports, classic movies, and Broadway musicals. He wrote a lot, but his writing never carried a whiff of showing off. He wrote to grapple with complex issues, to explain his reasoning, and to assure the parties that he had heard and considered their positions. When writing would not serve those purposes, he would instead announce decisions orally from the bench, with remarkable clarity and organization, in the manner pioneered by Martha Sosman.

Ralph's collegiality, along with his humility and good humor, quickly earned him good will, while his towering intellect and conscientious devotion to the law earned him universal respect. He needed both, because from very early in his tenure, Ralph demonstrated his independence, his systemic thinking, and his willingness to express his views to those in positions of power without concern for consequences.

Ralph had no fear of public criticism, or of reversal. When he found that police errors required dismissal of a charge, or that a police witness's misrepresentation required suppression of evidence, he said so unequivocally, and sent a copy of his findings to the police commissioner. When presented with expert testimony about a sex offender, he found and read the scientific literature himself, surely cognizant that reversal might follow, as it eventually did. He enjoined thousands of mortgage foreclosures founded on predatory loans, knowing there was little precedent for his ruling, but believing it was right. As Ralph himself

acknowledged at his swearing-in to the SJC in 2009, these decisions put his nomination at some risk. He accepted that risk.

Ralph also had no fear of court hierarchy. When he arrived at his first assignment in Middlesex County in 1997, he brought his own laptop computer, just as the court was beginning to issue standard equipment, with standard policies for its use. Barely two years into his judicial service, he sent a letter to the then Chief Justice proposing a process of setting goals and objectives for such matters as case management, long-range planning, and legislation. In 2002, when court leaders announced measures to manage a budget crisis, Ralph wrote a series of eloquent, respectful, and persuasive letters explaining why those measures were misguided. In about 2005, when he sat for the first time in the Suffolk First Criminal session, he proposed to the Regional Administrative Justice a comprehensive revamping of case-flow processes.

From my current perspective as Chief, I can easily see how Ralph's constant suggestions for improvement might have ruffled feathers, especially early in his tenure. But that was not the reaction he elicited. To the contrary, colleagues and court leaders loved and valued him, even though the court did not always adopt his ideas. I attribute that to his humility. Ralph never thought he was smarter or more capable or more committed than anyone else, although many of us thought he was. He respected all of us, and sought to enable all of us together to serve the public as well as we possibly could.

After Ralph left the Superior Court in early 2009, he came back regularly to speak at our educational conferences and at what we call "New Judge School." He seemed to feel that he was coming home, and we felt that we were welcoming a returning family member. One tip he gave, which I try to pass on, was this: If the law seems to be telling you to do something absurd, don't do it. Think longer. Consult others. Find a solution that makes sense.

Ralph showed us a way to think about the law so that it makes sense, and it serves. His memory is a blessing to all of us and to the public.

Chief Justice Judith Fabricant joined the Superior Court in 1996, and was appointed as Chief Justice on December 1, 2014. Prior to her judicial service, Chief Justice Fabricant served as an Assistant Attorney General for Massachusetts, including four years as Chief of the Government Bureau. She also served as an Assistant District Attorney for Essex County, Massachusetts, and for Wake County, North Carolina. She worked for the Boston firm Hill & Barlow, after serving as a law clerk to the Hon. Levin H. Campbell of the United States Court of Appeals for the First Circuit. She is a graduate of Yale College and Yale Law School.

Viewpoint

Interview with Robert Vitale

By Stephen Riden

As chair of the Boston Bar Journal, I had the opportunity to talk with Robert Vitale, Chief Court Officer of the Supreme Judicial Court, about his professional and personal relationship with Chief Justice Gants. What follows is an excerpt of our discussion, condensed and edited for clarity.

Q: Over the years you must have met a lot of judges. What was your first impression of Justice Gants?

A: Yes, I have. However, Chief Justice Gants stood out because I could tell he was a very kind and caring person. It was easy to see how passionate he was about his work and that he had a great sense of humor.

Q: How would you generally describe Justice Gants?

A: I would describe him as an all-around great guy and a good friend. He was very humble, compassionate, and intelligent. He cared about everybody. He had endless energy. Frankly, I don't know how he kept up the schedule he did. I feel like he worked twenty hours a day seven days a week.

Q: Could you provide an example?

A: In addition to his regular work schedule, he made it a point to go out and visit different courts around the state. The purpose for the visits was so that he could meet as many court employees as possible.

Typically, the visit would start with a small meet and greet with the court's "management team," the judges, magistrates, registrars, chiefs and assistant chiefs of probation and security. He would discuss a variety of issues and answer any questions they had.

From there, assuming the court had a jury pool, he always wanted to address the jurors. He wanted to thank them for their service and let them know the importance of the work they were doing for the Commonwealth.

He would then take a tour of the court. This would include going to each department and stopping by everyone's desk to say hello. He did not want to disturb anyone, but he wanted to meet as many employees as possible to say hello and thank them for the important work that they do every day.

In addition to meeting the staff, he always wanted to have an employee luncheon. This was his favorite part of the visit. The luncheon was only for "line" staff, not management. He said it was important for him to meet the employees who are in the trenches and on the front lines. He always told them that he valued their perspective and that they should not hold back on their opinions. He wanted to hear the good, the bad, and the ugly. He took notes and let the staff know that whatever was said at the luncheon was confidential and that he appreciated their honesty.

Q: He seems like the kind of guy who could talk to anyone, is that right?

A: Absolutely. I would say that, given the position he was in, I don't think you ever felt like you were talking to the Chief Justice – he was just so easy to talk to. He had a great sense of humor, he was quick witted, and he never took himself too seriously.

Q: What can you share about how he treated lawyers who appeared before him?

A: He treated everybody with respect. If he disagreed with an attorney, he always did it respectfully and did not embarrass anyone. For him, it was always about being fair, respectful and trying to get the right result.

Q: I understand that he was always looking for opportunities to make improvements to the court system. Did you observe that in your interactions with him?

A: Absolutely. He was always open to hearing new ideas. If something wasn't working, you were free to tell him it wasn't working and why you thought it wasn't. He did not have the "my way or the highway" mentality. He would always ask, "what can we do to fix it?"

Q: Do you have a sense of what else he wanted to accomplish?

A: One of the things that he was most passionate about was access to justice. He worked tirelessly to promote and expand access to the courts for everyone in the Commonwealth.

At the time of his death, he was working on several issues that were priorities for him. These included the Massachusetts Eviction Moratorium that was set to expire on October 18, racial injustice, and criminal justice reform.

Q: Is there anything else you would like to share?

A: Chief Justice Gants was an avid sports fan. He followed all the New England sports teams but he really loved the Boston Red Sox. On July 28, 2014, he was invited to throw out the ceremonial first pitch before the Red Sox played the Toronto Blue Jays.

He told me he had been practicing to make sure that he didn't bounce the ball before the plate. He was both excited and nervous at the same time but it was such an honor to have been asked.

Lastly, I would say that we are all going to miss him, certainly those of us who worked closely with him every day. This is a huge loss for the court system in general. He wasn't just my boss and colleague, he was also my friend.

Stephen Riden is a commercial litigator at Beck Reed Riden LLP, who represents corporate and individual clients in a wide array of disputes across the country. He is the chair of the Boston Bar Journal.

Viewpoint

Access to Justice: Reflections on Chief Justice Gants

By: Susan M. Finegan

It was a privilege to partner so closely with Chief Justice Gants on access to justice initiatives over the past ten years, having served with him for ten years as a member of the Massachusetts Access to Justice Commission (commission), and then as his commission co-chair. Throughout his time on the Supreme Judicial Court (SJC), he cared so deeply about access to justice, constantly thinking strategically about ways to make the civil justice system more accessible and fair. Soon after his appointment as an associate justice of the SJC, Chief Justice Marshall approached him to become the co-chair of the commission. This new role was his first engagement with civil legal aid and access to justice issues; true to form, he rolled up his sleeves to learn as much as possible, and energetically set to work. Four years later, during the appointment process for the Chief Justice position, he filled at least two pages of his application describing the various commission projects on which he collaborated with so many during his first years on the commission. In fact, in answering the judicial application question, “What are you most proud of?,” he listed his work as co-chair of the commission first. Certainly he did not lack for other professional achievements in his decades-long, storied career as a trial lawyer and trial and appellate judge, but his commission work clearly embodied the essence of what was truly important to him, as a judge and a person.

His emphasis on collaboration and teamwork was one of the hallmarks of his commission work. Throughout his tenure as co-chair, he encouraged people to work with him and engaged deeply with them – applying his laser focus and astonishing work ethic to every project. He relished working with the impressive and committed people of the commission, many of whom he had not met before joining, and likely would never have met had he not been asked to take on the co-chair role. He made the work enjoyable, too, by connecting with people on a human level, not just as Chief. He mixed his dry sense of humor with a dizzying familiarity of outdated cultural references and an encyclopedic knowledge of sports.

During his Chief Justice nomination period, he spoke several times about life lessons learned from his parents. The first was from his father, a French and German wine salesman to restaurants and liquor stores in New York. His father was always mindful of the concept of continued performance, saying often, “They don’t care what you did last year; they care what you are going to do this year.” The Chief Justice took that advice to heart in all of the work that we did together. He was an energetic man of action – on the commission, as Chief Justice, and nationally.

On the commission, for the better part of the last decade, he pushed us to be a “working” commission, transforming the organization into a more proactive organization. Every summer, he loved holding commission retreats at his house to develop a strategic plan of action for the coming year. He encouraged us in those meetings to think deeply with him about the important issues we faced, insisting that we left the retreat with three or four actionable goals that we could achieve by year’s end, and, inevitably, with an overflowing bag of leftover muffins and sandwiches.

He would often say to me that the commission needed to do things, not just create reports to have them “collect dust on shelves.” So, when we did produce reports, they had to have a purpose. A prime example of this is a report we worked on together four years ago, the Justice For All Strategic Action Plan. This project involved putting on paper a vision for the how the courts could transform how they handled those case types – family law, housing law, and consumer debt – where a majority of the litigants were unrepresented. We were one of the first states to work on such a project, so there was no blueprint for how it was supposed to be framed. We spent a year conducting outreach, convening committee meetings, and holding retreats. Then the time came, around Thanksgiving, to start drafting. When the consultant we had hired to produce the first draft

left the project unexpectedly, the Chief Justice did not miss a beat: he just rolled up his sleeves with a small team of us and started drafting. Then, as any experienced appellate judge would do, he started editing, and then continued editing, and editing some more. I never admitted this to him, but I was quite satisfied with the report on the twentieth round of edits, but he insisted that we continue, through Christmas Eve, to round twenty-five. The action-oriented plan we finalized has served as a blueprint for much of our commission's work for the last four years, and will for the years to come.

He also used his role as co-chair of the commission to advocate for changes in the court system. For example, several years ago, he asked commissioners to draft a report on a relatively new concept established by a few other states called "court service centers," which could assist unrepresented litigants. That report, authored by commissioner (and former BBA president) Tony Doniger, helped lay the groundwork for the court to fund two pilot court service centers the following year. Likewise, the Chief leaned on the commission at the start of the COVID-19 pandemic, and the resulting court building closures, to provide constructive feedback on the court user experience during that time.

He carried his passion for access to justice through to his work on the SJC. He used his judicial role to ensure that the voiceless in the court system had a voice. And he availed himself of every tool at his disposal, including: drafting opinions that impacted low income litigants; making rule changes that were equitable for all litigants, including the unrepresented; and expanding the court budget to increase the number of court service centers to assist more unrepresented litigants. He used his many speaking opportunities, such as the annual State of the Judiciary, to advocate for the racial justice, civil rights, criminal justice reform, and access to justice, issues about which he cared deeply. As he observed in his most recent State of the Judiciary address:

Until we create a world in which all who need counsel in civil cases have access to counsel, we must do all we can to make the court system more understandable and accessible for the many litigants who must represent themselves.

He was also a man of action on the national stage. As a dynamic member and leader of the Conference of Chief Justices and of the Justice For All Initiative, he deftly pressed other state courts to make justice more accessible to all. He created conference agendas and suggested keynote speakers to have other judges think about issues impacting those marginalized by the justice system. He also drafted policy resolutions addressing access to justice, consumer debt, and racial justice. Then, he used his political savvy to figure out the best way to ensure they were adopted, which often meant strategically asking someone else to take the lead in promoting the resolution. In his application to be considered for Chief Justice, he said: "I would like to believe that, if named as Chief Justice, I could play a national leadership role in advocating for access to justice, because I think Massachusetts is becoming a national leader in exploring innovative ways to provide access to all." He lived out that aspirational goal through his actions and words every day he served as Chief Justice.

Another life lesson he shared during his nomination process was from his mother, who judged everyone by how they treated others. The highest praise she could give to a person of accomplishment was that he "was a regular guy." As in, "that Jonas Salk invented the polio vaccine, but he was just a regular guy." He took that advice to heart in the way that he focused on how a typical court user would experience walking through the courthouse doors. In fact, he had a favorite hypothetical litigant, Mrs. Alvarado, a low income single mother of two who lived with her disabled mother. He used this example to educate himself, and others, to better understand how she would experience the courts in her family's high stakes eviction process.

Living his mother's credo, as the Chief Justice, he could have stayed in his ornate office on the second floor of the Adams Courthouse, and bask in his many accomplishments, yet he chose to venture out, physically and emotionally, to focus on those in our community who did not have access to such privilege. He felt a great responsibility as Chief Justice and as the leader of the court system to try to understand what it was like to

come to court with no attorney, with no facility with language, with insecure immigration status, or with no access to technology. He was especially concerned about the “court user experience” during his last seven months, during the pandemic, when access to court buildings was closed to most litigants and self-represented litigants had to figure out how to find and use remote court systems. He valiantly worked with other court leaders to address the many challenges the court system faced. He sought out feedback – the good and the bad – to make improvements where he could, noting that it was imperative for the court to know what was happening on the ground.

He continued to think about those litigants in the final months, and moments, of his life, when he focused almost exclusively on the looming eviction crisis resulting from the pandemic and the ensuing economic recession. He had previously described this eviction crisis as “the greatest access to justice challenge of our lifetime.” On the morning of his death, the Chief Justice and I spoke for more than a half hour about his deep concerns on the eviction front, strategizing on solutions as we often would. I take some solace in the fact that he spent the last hours of his incredible life using the gift of his intellect and the privilege of his power as Chief to help the many desperate people impacted by this pandemic.

In one of his last speeches as Chief Justice, at the Access to Justice Fellows “graduation” event this past June, he quoted from the opening lines of Charles Dickens’ *The Tale of Two Cities*, which he said described the first months of the pandemic:

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair ...

His examples of the “worst of times” in that speech were, of course, numerous – including the pandemic itself, widespread economic insecurity, and systemic racism. He noted, however, that there was an undercurrent of the “best of times” in that the pandemic presented an opportunity for the court system – and, indeed, for all of us – to begin to “transform ourselves in ways that we never really have had to do before.” It was a time, “in which not only do we need people’s commitment, but also we need people’s imagination, to find new ways to do things,” collectively and collaboratively. The Chief further noted that, even though the times were challenging, “we will emerge from this stronger.” I must admit that it will be much harder to emerge from this stronger without his indispensable leadership. I also know that, more than anything else, he would insist that we all continue to do our part to provide greater access to justice for all because there is still so much unfinished work.

I’ll close this reflection with a nod to his mother: “that Ralph Gants was a brilliant jurist; a national voice for access to justice; an indispensable leader of the court system; a beloved figure to so many yet also a great friend to those close to him; but, most of all, a regular guy.”

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Viewpoint

Honoring Chief Justice Ralph Gants

By: Hon. Jay Blitzman (Ret.)

Celebrating the visionary legacy of Chief Justice Ralph Gants demands consideration of his commitment to access to justice and achieving racial and ethnic equity, particularly for marginalized communities. The Chief understood the need to address issues involving youth through a developmentally appropriate lens and the reality that many children and families are affected or involved in both child welfare and juvenile justice systems.

In his keynote address at the Second Annual Massachusetts Criminal Justice Reform Coalition Summit on March 16, 2015, less than a year after becoming Chief, Justice Gants emphasized that sentences should be proportionate, no greater than necessary, and designed to help the offender “get past the past.”^[1] “In medicine, there is a principle that a doctor should inflict no more pain and furnish no more medication than is necessary to treat the patient, and we need to act on a comparable principle in sentencing.” In his annual State of the Judiciary address in October 2015, Chief Justice Gants amplified his previous observations by noting that, “in a criminal case, problem-solving means not only adjudicating the question of guilt or innocence regarding crimes already committed; it also means crafting a fair and proportionate sentence that is designed to reduce the likelihood of recidivism and to prevent future crimes.” Given what we have learned about the maturational arc of adolescence and emerging adults, late adolescents between the ages of 18-25, the Chief’s observations are particularly relevant. As the noted lawyer and civil rights advocate Bryan Stevenson has observed, each one of us is more than the worst thing we have done. The Chief’s admonitions are so important that they are cited in the report of the Juvenile Court Dispositional and Sentencing Best Practices Committee which I was privileged to chair.

The Chief’s understanding of adolescent development and the importance of a fair and proportional approach which achieves rehabilitative goals while best protecting the public was a theme of his jurisprudence. In *Commonwealth v. Hanson H.*, 464 Mass. 407 (2013), he wrote the majority opinion addressing the issue of whether a judge is required to order G.P.S. monitoring for a juvenile who have been adjudicated of a sex offense as defined by G.L. c. 6 § 178C. Then Associate Justice Gants observed that it was not apparent that the legislature intended to apply mandatory G.P.S. supervision and “eliminate the discretion granted to juvenile court judges to render individualized dispositions consistent with the best interest of the child.” “We also conclude,” he wrote, “that where the legislature has established the statutory principle that as far as practicable juveniles should be treated not as criminals, but as children in need of encouragement and guidance (G.L. c. 119 § 53), we will not interpret a statute affecting juveniles, to conflict with this principle in the absence of clear legislative intent.” In reaching this conclusion, Justice Gants emphasized that our juvenile system is primarily rehabilitative. In recognizing the adverse effects of G.P.S. monitoring on normative socialization and school functioning, he stated that “We have recognized that G.P.S. monitoring is inherently stigmatizing.”

The Chief’s insight into the stigmatizing collateral consequences of a juvenile record was also evidenced in *Commonwealth v. Humberto H.*, 466 Mass. 562, 572 (2013), which authorized the juvenile court to allow pre-arraignment motions to dismiss in the absence of a finding of probable cause. In allowing a motion to dismiss prior to arraignment in such circumstances, Justice Gants noted that after arraignment a juvenile’s name and charge become part of the permanent Court Action Information record (C.A.R.I.) and may not be expunged, *Gavin G. v. Commonwealth*, 459 Mass. 470 (2002). The Chief cited *Magnus M.*, 461 Mass. 459, 461 (2012), which allowed juvenile court judges to continue cases without a finding after jury adjudications. The juvenile system “is primarily rehabilitative” and “[p]rotecting a child from the stigma of being perceived to be a criminal and from the collateral consequences of a delinquency charge is important,

even more important where there is no probable cause.” Access to juvenile and criminal records has been increasingly recognized as a punitive badge which, absent a much more robust model of record expungement or sealing than currently exists, becomes an eternal punitive badge. *See e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2012, 2016).

Chief Justice Gants again displayed fealty to the medical model of limiting the dose and letting an offender get past the past in *Commonwealth v. Henry*, 475 Mass. 117 (2016), a criminal case involving restitution. In this case, the opinion crafted by the Chief held that, in determining restitution, a judge must make a finding regarding a defendant’s ability to pay as well as an assessment of loss by the victim. Of particular note is that probation may not be extended for inability to pay as doing so “subjects the probationer to additional punishment solely because of his or her poverty [a] judge may not extend the length of probation where a probationer violated an order of restitution due solely to an inability to pay.” This holding is particularly consequential for juveniles who rely on parents, guardians, or interested adults to support them.

In re: Care & Protection of Walt, 478 Mass. 212 (2017), involved a case in which Chief Justice Gants concluded that prior to the Department of Children and Families (DCF) removing a child from a parent’s care, the department take reasonable efforts before having the ability to justify the removal. This case reflects the Chief’s jurisprudence seeking to minimize unnecessary state intervention, which is especially important during the Covid-19 crisis. Prior to *Walt*, the orthodoxy had focused on Art. 30 separation of power case law limiting challenges to DCF custody to abuse of discretion. However, the Chief’s analysis now requires more rigorous inquiry into what reasonable efforts have been made to keep children with caretakers prior to removal and permits juvenile court judges to exercise equitable authority to order DCF to take reasonable remedial efforts to diminish the adverse consequences of failure of the department to having made reasonable efforts prior to removal.

In *Lazlo L. v. Commonwealth*, 482 Mass. 325, 328-330 (2019), the Chief authorized the retroactive application of 2018 juvenile justice reforms allowing dismissal of first offense crimes for juveniles carrying sentences of six months or less. He emphasized that “the Legislature understood that children who enter the juvenile system have a higher risk of re-offending for the remainder of their lives and ... their risk of recidivism is greater the earlier they enter the system.” “We see no reason to delay the application of an amendment aimed at combatting the negative effects of Juvenile Court involvement on children and their communities.”

The Chief’s abiding conviction in ensuring equity was again reflected in one of the last cases he worked on. In his concurring opinion in *Commonwealth v. Long*, S.J.C. 12868 (Sept. 17, 2020), he supported the decision to adopt a new rule in allegations of racially motivated motor vehicle stops, which would place an initial burden on defendants to argue that there was a reasonable inference that stops were motivated by race or another protected class; and that in lieu of relying on statistical analysis, as previously required by *Commonwealth v. Lora*, 451 Mass. 425 (2008), defendants could rely on the totality of the circumstances regarding the stop. In noting that the justices had different ideas about the appropriate constitutional analysis, the Chief wrote that “... the court is unanimous in concluding that a motor vehicle stop that arises from racial profiling is unconstitutional [I]n short it is the unanimous view of this court that prohibition against racial profiling must be given teeth and that judges should suppress evidence where a motor vehicle is motivated, even in part, by the race of the driver or passenger.” Practitioners are already considering the implications of the case and tailoring arguments regarding racial profiling in all contexts.

Chief Justice Ralph Gants is not gone. He lives in all of our hearts. As former Chief S.J.C. Justice Margaret Marshall said during an October 27, 2020 event honoring her former colleague, “Now is not the time to grieve. It is time to get to work.” I concur. Ralph Gants was inspired by Deuteronomy’s admonition: Justice, Justice Shall You Pursue. We should all follow his example.

[1] Available at <http://www.mass.gov/courts/docs/sjc/docs/speeches/sjc-chief-justice-gants-remarks-umass-boston-03165.pdf>.

Jay Blitzman served as the First Justice of the Middlesex County Division of the Massachusetts Juvenile Court. Prior to his retirement he was the founder of the Roxbury Youth Advocacy Project, a multi-disciplinary public defender unit which became the template for the creation of the statewide Youth Advocacy Division. Jay was also a co-founder of Massachusetts Citizens for Juvenile Justice (CfJJ) and a co-founder of Our RJ, a court and school-based diversionary restorative justice program. Judge Blitzman currently serves on the advisory boards of CfJJ, UTEC (Lowell) and is a Massachusetts Access to Justice Fellow working with More Than Words (MTW). Jay also served as a member of the Boston Bar Association's School to Prison Pipeline Service Innovation Project and is a former Cradle to Prison Pipeline a former BBA John Brooks Brooke public service award winner. Jay writes and presents regularly on systemic juvenile and criminal issues and holds teaching positions at Harvard Law School (trial advocacy), Northeastern University School of Law (juvenile law), and Boston College School of Law (Cradle to Prison Pipeline). Judge Blitzman is also a faculty member at the Center on Law Brain and Behavior (CLBB- Harvard Medical School, M.G.H.