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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

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

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

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.

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.

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.

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]

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.

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

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

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

12 See www.americanbar.org/groups/labor_law/membership/equal_opportunity/?fbclid=IwAR1lHvCxX9RzWp-0u7FarSzDm3JhPEHS6GRK76uwtKSgL2pCOMSGcbqVkTZY or www.americanbar.org/groups/public_contract_law/leadership/21-challenge/.

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.

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.