

Remarks by
Chief Justice Ralph D. Gants
Supreme Judicial Court

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MASS. INC CRIMINAL JUSTICE REFORM COALITION
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Thank you, Jeff, for that kind introduction. And thank you to the members of the Massachusetts Criminal Justice Reform Coalition and to all of you at MassINC for your leadership in spurring discussions about criminal justice reform through forums like this and through your many excellent research reports.

The research you have performed and the discussions you have triggered have helped all of us in the Commonwealth recognize that our criminal justice system affects more than the individuals accused of crimes and the victims of those crimes. You have focused our attention on the many costs of incarceration: not only the direct costs, that is, the approximately \$1.2 billion we spend annually to operate our prisons, houses of correction, and jails; but the opportunity costs, that is, the opportunity lost to spend that money on improving education, job training, drug treatment, and mental health care; and the collateral costs that narrow the job prospects for those with criminal records, that devastate neighborhoods, especially communities of color, and that ultimately undermine the economic productivity of our Commonwealth. You have demonstrated how criminal justice policy affects all of us -- individuals, families, neighborhoods, communities, and ultimately every resident in the Commonwealth⁽¹⁾.

All of which leads me to talk football. There are 53 men on an NFL football team. What if the NFL enacted a rule that told Coach Belichick that the 53 you start with at the beginning of the season are your 53 for the entire season? If you lose any to injury or disciplinary action, you simply must carry on with fewer players. He would say, "You have to be kidding! Every member of my team has a job to do; I need every one of them. You take some away and I have a far poorer football team." But after he would calm down, he would recognize what he needed to do.

He would need to find ways to reduce the risk of injuries, such as concussions and muscle tears, and to reduce the recovery time for those who suffer such injuries. He would need to think hard about the discipline he imposes for missing practice, for fighting with other players, and for drug use. He would consider whether there were alternatives to suspension for these violations, and when suspensions were needed because of the severity of those violations, he would impose no longer a suspension than was required to accomplish his disciplinary purpose.

Why do I set forth this scenario? Because our Commonwealth is also a team, comprised of our 6.8 million residents, and the residents we start with at the beginning of our season are, for the most part, the residents we will have at the end. If we lose any of our teammates -- to incarceration, to drug addiction, to disabling mental health, to despair -- we deprive ourselves of their talents, of the work they otherwise could perform, of their potential for growth and maturity, and we therefore are poorer as a Commonwealth.

If we think of our Commonwealth as our favorite football team, it becomes pretty obvious what we need to do. We need to find ways to reduce the number of people whose talents we are losing to opiate addiction, to debilitating mental health problems, to insufficient education, to domestic violence, to unemployment, to homelessness, to criminal gangs, and to incarceration. Where they are burdened by drug addiction or alcoholism, we need to get them treatment. Where they are confronting the demons of mental illness, we need to get them medication and therapy. Where they have not graduated from high school, we need to get them a diploma, or help them pass the HiSET, and get them into job training or college. Where they grew up in a household with domestic violence, and use violence to control their spouse or partner, we need to get them intimate partner abuse prevention education. Most importantly,

where they have been unable to support themselves except through selling drugs or theft or fraud, we need to help them find jobs with a living wage, and help them to keep those jobs.

When persons commit crimes, we need to think carefully about whether those crimes are serious enough to require prosecution. And, when they are, we need to think carefully about whether they require incarceration. And, when they do, we need to think carefully about how much incarceration is required to deter, punish, and protect the safety of the public, and impose no more than that amount of incarceration. And in all that we do, we need to ask ourselves: what can we do, consistent with justice and fairness, to help each person who enters our criminal justice system to get past their past, and to move on to a more productive future? And when we figure out what to do, we need to craft an individualized plan for that person and implement it. And we need to ask ourselves another important question: are we treating the rich the same as the poor, the white the same as the black and brown, the citizen the same as the immigrant? And where the answer is "no," we need to be willing to handle that truth, and dedicate ourselves to make the changes necessary to enable that answer to become "yes."

We know this is what we need to do. But we are not doing it as effectively as we could or should. We are losing far too many people from our team, especially young people. Here are five things we can do. And when I say "we," I do not mean simply our courts; the courts can do none of this alone. If we are to succeed, we need this to be a collective effort by the Legislature, the Governor, the police, the prosecutors, the sheriffs, and the Department of Correction.

First, where a person has committed a minor, non-violent crime, especially a juvenile or young person with no criminal record or only a minor criminal record, prosecutors should consider pretrial diversion or pretrial probation, if necessary with appropriate conditions crafted

to address the problems that led to the commission of the crime. Where we can reasonably do so, we need to spare persons from a criminal record or minimize the impact of having such a record. As many as one out of every four people in Massachusetts has some kind of criminal record, according to data discussed at your March forum⁽²⁾. The repercussions of those criminal records endure for years in lost jobs and lower wages. As one of the papers presented at your March forum pointed out, persons with criminal records are 50 percent less likely to receive an interview or job offer, and those who do find jobs will earn 10-40 percent less compared to persons without criminal records⁽³⁾. The CORI legislation to "ban the box" was well-intentioned, but there is reason to be skeptical of its effectiveness in reducing the adverse employment consequences of a criminal record. Those who cannot find jobs to support themselves are more likely to find other ways to do so⁽⁴⁾, because, as Darrin Howell noted at the March forum, "The streets are always hiring."⁽⁵⁾

The decision to *not* *pros* a case after successful pretrial diversion is solely a prosecutorial prerogative, and the dismissal of a case after successful pretrial probation generally can be done only with the approval of the prosecutor. But there are times when the Legislature has granted judges the authority to exercise this authority over the objection of prosecutors. In *Commonwealth v. Morgan*, the Supreme Judicial Court recently reviewed the case of a nine-year Army veteran who served three tours of duty in Iraq and Afghanistan, suffered from PTSD, and fell into drug and opioid abuse⁽⁶⁾. In 2014, he was stopped for driving erratically and charged with OUI, second offense. Now ordinarily, as a matter of statute, a charge of OUI, second or subsequent offense, cannot be placed on file or continued without a finding. But the SJC determined that the Legislature overrode that provision when it extended pretrial diversion to veterans under the VALOR Act, so that Mr. Morgan could be eligible for dismissal

of the charges against him if he successfully completed his pretrial diversion program. As part of his pretrial diversion program, he received treatment for his PTSD and substance abuse. He regained his sobriety, passed a union examination to become a carpenter, joined the union, maintained his employment, mended relations with his family, and provided for his son. The Legislature through the VALOR Act gave those who served their nation in the military the possibility of a second chance, which he courageously seized. It is fair to ask whether others also deserve the possibility of a judge giving them a second chance?

Second, where a case is appropriately prosecuted because of the severity of the crime or the criminal history of the offender, we need courts with the knowledge, experience, and resources to address the problems that contributed to the commission of a defendant's crimes. We have already established a number of drug courts, mental health courts, and veterans treatment courts to address those issues, and the number of these specialty courts has grown rapidly over the last few years, but we do not yet have the resources to bring these courts to every corner of the Commonwealth. We need to do so; no one should be deprived of access to a drug court, mental health court, or veterans treatment court because of where they live.

We are giving careful consideration to the creation of another type of specialty court in our District Courts and the Boston Municipal Court -- one focused on addressing the crimes committed by young adults aged 18 to 24. As you know, our recidivism rates are unacceptably high. But the figures for young adults are particularly grim. Seventy-six percent of 18-24 year olds released from houses of correction in Massachusetts are re-arraigned within three years -- higher than for any other age group⁽⁷⁾. Three-year reincarceration rates for 18-24 year olds in Massachusetts are at 52%-56% -- again, significantly higher than for any other age group⁽⁸⁾. And not surprisingly, youthful offenders make up a disproportionate percentage of our inmate

population. As MassINC has pointed out, Massachusetts residents aged 18-24 make up just 10 percent of our population, yet they represent 20 percent or more of all new commitments to state prison and houses of correction⁽⁹⁾.

Recently, San Francisco, New York, Bonneville County, Idaho, and Douglas County, Nebraska have established young adult courts based on scientific research showing that young adults' brains are still developing psychosocial maturity through their early twenties⁽¹⁰⁾. Young adult courts would be most likely to succeed if probation officers had the resources to contract with extraordinary local youth programs, such as Roca, UTEC, and YouthBuild, to arrange the kind of wrap-around services that defendants often need to get an education and a job: drug and mental health treatment, housing assistance, tutoring, HiSET classes, job training, and job placement.

Roca and UTEC serve the most difficult, high-risk youth -- young people who are high school dropouts involved in gangs and drugs, many of them coming out of incarceration. Yet they are achieving spectacular results. At Roca, 87% of participants enrolled for two years or more were arrest-free during the following year, and 88% of participants placed in jobs kept their job for at least six months⁽¹¹⁾. At UTEC, 89% of participants remained arrest-free, and 82% were still employed two years after leaving the program⁽¹²⁾.

How do they do it? While the two programs differ in details and points of emphasis, they share some common characteristics.

They both engage in extensive youth outreach, relationship building, mentoring, and counseling. Roca calls it "relentless outreach" -- a Roca youth worker will keep knocking on the door no matter how many times a young man tells him to get lost. UTEC sends its street workers,

former gang members themselves, into the streets, into jails, and into the courts, to build relationships with potential participants.

Both programs provide essential education, transitional work experience, and assistance with job placement. They prepare participants for the HiSET. They help develop work skills through paid employment with internal work crews. For example, UTEC operates a mattress recycling program, a cafe and catering service, and a woodworking shop for its participants. When young people are ready to leave Roca and UTEC, their mentors assist them with job placement, and ongoing follow-up should they fail in that first job, or in a second. And both programs carefully track and evaluate data on individual and group performance to determine what works best and where they can improve.

Third, where conviction of a crime warrants incarceration, judges need to be able 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 mandatory minimum sentence. I join the Massachusetts Sentencing Commission's conclusion that mandatory minimum sentencing is a failed experiment that must end. And it must end for all crimes, except the crimes of murder and repeated OUI offenses, not just for drug crimes.

I think my views on this subject are well known, so I will not burden you by repeating them. But I cannot help but address the argument in support of mandatory minimum sentences so often furnished by prosecutors, that is, that only they know who are the really bad guys. In our adversary system, in those cases where there is no mandatory minimum, a prosecutor at sentencing has the opportunity to present to the judge all the reasons why the prosecutor believes that the defendant is a really bad guy who deserves a long sentence. And the defense attorney has

the opportunity to present to the judge all the reasons why the defendant might not be such a bad guy or might be a guy who did really bad things in the past but has the potential for redemption. Having served for eight years as a prosecutor, I understand the desire of prosecutors to determine a defendant's sentence. But in our adversary system, a prosecutor is a party in a case, not the judge; he or she can advocate but not decide. It is the proper role of the judge to consider both arguments and decide an appropriate sentence. And I cannot help but note the results of the public opinion poll issued last week by MassINC, which reveal that only eight percent of those polled support mandatory minimum sentencing⁽¹³⁾. The Governor has chosen fine judges; let us do our job in accordance with the best sentencing practices we have established.

Fourth, where defendants are incarcerated, we must not squander their time in prison or a house of correction. We should not wait until they are released to provide them the programming they will need once they get out to reduce the risk of recidivism: not only substance abuse treatment, violence reduction programs, and sex offender treatment, but also education and job training. But, for too many, the programs available in prison and the house of correction are too little or too late. As the report released by MassINC today reveals, in fiscal year 2015, more than one-third of DOC inmates who were determined by a risk-need assessment to need violence reduction training were released without receiving this training, either because it was not available in their facility or because their sentence expired while they remained on the wait list⁽¹⁴⁾. One-quarter of all sex offenders were released without receiving cognitive behavioral training that could reduce the risk of sexual recidivism⁽¹⁵⁾. Nearly one-quarter of all inmates with substance use disorder were released without receiving appropriate treatment for their addiction⁽¹⁶⁾. A key component of effective recidivism reduction is providing educational opportunities in prison, such as vocational training, preparation for the HiSET, and even college

courses. But there are significant gaps in program availability, and access to college level courses is limited to just a few facilities. In fiscal year 2016, there was just one DOC prison education staff member for every 128 inmates⁽¹⁷⁾. In that same fiscal year, DOC devoted just 2.7 percent of total spending to program services, which include reentry support, behavioral health counseling, and prison education; it was three percent five years ago⁽¹⁸⁾. The Council of State Governments recommended that DOC expand program capacity and availability, and improve coordination with the Parole Board to ensure that inmates receive the programming they need to reduce their rate of recidivism and earn parole approval⁽¹⁹⁾. We need to follow that recommendation, and focus the efforts of DOC on recidivism reduction, not just security.

Fifth and finally, we need to do more to eliminate the collateral consequences of a criminal conviction that trip up too many people once they return to civil society. We impose too many fees on defendants who cannot afford them -- probation fees, indigent counsel fees, victim witness fees, GPS fees -- and then we treat their failure to pay as a violation of probation conditions. We suspend licenses whenever an arrest or default warrant issues, making it that much more difficult for defendants to maintain a job and pay off those fees. For those who cannot afford to pay these fees, we impose community service obligations that get in the way of finding and keeping a job. I was just in the Plymouth courthouse last week and learned that those ordered to provide community service because they cannot afford their monthly probation fee must be in front of the courthouse at 8 a.m. two weekdays each month, where they will devote four hours to community service. How many of your employers would be happy about your taking off two days each month to do this? How many would hire you if they knew you had this obligation? We need to reduce or eliminate those fees and limit license suspensions to punishment for driving violations.

We also need to take a hard look at how we can help persons with criminal histories find and keep honest jobs. We need to examine the balance we have struck between protecting the public from persons with criminal histories and barring those persons from gainful employment. For example, the new regulations for the ride-sharing industry in Massachusetts led to the rejection of more than 8,000 drivers for companies such as Uber and Lyft. In some cases these rejections were plainly well-grounded in legitimate public safety concerns, but press reports have raised questions about the disqualification of drivers based on youthful transgressions more than two decades old⁽²⁰⁾. We need to think hard about where to draw the line. And we need to find ways to encourage more employers to offer jobs to people with criminal histories. The federal Work Opportunity Tax Credit provides tax credits of up to \$2,400 to an employer for hiring a convicted felon within one year of release from prison. Should we consider comparable state tax credits? New York City Mayor Bill de Blasio recently garnered headlines for his \$10 million "jails to jobs" initiative⁽²¹⁾. Should we consider similar steps in Massachusetts? Or should we instead focus on expanding the approach used by Roca and UTEC, that is, helping ex-offenders gain experience in transitional supported work programs so that they can show a potential employer they have the necessary skills to be a dependable employee?

Simply put, we need to do whatever works best, based on the best available social science evidence, to reduce recidivism and put people with criminal histories back on the path to living normal lives, not only for their sake, but for the sake of our society as a whole. "No man is an island, entire of itself," the poet John Donne wrote. "[E]very man is a piece of the continent, a part of the main."⁽²²⁾ Those lines are not just poetry; they speak an elemental economic fact. In our Commonwealth, we are all interconnected, we are all part of the same team, and the

successes or failures of one affect us all. One in four of our residents have a criminal record. If we allow them to fail, we will fail as a Commonwealth and endanger our public safety.

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^{i i}(1) See Ben Forman and Michael Widmer, *Getting Tough on Spending: An Examination of Correctional Expenditure in Massachusetts*, MassINC, May 15, 2017, at 4, 15-17; Ben Forman and John Larivee, *Crime, Cost, and Consequences: Is it Time to Get Smart on Crime?*, MassINC, March 24, 2013, at 12-21.

(2) Robert Clifford and Riley Sullivan, *The Criminal Population in New England: Records, Convictions, and Barriers to Employment*, Federal Reserve Bank of Boston, New England Public Policy Center, March 2017, at 13.

(3) *Id.* at 14.

(4) *Id.* at 16.

(5) Adrian Walker, *The formerly incarcerated still struggle to find work*, *Boston Globe*, Mar. 22, 2017, at <https://www.bostonglobe.com/metro/2017/03/21/years-after-criminal-justice-reform-formerly-incarcerated-struggle-find-work/0UkQxfESAv7zGgnNO8TtuL/story.html>

(6) *Commonwealth v. Morgan*, 476 Mass. 768 (2017).

(7) Council of State Governments Justice Center, *Massachusetts Criminal Justice Review, Working Group Meeting 3 Interim Report*, July 18, 2016, at 30.

(8) *Id.*

(9) Ben Forman and Sarah Yee, *Viewing Justice Reinvestment Through a Developmental Lens*, MassINC, Dec. 15, 2015, at 3.

(10) Tim Requarth, *A California Court for Young Adults Calls on Science*, *New York Times*, April 17, 2017, at https://www.nytimes.com/2017/04/17/health/young-adult-court-san-francisco-california-neuroscience.html?_r=0

(11) See <http://rocainc.org/work/young-men-program/>

(12) See <https://www.utec-lowell.org/impact>

(13) See <https://massinc.org/wp-content/uploads/2017/05/topline-2017-04-criminal-justice-poll.pdf>

(14) Ben Forman and Michael Widmer, *Getting Tough on Spending: An Examination of Correctional Expenditure in Massachusetts*, MassINC, May 15, 2017, at 11.

(15) *Id.*

(16) *Id.*

(17) *Id.*

(18) *Id.*

(19) *Council of State Governments Justice Center, Justice Reinvestment in Massachusetts: Policy Framework*, Feb. 2017, at 9, 12-13.

(20) Adam Vaccaro and Dan Adams, *Thousands of current Uber, Lyft drivers fail new background checks*, *Boston Globe*, April 5, 2017.

(21) Yoav Gonen and Shawn Cohen, *De Blasio wants to employ every inmate who served time in jail*, *New York Post*, March 29, 2017; <http://www1.nyc.gov/office-of-the-mayor/news/187-17/mayor-de-blasio-re-entry-services-everyone-city-jails-end-this-year#/0>

(22) John Donne, *Meditation XVII, Devotions Upon Emergent Occasions* (1624).