Annual Address: State of the Judiciary
Chief Justice Ralph D. Gants, Massachusetts Supreme Judicial Court
Message to Massachusetts State Bar Meeting
October 20, 2016, in Boston, Massachusetts

A State of the Judiciary address is an opportunity to reflect on the year that has passed and the year ahead, on what we have accomplished and what remains to be done, on the judiciary we are and the judiciary we aspire to be. Since I became Chief Justice in 2014, I have sung our State of the Judiciary in three-part harmony with Chief Justice Paula Carey and Court Administrator Harry Spence, which reflects our partnership in the governance and management of the judiciary. This will be the last State of the Judiciary address for Harry – he retires in April – so let me speak for a moment of the contributions that he has made to court management and to the cause of justice.

Harry, together with Chief Justice Carey, our seven Trial Court Chiefs, and Appeals Court Chief Justice Scott Kafker, has led the way in changing our culture as an organization. We gather data, we measure with the data, and we learn from the data. We appraise the performance of our employees in our Trial Courts, and we honor superior performance and address nonperformance. We focus on the experience of our court users – litigants, attorneys, jurors, victims – and we look for ways to improve that experience. We reach beyond our grasp and expand our expectations of what we can accomplish. We aspire to transparency, admit our mistakes, and endeavor to correct them. We listen, we collaborate, and we adapt to changing circumstances.

Harry is a tough act to follow, but there will be a second act and we are committed to making that second act a success. SJC Justice Robert Cordy, who retired from the bench only two months ago, has agreed to lead the search committee to find a worthy successor, which reflects the importance we give to that selection. The position has been posted and the search is underway.

It has also been a year of transition for the SJC. On June 8 of this year, we had our last sitting of the court year, hearing challenges to two ballot questions that needed to be decided by early July. Those were the last cases heard by our retiring Justices Spina, Cordy, and Duffly.

We issued those opinions on time, and we sat for our first sitting of this court year, as scheduled, on September 6, with new Justices Gaziano, Lowy, and Budd. The selection of three superb justices and the passing of the jurisprudential baton without the loss of a step is an accomplishment we should not take for granted. On the United States Supreme Court, Justice Scalia's seat has yet to be filled, more than eight months after his death. The State of Michigan filled three seats on its Supreme Court in 2013 and 2014 through judicial elections, where approximately $9.5 million was spent on the campaigns, nearly $5 million of which was raised by the judicial candidates' campaign committees, no doubt from many of the attorneys who would be appearing before them. The State of Illinois selected only one Supreme Court Justice during that time period, also through a judicial election, and $3.35 million was spent on that campaign alone, with roughly ninety percent of the money coming from special interest groups. The statue of Rufus Choate stands so prominently in this hall, not because he was a great SJC Justice – he was an attorney who never served on the SJC – but because he eloquently and successfully argued against the election of judges at the Massachusetts Constitutional Convention of 1853. Choate contended that the qualities of mind and character that make a great

judge are best discerned, and judicial impartiality and independence are best preserved, through a rigorous appointment process. The wisdom of his argument was demonstrated in the past few months – a Governor dedicated to the merit selection of judges, advised by a committee of accomplished attorneys and retired judges, nominated three greatly admired Superior Court Judges to sit on the SJC; the Governor's Council interrupted their summer to hold prompt hearings on each nominee, and voted unanimously to confirm them in time for all to be sworn in for our September sitting. I thank Governor Baker, his Legal Counsel (Lon Povich), the SJC Nominating Committee and its Executive Director Sharon Casey, and the Governor's Council for doing honor to the judicial branch and to the people of this Commonwealth by the timely selection of three fine justices.

During the past year, we have continued the process of reimagining what our court system should be. On the civil side, the Superior Court, District Court, Boston Municipal Court, Probate and Family Court, and the Land Court have announced procedural changes designed to provide litigation options that will enable litigants to resolve a civil dispute in a prompt, cost- effective manner that is appropriate to the amount at issue and the nature of the dispute. The SJC just last week approved a Superior Court rule that will allow parties to request an early non- binding judicial assessment of a case, a case management conference, the immediate scheduling of a trial date, earlier pretrial deadlines, limits on discovery, and other opportunities to reduce the cost of litigation and obtain a quicker resolution. Despite being short of judges or staff, the District Court and the BMC have established dedicated civil sessions in many courts, so that these cases get the time and attention they deserve. The Probate and Family Court is developing an early case settlement process where the parties agree to limited discovery, limited motions, and participation in a settlement conference. The Land Court offers streamlined discovery and other alternatives to reduce the time between filing and judgment or settlement, and the SJC last week approved a Land Court rule giving parties the opportunity to obtain a prompt ruling after a bench trial by agreeing that the form of the ruling may be a special verdict regarding each element of each claim.

We promised to provide the bar with practical alternatives to arbitration, and we have done so. The ball now is in the bar's court – it matters little whether we offer alternatives that can reduce the cost and length of litigation if the parties do not agree to choose these alternatives.

I know that some other states have come to the conclusion that the courts must impose these cost-saving alternatives on the litigants, because the litigants will not agree to them unless they are mandated. We have, for now, not gone down that road; we believe that our bar will recognize the benefits these streamlined processes offer in many cases, and opt in to help clients resolve their legal problems more quickly and more economically. I ask the bar to inform clients in every case of these alternatives, and to explore with them the wisdom of selecting these alternatives to achieve a fair, timely, and cost-effective resolution of their civil dispute.

We are taking a hard look at how we can better fulfil our promise to provide equal justice for every litigant. Through the training of judges and court staff, bench cards, and even jury instructions, we are examining the implicit bias that afflicts all of us, and are seeking to ensure that bias does not infect our bail and sentencing decisions. We need to explore the reasons behind the great disparity in the rates of imprisonment among Whites, African-Americans, and Hispanics in this Commonwealth. According to data collected by the Sentencing Commission, 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 8 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 4.9 times greater. We need to find out why. The Chief Justice of Delaware recently asked the University of Pennsylvania to examine the reasons for racial disparity in sentencing in his state, and its report was issued last month. I have asked Dean Martha Minow of Harvard Law School if she would gather an independent research team to explore the reasons for racial and ethnic disparity in the incarceration rate in Massachusetts, and she has graciously agreed to do so. We in the judiciary will cooperate with her research team to provide them with the data they will need to examine this criminal justice systemic issue. We need to learn the truth behind this troubling disparity and, once we learn it, we need the courage and the commitment to "handle" the truth.

We are also taking a hard look at how we can better fulfil our promise to provide equal justice for those who face financial challenges. Last term, we reaffirmed the legal principle that no defendant should be imprisoned or otherwise punished because he or she is too poor to be able to pay a fine, fee, or an order of restitution. We are examining whether we are unwittingly punishing poverty by the imposition of fines, fees, and restitution that a defendant has no ability to pay, and taking steps to ensure that the inability to pay does not result in the revocation of probation, the inappropriate extension of a period of probation, or time in jail. We will continue to work with legal services and the pro bono bar to diminish the justice deficit endured in civil cases by those unable to afford counsel. We have created six new court service centers in our larger courthouses that have made it easier for those without counsel to navigate our court system. We take pride in the National Center for Access to Justice having recently ranked Massachusetts second overall in the country for our work in the areas of attorney access, assistance to self-represented litigants, language and disability assistance, and self-help information. But we know that progress in these areas requires continued commitment, resources, and study, and that we are far, far away from where we need to be.

Equal justice also means that every person in this Commonwealth has equal access to the courts of this Commonwealth. So we hope that the Legislature this year will rectify the injustice that nearly one in three of our residents are denied access to a Housing Court. It is neither fair nor sensible that residents of Boston and Boylston have access to a Housing Court, but residents of Brookline, Braintree, and Burlington do not. A Housing Court is not only good for tenants; it is good for landlords: where a landlord has access to both a Housing Court and a District Court or the BMC, more than four out of five landlords vote with their feet by choosing to bring their eviction action in Housing Court. Housing Courts save vulnerable people from homelessness, and save the taxpayers millions of dollars by avoiding the need for emergency shelter. The Tenancy Preservation Program (TPP), a program available only in the Housing Court, helps families and individuals struggling with substance abuse, mental health challenges, and dementia to remain in their home and avoid homelessness. According to the Massachusetts Law Reform Institute, 92 percent of those whose eviction cases were closed by TPP in fiscal year 2016 were spared from homelessness, saving our state government more than $4 million it would have needed to spend in shelter costs. The Institute further estimates that, if TPP were expanded statewide, the additional savings to state government from homelessness prevention would be more than $1.8 million per year. The housing specialists available only in Housing Court can also direct litigants to privately-funded programs like HomeStart, which provides financial assistance to tenants who are being evicted because they have suffered a health emergency or

loss of employment that left them temporarily unable to pay their rent. By paying a portion of the rent and crafting an agreement to pay the balance due over time, HomeStart saved 413 Boston families from eviction in 2015. 130 of those Boston families were tenants of the Boston Housing Authority, the largest landlord in Boston, which estimates that HomeStart saved it more than $1 million last year by sparing it the costs arising from eviction. HomeStart estimates that it saved private landlords at least $2 million last year by helping them to avoid eviction of their tenants. If we care about tenants, if we care about landlords, if we care about homelessness, we must care about Housing Courts, because programs like these can best succeed only in a Housing Court.

In 2011, the Legislature, under the leadership of Speaker Robert DeLeo and then-Senate President Therese Murray, in coordination with judicial leadership, and with the support of the Governor, fundamentally reimagined the management of our court system and succeeded in enacting legislation that created the position of Court Administrator. The vision was bold; many feared it would turn out badly, and said so. But the Legislature was firmly committed to constructive reform and equally committed to listening to the suggestions of the judiciary, and the result was legislation that turned out to be a great blessing for the court system and for the litigants we serve.

Five years later, the Legislature again has a once-in-a-generation opportunity to reimagine a flawed system and to enact constructive reform, this time in the realm of criminal justice. As many of you know, the Governor, Speaker, Senate President, and I invited the Council of State Governments (CSG) to do an in-depth study of our criminal justice system as part of its Justice Reinvestment Initiative, and to provide us with the data and analysis that will assist us in shaping criminal justice policy and improving public safety by reducing the rate of recidivism. The Steering Group created to guide the Justice Reinvestment Initiative and the Working Group created to implement it have carefully reviewed the data that CSG has furnished and the analysis it has provided, and we eagerly await CSG's final policy recommendations.

As we await those recommendations, we in the judiciary have moved forward with the sentencing initiatives I discussed in my first State of the Judiciary address. Each Trial Court Department with criminal jurisdiction, including the Juvenile Court, has established best practice principles for individualized evidence-based sentencing, and is in the process of training its judges in implementing these best practices. We have made available to judges the social science findings relevant to crafting appropriate dispositions. We have taken steps to ensure that judges, prosecutors, and defense counsel confer with probation to learn of the community resources available to assist defendants with drug, alcohol, and mental health challenges, so that judges may make appropriate use of those resources in setting conditions of probation. We now have 25 adult drug courts, three juvenile drug courts, and one family drug court, as well as seven mental health courts, five veterans courts, two homeless courts, and a family resolutions specialty court to better address the problems of opiate abuse, mental illness, PTSD, and homelessness that make it so difficult for so many defendants and families to get back on their feet. We are committed to the principle that a sentence should be no more severe than necessary to achieve the sentencing purposes of punishment, deterrence, protection of public safety, and rehabilitation. And we now understand that conditions of probation should be narrowly tailored, because unnecessary probation conditions increase both the likelihood of a violation and of re-offense.

We in the judiciary want to do more to improve the quality of criminal sentencing and to reduce the risk of recidivism, but to accomplish more we will need statutory changes and a realignment of criminal justice resources from incarceration to post-release supervision, and that is why I am so excited by the historic opportunity presented by the collaboration of all branches of government in the Justice Reinvestment Initiative. But I also recognize that, even with perfect collaboration, success is not ensured. We must have the perspective and the humility to recognize that calling something a reform does not necessarily make it so. We must remember that the criminal justice system we are seeking to reform was itself the result of changes that were thought to be reforms when they were put in place. We must think hard not only about the consequences we intend, but about the foreseeable consequences that we do not intend.

Reducing the rate of recidivism is not just about sentencing policy and probation supervision. This year the Legislature has shown great leadership in looking carefully at some of the collateral consequences of a criminal conviction that make it more difficult for convicted defendants to do precisely what we would want them to do upon their release from custody: obtain job training and stable employment, find adequate housing, and get medical insurance for drug treatment and mental health medications and counseling. The Legislature this year revised the statute that caused those convicted of drug offenses to have their driver's license suspended for five years. These suspensions prevented them from lawfully driving to find a job or to commute to work, or from holding any job that required the employee to drive a vehicle. But there still remain laws on the books that pose formidable obstacles for defendants who are trying to do the right thing, as well as many statutory fees, including the indigent counsel fee, that impose a financial burden on those least able to bear that burden. If we are committed to reducing recidivism, we should be lending defendants a helping hand to enable them to get back on their feet, not weighing them down with punishing collateral and financial consequences.

I end with a few words of thanks. I have served for more than 19 years as a judge, and I have never been more impressed by the commitment of our court family – justices, judges, clerks, registers, court managers, probation officers, court officers, court reporters, court facilities employees – to our shared mission of justice with dignity and speed. When I visit these members of our family in courthouses around the Commonwealth, I am continually invigorated by the dedication they demonstrate, the challenges they surmount, and the initiative and creativity they show. It is an honor to be among such dedicated public servants.

I also want to thank our legislative leaders – Speaker DeLeo and Senate President Rosenberg, the Chairs of the Judiciary Committee – Representative Fernandes and Senator Brownsberger, and the Chairs of the Ways and Means Committees – Representative Dempsey and Senator Spilka – who share our commitment to provide justice for all, who have been partners in our efforts to address the scourge of opiate abuse, and who have fairly considered our budgetary needs in challenging fiscal times.

I also want to thank the bar for what I believe has been an extraordinarily productive partnership in my years as Chief Justice. You have been our advocates in the Legislature; you have helped us to educate new members of the bar in standards of professionalism and civility; you have offered constructive guidance regarding attorney voir dire, court rules, and public access to court files; you have given your time to help those who cannot afford counsel. You have been, in every way, our partners in the pursuit of justice.

I now give the podium to two other partners in the pursuit of justice, first, Chief Justice Paula Carey and then, Court Administrator Harry Spence.