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The Juvenile Justice Legacy of Chief Justice Ralph Gants

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THE JUVENILE JUSTICE LEGACY OF CHIEF JUSTICE RALPH GANTS

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Abstract: The late Chief Justice Ralph Gants was a catalyst for criminal justice reform and a champion for young people within the justice system. In his work on the Massachusetts Supreme Judicial Court, Chief Justice Gants committed himself to ensuring that children in juvenile court be treated as youths in need of help and never as criminals in need of punishment. While always respecting proper institutional boundaries, Chief Justice Gants worked to reduce the scope of juveniles' involvement in the justice system where possible, limit the harmful effects of such involvement on young people, their families, and their communities, and provide youths with an expanded opportunity for release upon proven rehabilitation. This Article explores Chief Justice Gants's influential legacy in the area of juvenile justice—a legacy left through both his opinions and advocacy—and what efforts he might have made on these issues in the future.

INTRODUCTION

As a Justice, and then Chief Justice, Ralph Gants was a man ahead of his time. He was committed to reforming the criminal legal system long before the current movement for reform. In Massachusetts, he was, in many ways, the impetus for that reform. His opinions and speeches opened people's eyes to the reality of the system—its lengthy sentences, racial disparities, and failure to reduce recidivism.

In the context of juvenile justice, his commitment to reform was, if anything, yet stronger. The problems that plague our criminal legal system for

* Associate Justice (ret.), Supreme Judicial Court, 2011–2020. Chief Justice Gants was one of the most brilliant lawyers I ever encountered, and it was my honor, privilege, and pleasure to share the Journey with him. When I joined the Court in 2011, Chief Justice Gants was already there. The tremendous void left by his death was made terribly apparent to me by the three months I continued to serve after his tragic passing. He is irreplaceable. He had an overpowering intellect, tempered by profound kindness. He treated me as an equal even though we were not equals. It has been a pleasure writing this article, as it gave me an excuse to go back and read his words.

** Staff Attorney, Committee for Public Counsel Services, Public Defender Division Appeals Unit. Many thanks to the editors of the *Boston College Law Review* for their insightful comments and suggestions, to Justice Lenk for asking me to join her in this project and for a decade of advice and guidance, and to Chief Justice Gants for leaving such a rich legacy for us to learn from.

adults equally affect the system for young people. Chief Justice Gants recognized that juveniles in the legal system are overwhelmingly children living in poverty, children of color, and children with high rates of trauma.[1] He understood the negative consequences that the system itself can impose.[2] As he recognized, juveniles in the legal system are more likely to reoffend later in life, a risk that increases the sooner they become involved in the system.[3] Chief Justice Gants dedicated his life to solving problems through the court process, yet at the same time, he is one of the jurists most responsible for reducing the scope and scale of the courts' involvement in children's lives. In the juvenile legal system especially, Chief Justice Gants understood that less can be more.[4] His opinions reflected that understanding.[5]

Chief Justice Gants did not act without constraint, however, as he recognized the limited role of the judiciary and respected institutional lines of authority.[6] He did what he could where he could, and when he could not, he urged every other actor in the system to do their part.[7] Being Chief Justice of the Massachusetts Supreme Judicial Court (SJC) is an enormous job, but he somehow made it even bigger. He was always bold; his brilliance coupled with his compassion proved to be a mighty force.

Although Chief Justice Gants accomplished much in this area, he was far from finished. This Article discusses Chief Justice Gants's juvenile justice legacy through the opinions he wrote and the juvenile justice positions he might have urged in the remaining years he should have had on the SJC as its Chief Justice.[8] Part I describes Chief Justice Gants's past juvenile justice opinions.[9] Part II then considers where he might have taken us in the future with further reforms to the juvenile legal system.[10] Part II acknowledges that Chief Justice Gants's legacy is not complete, and so we offer brief thoughts on how he might have completed it. By its nature, that is an impossible task; Chief Justice Gants saw subtleties in issues and arguments that few others could appreciate. It is hard to keep up with a man ahead of his time. Still, if we trust that past is prologue, we may learn from what he did to predict what he might have done.

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[1] *See infra* notes 17–38 and accompanying text.

[2] *See infra* notes 17–38 and accompanying text.

[3] Lazlo L. v. Commonwealth, 122 N.E.3d 532, 541 (Mass. 2019) ("[C]hildren who enter the juvenile justice system have a higher risk of reoffending for the remainder of their lives, and . . . their risk of recidivism is greater the earlier they enter the system.").

[4] *See infra* notes 47–61 and accompanying text.

[5] *See infra* notes 47–61 and accompanying text.

[6] *See infra* notes 17–38 and accompanying text.

[7] *See infra* notes 47–61 and accompanying text.

[8] *See infra* notes 12–85 and accompanying text.

[9] *See infra* notes 12–72 and accompanying text.

[10] *See infra* notes 73–85 and accompanying text.

At a time when a conservative majority on the United States Supreme Court seems loathe to push juvenile justice reform any further as a matter of federal law, future decisions from the SJC will likely be the only source of protection for Massachusetts juveniles caught up in the legal system.[11] That both heightens the tragedy of his loss and the importance of learning from his legacy.

I. Chief Justice Gants's Juvenile Justice Decisions

In decisions authored by Chief Justice Gants, the SJC took major steps to protect and advocate for the best interests of juveniles in the justice system.[12] Section A of this Part discusses a number of Chief Justice Gants's opinions that sought to protect juveniles from the harms that the system itself inflicts.[13] Section B explores Chief Justice Gants's efforts to interpret the 2018 Criminal Justice Reform Act to expand protections for juveniles.[14] Section C discusses his opinions that called on other institutional actors to change either the law or the practice of how they treat juvenile offenders. In particular, this section primarily focuses on Chief Justice Gants's advocacy to end the use of juvenile offenses as enhancements for later adult sentences and his admonishment of the Parole Board for its failure to give serious consideration to release requests of those convicted of murder as juveniles.[15] Finally, Section D explores the court's cases decided during his time as Chief going about as far as any state high court in the country in expanding the rights of juvenile homicide offenders—even disallowing life without the possibility of parole in *all* cases.[16] Chief Justice Gants left an enormous legacy.

A. Recognizing and Limiting the Harm of the Justice System on Juveniles and Communities

In 2013, in *Commonwealth v. Humberto H.*, the SJC, with then-Justice Gants writing, held that juvenile court judges have the discretion to dismiss delinquency complaints for lack of probable cause on their face, *even prior to arraignment,* so long as the dismissal was in the best interests of the juvenile and of fairness.[17] In his opinion for the court, the Chief showed his understanding of the importance of recognizing that authority when he described how "a

[11] *See* Jones v. Mississippi, 141 S. Ct. 1307, 1318 (2021) (holding in a divided opinion that a judge "need not make . . . a . . . factual finding of permanent incorrigibility" before imposing a discretionary sentence of life without parole on a juvenile).

[12] *See infra* notes 13–72 and accompanying text.

[13] *See infra* notes 17–38 and accompanying text.

[14] *See infra* notes 39–46 and accompanying text.

[15] *See infra* notes 47–61 and accompanying text.

[16] *See infra* notes 62–72 and accompanying text.

[17] 998 N.E.2d 1003, 1014 (Mass. 2013).

juvenile's name and charge" would be filed in the Court Activity Record Information (CARI) during initial proceedings, thereby establishing a permanent record that, at least at that time, could never be expunged.[18]

Due to the harmful effects of a CARI record, and the juvenile legal system's commitment to rehabilitation and redemption, he wrote that juvenile court judges must have "broad discretion" to dismiss charges unsupported by probable cause before arraignment.[19] Chief Justice Gants understood the lifelong stigma that can attach at arraignment when he described the great significance of shielding a juvenile from the shame and other consequences associated with being perceived as a criminal.[20] Consequently, he sought to ensure that judges could spare children that harm *at least* where the charges were not supported by probable cause, and would not otherwise result in a delinquency adjudication.[21] In such cases, great harm would be inflicted for no reason.

The SJC reached that result, in the words of Justice Spina's dissent, by applying what had heretofore been used as a "dispositional theory"—the "best interests of the child" analysis—to "the manner in which the rules of criminal procedure are applied."[22] Before *Humberto H.*, that sort of analysis had been reserved only for the dispositional phase of a case and not for its judgment or procedural aspects.[23] After the Chief's innovative decision, however, that was no longer the case. And although the decision recognized that novel authority to dismiss cases prior to arraignment, it also carried an even more expansive implication: *all* procedural rules governing juvenile adjudication must be read through a rehabilitative lens.[24]

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[18] *See id.* at 1012 (describing the significance of a CARI record in relation to the preliminary decision of whether to charge a child with a criminal offense). The Legislature has since added an expungement provision in the 2018 Criminal Justice Reform Act that allows discretionary expungement of CARI records in limited circumstances. *See* MASS. GEN. LAWS ch. 276, § 100K (2020).

[19] *Humberto H.*, 998 N.E.2d at 1014–15. At that time, mere possession of less than one ounce of marijuana would have only been a civil infraction. *Id*. at 1010. Consequently, then-Justice Gants also noted that prosecutors and police might be inclined to overcharge an otherwise civil violator, so judges had to be careful in ensuring probable cause, especially for the intent to distribute element. *See id*. at 1010–11 (describing that where intent to distribute is lacking, criminal prosecution contravenes the public policy of treating such marijuana possession as a civil violation).

[20] *See id.* at 1014 (describing the purpose of the juvenile legal system to include improvement and recovery of children).

[21] *See id.* at 1015 (noting that although a judge does not have the power to "expunge a CARI record" under such circumstances, he does have authority to prevent the creation of a CARI record when probable cause is lacking).

[22] *See id.* at 1015–16 (Spina, J., dissenting) (noting that contemporary jurisprudence has doubted the appropriateness of the "best interest" analysis for procedural and judgment-related components of a case).

[23] *See id.* at 1016.

[24] *See id.* at 1014 (majority opinion) (quoting Commonwealth v. Magnus M., 961 N.E.2d 581, 584 (Mass. 2012)) (describing the justice system for children as predominantly "rehabilitative").

That principle was not without limitation, however. In 2018, in *Commonwealth v. Newton N.*, Chief Justice Gants wrote the decision for a unanimous court declining to recognize a broad, freestanding power for juvenile court judges to dismiss delinquency complaints prior to arraignment where the charge *is* supported by probable cause.[25] Without explicit legislative authorization to the contrary, when a charge is supported by probable cause, the Chief explained, the choice to pursue prosecution remains in the prosecutor's comprehensive and sole authority.[26] Chief Justice Gants respected the separation of powers.[27]

But the Chief could not just leave it at that; that was not his way. With his concluding paragraphs, he emphasized that—because of this institutional arrangement—the community and the court depend on prosecutors to exercise reasonable judgment in determining whether to arraign a child, citing the prosecutorial duty to do justice and "temper[] zeal with human kindness."[28] Recognizing the mental health issues of the particular juvenile whose case was on review, Chief Justice Gants encouraged diversion prior to arraignment "as an alternative to prosecution."[29] Although he acknowledged the limitations of the court's authority, that did not stop him from exhorting the empowered party—the prosecutor—to consider the child's best interests when deciding whether to place charges on his record forever.[30]

In 2013, in *Commonwealth v. Hanson H*, Chief Justice Gants again highlighted the magnitude of the stigma and trauma that children suffer when

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[25] 89 N.E.3d 1159, 1166 (Mass. 2018).

[26] *Id.*

[27] *See id.* (noting that to hold otherwise would allow for an unsupportable intrusion by the judiciary into the executive branch).

[28] *See id.* at 1167 (quoting Robert H. Jackson, Att'y Gen. of the U.S., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys 7 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf [https://perma.cc/5B5B-TST8]).

[29] *See id.* at 1167–68 (noting that most district attorneys have created "juvenile pretrial diversion programs"). As was his wont, Chief Justice Gants did not give up on the juvenile in the case itself. In remanding, his opinion instructed the prosecutor to determine anew whether to continue with arraignment, and in doing so to assess all new information that has been gained about the juvenile since the original hearing on the motion to dismiss. *Id.* at 1168. In the context of pre-arraignment dismissal of charges initiated by private complaint, Chief Justice Gants also wrote the decision for the SJC—issued the same day as *Commonwealth v. Newton N.*, 89 N.E.3d at 1166—holding that a Juvenile Court judge has discretion to dismiss a complaint prior to arraignment before the Commonwealth formally moves for arraignment, but no such discretion thereafter. Commonwealth v. Orbin O., 89 N.E.3d 1151, 1157 (Mass. 2018). He again emphasized the need for "wise exercise of discretion" by the Commonwealth in deciding whether to move forward with private delinquency complaints. *Id.* at 1158.

[30] *See Newton N.*, 89 N.E.3d at 1167–68 (noting that prosecutors may consider diversion programs for eligible juveniles, instead of prosecution).

courts treat them like criminals.[31] There, he wrote the SJC's opinion holding that the mandatory imposition of GPS monitoring required by statute for those convicted of sex offenses did not apply to "juveniles who have been adjudicated delinquent."[32] His opinion explained how such a severe condition, imposed on a mandatory basis, clashed with the "broad discretion" generally afforded juvenile court judges, ostracized the child, and potentially hindered his rehabilitation.[33] Again, just as in *Humberto H.*, Chief Justice Gants saw the multitude of consequences that the juvenile legal system can have on children.[34] He vividly used the facts of the case to show that effect—describing how the juvenile had become "withdrawn, anxious and depressed" by having the GPS device affixed to his ankle and had stopped participating in after-school programs and sports that he had previously enjoyed.[35]

In reaching this decision, the SJC also established a new rule of statutory interpretation for juvenile cases: where the Legislature intends to treat adult defendants and juveniles identically, it must do so with special clarity.[36] This requirement was predicated on the understanding that equal treatment "fundamentally conflict[s] with" the established norm, codified in Massachusetts law, that juveniles in the system should *not* be regarded as convicts, but rather "as children in need of aid, encouragement and guidance."[37] Like his decision in *Humberto H.*—which expanded the "best interests of the child" analysis from a dispositional principle to an interpretive one—the Chief's opinion resolving the particular statutory issue before the court also announced a broader interpretive presumption against the identical treatment of children and adults.[38]

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[31] *See* 985 N.E.2d 1179, 1185 (Mass. 2013) (noting the "potential adverse impact" of a GPS device on a child's recovery).

[32] *Id.* at 1186.

[33] *Id.* at 1185 (first quoting Police Comm'r of Bos. v. Mun. Ct. Dorchester Dist., 374 N.E.2d 272, 287 (Mass. 1978); and then quoting Commonwealth v. Balboni, 642 N.E.2d 576, 578 (Mass. 1994)).

[34] *See* Commonwealth v. Humberto H., 998 N.E.2d 1003, 1012 (Mass. 2013) (describing the adverse consequences of a CARI record on a juvenile's wellbeing); *see also Hanson H.*, 985 N.E.2d at 1186 (describing the "inherently stigmatizing" effects of the GPS device on the juvenile).

[35] *Hanson H.*, 985 N.E.2d at 1186 (internal quotation marks omitted) (quoting the attestation of the juvenile's mother).

[36] *Id.* ("Where the Legislature intends to depart from this statutory principle and mandate a condition of probation for a juvenile, we trust it will do so with more clarity than we find in § 47."); *id.* at 1181 ("[W]e will not interpret a statute affecting the delinquency adjudications of juveniles to conflict with this principle in the absence of clear legislative intent.").

[37] *Id.* at 1185; *see* MASS. GEN. LAWS ch. 119, § 53 (2020).

[38] *Hanson H.*, 985 N.E.2d at 1185 (emphasizing the importance of judicial discretion to implement the "redemptive principles" at the core of juvenile matters); *see Humberto H.*, 998 N.E.2d at 1016 (Spina, J., dissenting) (describing the expansion of the "best interest" analysis into judgment and procedural aspects of a case).

B. Expanding Protections for Juveniles Through Criminal Justice Reform

In addition to his decisions seeking to reduce the harm inflicted on young people by the juvenile legal system, Chief Justice Gants was also a major driver behind the 2018 Criminal Justice Reform Act that included significant changes to the juvenile legal system.[39] When it came time to interpret the new law, the SJC protected *all* children who fell within its scope.[40] In 2019, in *Lazlo L. v. Commonwealth*, the SJC—in another opinion authored by Chief Justice Gants—concluded the narrowed definition of "delinquent child," that raised the age for juvenile court jurisdiction from seven to twelve, applied retroactively to all cases still pending in the juvenile court, even if the incident in question had occurred prior to the enactment of the new law.[41]

Mere prospective application, Chief Justice Gants wrote, would be "repugnant" to the legislation's purpose of "reduc[ing] the number of children who enter the juvenile justice system" in order to "combat[] the negative effects of Juvenile Court involvement on children and their communities."[42] The Chief's "repugnancy" analysis was quite distinct from how the court had conducted its analysis in past cases involving adult criminal defendants, again showing his strong belief in the need for strict separation between juvenile and adult proceedings.[43] The analysis was also quite novel: by its reasoning, one might well think that *all* statutes narrowing juvenile liability ought to be applied retroactively, as the refusal to do so would unavoidably contravene the legislative purpose reflected in the narrowed statute.[44]

Also buried in this staid retroactivity decision was an extraordinary observation: involvement in the system *itself* harms children, and the need to avoid that harm justified an expansive reading of the 2018 Criminal Justice

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[39] *See* An Act Relative to Criminal Justice Reform, ch. 69, 2018 Mass. Acts 2d Ann. Sess. 59 (setting forth the various provisions of the reform); Shira Schoenberg, *Massachusetts Chief Justice Ralph Gants Urges Legal Reforms to Reduce Recidivism*, MASSLIVE, https://www.masslive.com/politics/2017/10/chief_justice_ralph_gants_urge.html [https://perma.cc/96N8-WDVP] (Jan. 7, 2019) (describing how Chief Justice Gants used his yearly State of the Judiciary address in 2017 to underscore the need to ensure that defendants leaving prison have mental health treatment and professional training to decrease recidivism).

[40] *See* Lazlo L. v. Commonwealth, 122 N.E.3d 532, 536, 543 (Mass. 2019).

[41] *Id.*

[42] *Id.* at 541–42.

[43] *See id.* at 541; Commonwealth v. Dotson, 966 N.E.2d 811, 815 (Mass. 2012) (holding that, when the Legislature narrowed the statutory definition of a crime, prospective application "may be, in the defendant's view, an unfair consequence . . . but it does not rise to the level of repugnancy").

[44] *See Lazlo L.*, 122 N.E.3d at 541–42 (describing the Legislature's purpose of "giving children . . . a second chance" by limiting the potential for involvement with the Juvenile Court).

Reform Act to keep as many children out of court as possible.[45] Chief Justice Gants was an unrivaled courtroom problem solver, but he also understood the unintended harm that courts themselves can cause.[46]

C. Calling on Those in Power to Minimize the Impact of the Justice System on Juveniles

Even when he did not write for the court's majority, Chief Justice Gants never shied away from writing separately to encourage other actors in the juvenile legal system—both prosecutors and the Legislature—to lessen the severity and footprint of that system.[47] In particular, he wrote separately to urge legislative changes that he thought necessary to reduce the chain of consequences that can follow young people who have been adjudicated delinquent for the rest of their lives.[48]

In 2018, in *Commonwealth v. Baez*, the SJC unanimously held that juvenile delinquency adjudications for violent offenses could constitute predicate offenses for purposes of the state Armed Career Criminal Act (ACCA), which creates an escalating set of mandatory minimum sentences based upon the number of predicate qualifying offenses on a defendant's record.[49] Although he was constrained to agree with the court's analysis, Chief Justice Gants concurred separately "to encourage the Legislature to consider the wisdom and fairness of the mandatory minimum aspect of those enhanced sentences, especially where the predicate offenses were committed when the defendant was a juvenile."[50]

Although he generally disapproved of all mandatory minimums,[51] Chief Justice Gants clearly felt that imposing a mandatory minimum based upon past juvenile offenses was *uniquely* unfair. In his *Baez* concurrence, Chief Justice Gants emphasized the disconnect between the law's colloquial name—the

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[45] *See id.* at 541 (noting that the Legislature recognized that juveniles moving through the justice system experience an elevated risk of recidivism); *see also* An Act Relative to Criminal Justice Reform, ch. 69, 2018 Mass. Acts 2d Ann. Sess. 59.

[46] *See Lazlo L.*, 122 N.E.3d at 541 (describing how the sooner a juvenile becomes involved in the system, the higher the likelihood that they will also remain involved in the system throughout their life).

[47] *See infra* notes 49–61 and accompanying text.

[48] *See infra* notes 49–61 and accompanying text.

[49] 104 N.E.3d 646, 647, 650 (Mass. 2018); *see also* MASS. GEN. LAWS ch. 269, § 10G (2014), *held unconstitutional in part by* Commonwealth v. Beal, 52 N.E.3d 998 (Mass. 2016).

[50] *Baez*, 104 N.E.3d at 650 (Gants, C.J., concurring).

[51] The Chief had long been an opponent of mandatory sentencing regimes: he requested their abolition "in his first State of the Judiciary Address in 2014," did the same when "testifying before the Joint Committee on the Judiciary in 2015," and engaged Harvard to assess racial inequities in sentencing in 2016. *See* Jared B. Cohen, *Careful Scrutiny: The SJC and Mandatory Sentencing Laws*, BOS. BAR J., Summer Edition 2021, at 16, 20 n.5.

Armed Career Criminal Act—and what it actually did.[52] He explained that many, if not the majority, of defendants facing mandatory minimum sentences pursuant to the ACCA may not reasonably be described as "armed career criminals," particularly when they engaged in their predicate offenses as children.[53] Under the state ACCA, predicate convictions may also include quite minor offenses—assault and battery, unarmed robbery, and resisting arrest, among others.[54]

The Chief also urged the idea that subjecting someone to years of additional mandatory punishment based on something they might have done as young as age seven would be fundamentally unjust.[55] At such a young age, the likelihood that the offense was the product of immaturity or impulsivity caused by an undeveloped brain is just too compelling to allow it to be the basis for a later severe mandatory adult sentence.[56] Given the differences between juve-

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[52] 104 N.E.3d at 650–51 (Gants, C.J., concurring).

[53] *Id.*

[54] Ch. 269, § 10G. *See generally* Commonwealth v. Wentworth, 128 N.E.3d 14 (Mass. 2019) (incorporating assault and battery through the ACCA's "force clause"); Commonwealth v. Mora, 77 N.E.3d 298 (Mass. 2017) (incorporating unarmed robbery through the ACCA's "force clause"). Although the state ACCA shares its name with a federal statute, the two bear little resemblance to one another. *See* Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), *held unconstitutional in part by* Johnson v. United States, 576 U.S. 591 (2015); Ch. 269, § 10G. As Chief Justice Gants pointed out, the federal law imposes a fifteen-year mandatory minimum for those convicted of three prior "violent felon[ies]" or "serious drug offense[s]." *Baez*, 104 N.E.3d at 650 (Gants, C.J., concurring) (internal quotation marks omitted) (quoting *Commonwealth v. Anderson*, 963 N.E.2d 704, 714 n.10 (Mass. 2012)). The Massachusetts law, on the other hand, is far more punitive, as it introduces a tiered series of punishments starting from the very first qualifying predicate offense. Ch. 269, § 10G. Under the state ACCA, one predicate gives rise to a three-year mandatory minimum; two results in ten years; and three predicates, just like under federal law, fifteen years. *Id*. And although the statutory language defining a "violent felony" in the federal ACCA is similar to the Massachusetts ACCA's definition of a "violent crime," in practice the federal definition is considerably narrower as a result of a judicial construction that has not been followed in Massachusetts courts. *See* 18 U.S.C. § 924(e)(2)(B) (defining a "violent felony" to include an act punishable for a time period over one year or any act of "juvenile delinquency" pertaining to the utilization of a lethal weapon); MASS. GEN. LAWS ch. 140, § 121 (2021), *held unconstitutional in part by Beal*, 52 N.E.3d at 998 (describing a "violent crime" as the same). *Compare* Mathis v. United States, 136 S. Ct. 2243, 2247–48 (2016) (using an elements-based approach and holding that a crime is categorically excluded from the definition of a "violent crime" so long as there is any way to commit the crime without violence), *with Wentworth*, 128 N.E.3d at 22 ("[T]he Commonwealth may be able to show that a crime was 'violent' even if the elements of the crime alone do not show that it was violent.").

[55] *See Baez*, 104 N.E.3d at 651 (Gants, C.J., concurring) (noting that in the matter at issue, the defendant was merely fifteen years of age when he undertook his prior predicate offenses).

[56] *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) (recognizing that juveniles are categorically distinct from adults for purposes of sentencing); Graham v. Florida, 560 U.S. 48, 68 (2010) (same); Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (same). The differences between juveniles and adults, for purposes of sentencing, manifest in three main ways, according to the Supreme Court: (1) juveniles do not have the sensibility of adults and experience a limited sense of accountability, resulting in "recklessness, impulsivity, and heedless risk-taking"; (2) juveniles are more susceptible to negative influences and external stressors within their community, and "lack the ability to extricate themselves from horrific, crime-producing settings"; and (3) children's personality, behaviors, and

niles and adults, in his view, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult . . . ."[57]

Massachusetts is one of the only states that allows enhancements using juvenile delinquency adjudications.[58] Following the 2018 Criminal Justice Reform Act, those enhancements could be regarded as especially unfair in certain circumstances. In particular, because the legislation raised the minimum age of juvenile court jurisdiction from seven to twelve, a juvenile now *cannot* be found delinquent based upon conduct that occurs before they turn twelve, but adults who were found delinquent in the past (for conduct between the ages of seven and twelve) *can* still have mandatory minimum sentences imposed using those offenses as predicates.[59] For Mr. Baez, the enhancement meant his minimum punishment increased from eighteen months to *ten years* in prison, all due to two offenses committed at age fifteen.[60] The Legislature is currently considering legislation that would do essentially what Chief Justice Gants called for: prevent the imposition of mandatory minimum sentences based upon juvenile adjudications.[61] When Chief Justice Gants spoke, many listened.

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qualities are "less fixed" than those of an adult, and therefore their conduct is less likely to demonstrate "irretrievable depravity." Montgomery v. Louisiana, 577 U.S. 190, 207 (2016) (internal quotation marks omitted) (quoting *Miller*, 567 U.S. at 471).

[57] *Roper*, 543 U.S. at 570.

[58] *See* Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 645–53 (2012) (explaining, in the most recent comprehensive survey of the law conducted in 2012, that Massachusetts is one of only three states that allows mandatory minimum sentences to be enhanced by juvenile adjudications, the others being California and Texas). The federal ACCA also allows juvenile adjudications to be used as predicate offenses, although federal law treats fewer offenses as predicates. *See* 18 U.S.C. § 924(e)(2)(C) (defining "conviction" to include a determination that an individual has undertaken conduct of "juvenile delinquency involving a violent felony"); *see also supra* note 54 and accompanying text (explaining the narrower judicial construction of "violent felony" under the federal ACCA).

[59] *See Baez*, 104 N.E.3d at 647 (describing how the ACCA requires heightened sentencing for adults who violate certain provisions of Massachusetts law and who have already been "convicted of a violent crime or of a serious drug offense" (internal quotation marks omitted) (quoting Ch. 269, § 10G)).

[60] *Id.* at 647 n.3.

[61] *See* S.B. 1022, 192d Gen. Ct. (Mass. 2021), https://malegislature.gov/Bills/192/SD138 [https://perma.cc/5SY4-BJWM] (eliminating only the enhanced mandatory minimum sentences for illegal gun possession). A similar bill last session would have eliminated *all* uses of prior juvenile adjudications for enhanced sentencing, but it did not become law. *See* S.B. 845, 191st Gen. Ct. (Mass. 2019), https://malegislature.gov/Bills/191/S845 [https://perma.cc/ZT9S-BZC6] (setting forth the provisions relating to the prevention of "mandatory minimum sentences" predicated on juvenile judgments). Aside from the gun possession statute, other provisions of Massachusetts law that require enhanced mandatory minimum sentences based on prior juvenile adjudications are: (1) commission of "indecent assault and battery on a child under . . . 14"; (2) rape and "abuse [of] a child under 16 years of age"; (3) "enticement of a child under age 18 to engage in prostitution, human trafficking or commercial sexual activity"; and (4) additional trafficking crimes. MASS. GEN. LAWS ch. 265, §§ 13B3/4, 23B, 26D, 52 (2021). Even if the pending bill becomes law, juvenile adjudications could still enhance these sex offense mandatory minimum sentences.

D. Expanding the Rights of Juvenile Homicide Offenders

Finally, Chief Justice Gants's time on the SJC coincided with a sea change in the sentencing treatment of juveniles convicted of first-degree murder, with the Chief either drafting or joining all opinions for the court on the subject.[62] When he first took his seat on the court, those juveniles were still subject to mandatory life in prison without the possibility of parole. The United States Supreme Court struck down such a mandatory regime in 2012 in *Miller v. Alabama*, which the SJC then extended to disallow *any* sentence of life without the possibility of parole, mandatory and discretionary alike, for juvenile offenders.[63] The SJC also ensured that juvenile homicide offenders have a right to counsel at parole proceedings, funds for experts, and judicial review from the Parole Board's decision.[64]

Of course, a parole board is no more able to subject a juvenile to life in prison than a sentencing judge. In 2020, in *Deal v. Massachusetts Parole Board*, the SJC upheld the denial of a juvenile homicide offender's request for parole.[65] Yet again, as in *Baez* and so many other cases, Chief Justice Gants could not simply leave it there. If constitutionality hinges on eligibility for parole—which requires a genuine opportunity to secure release based on "demonstrated maturity and rehabilitation"—then the parole process must afford the juvenile a real chance to win release.[66] The Chief wrote separately in *Deal* to express just how much the Parole Board's approach to these juvenile homicide cases troubled him. In all of them, the Parole Board seemed to rely on identical "boilerplate language" that did not reflect "meaningful individualized analysis" of each case.[67]

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[62] *See infra* notes 63–85 and accompanying text.

[63] *See* 567 U.S. 460, 489 (2012) (holding that a judge or jury are required to have the chance to consider all factors before inflicting the most severe punishment for juveniles); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 276, 282, 285 (Mass. 2013) (holding that discretionary imposition of a life sentence without parole for a child offender constitutes "cruel or unusual punishments").

[64] Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 367 (Mass. 2015).

[65] 142 N.E.3d 77, 84 (Mass. 2020).

[66] Graham v. Florida, 560 U.S. 48, 74–75 (2010); *see* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (stating that the possibility for release may be provided to juveniles who exhibit the "truth of *Miller*'s central intuition" that children who undertake even horrible crimes are able to rehabilitate themselves); *Diatchenko*, 27 N.E.3d at 356 (emphasizing that the possibility of parole is a key element of the constitutionality of sentencing "for a juvenile homicide offender subject to mandatory life in prison"). *See generally* Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham*,* Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 292 (2016) ("Vague standards directing parole boards to consider youthful characteristics or the diminished culpability of youth do not go far enough."); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 412 (2014) ("[U]nder *Graham*, a meaningful opportunity for release means a realistic one.").

[67] *Deal*, 142 N.E.3d at 85–86. (Gants, C.J., concurring).

Although his opinion was styled as a concurrence, it had the feel of a dissent. He wrote that the Parole Board had "fail[ed] to meet [the] requirement" of individualized consideration required by the Constitution.[68] He described the Parole Board's approach to these cases: "Essentially, the board simply identifies the so-called *Miller* factors and declares in all these cases that it considered them, without demonstrating in any way *how* it considered them."[69] As Chief Justice Gants described it, the Parole Board seemed to cut and paste text verbatim from its juvenile lifer decisions, only changing the name of the person denied parole.[70] He also noted how the Parole Board's decision denying Deal parole suggested that they might have thought him guilty of a greater crime (first-degree murder) than his actual crime of conviction (second-degree murder).[71]

In the last line of his concurrence, Chief Justice Gants included what can only be seen as a warning to the Board: at any future parole hearing for these juvenile offenders, he said, "we would expect meaningful individualized findings that are far less conclusory and perfunctory than here."[72]

II. THE CHIEF'S LOST LEGACY

Although the cases discussed above are not the entirety of the Chief's juvenile justice canon,[73] they embody the core themes reflected in those decisions.

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[68] *Id.* at 85.

[69] *Id.* at 86 (emphasis added). The *Miller* factors are the mitigating factors for juvenile offenders recognized by the U.S. Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012). *See* Commonwealth v. Perez, 80 N.E.3d 967, 975–76 (Mass. 2017) (listing the factors).

[70] *Deal*, 142 N.E.3d at 86 n.1 (Gants, C.J., concurring). In one case, the board did not change the name of the juvenile either. *See* George Vicente, No. W87303, at 1, 3 (Mass. Parole Bd. 2018), https://www.mass.gov/doc/george-vicente-life-sentence-decision/download [https://perma.cc/3DLH-8PJ9] (referencing the incorrect name "Mr. Bowser" instead of Mr. Vicente within the Parole Board's opinion denying the defendant's parole request).

[71] *See Deal*, 142 N.E.3d at 87 (Gants, C.J., concurring) ("Where, as here, the jury did not convict the parole applicant of the crime charged, the board should act with caution and care before it concludes that the applicant was nonetheless guilty of the crime charged."). The Board had deemed Deal's version of events offered at the parole hearing "not plausible," despite its consistency with the jury's verdict of guilt as to only second-degree murder. *Id*. The Chief also noted that, even if Deal had denied responsibility for the killing (which he did not), "there is little, if any, empirical support for a link between acceptance of guilt and a decreased likelihood of recidivism." *Id*. Plus, as he put it, "if a prisoner's failure to acknowledge guilt alone were to suffice to support a denial of parole, a prisoner wrongfully convicted of murder as a juvenile might never be paroled unless he or she falsely accepted responsibility for a crime he or she never committed." *Id*. at 88.

[72] *Id.* at 89.

[73] *See In re* Juvenile, 152 N.E.3d 1128, 1138–39 (Mass. 2020) (holding that due process does not allow an incompetent adult to be subject to a transfer hearing to be tried for a crime committed as a juvenile in adult court); Commonwealth v. Wilbur W., 95 N.E.3d 259, 276–77 (Mass. 2018) (Gants, C.J., concurring) (offering a novel interpretation of the child rape statute—that "abuse" be added as an element—to distinguish between the victim and perpetrator of rape when two minors engage in sexual

They show his understanding of the reality of how delinquency charges affect children and follow them for the rest of their lives. He constantly strove to lessen both the magnitude and permanence of those consequences. Because he recognized the long-term consequences that can result from treating children like criminals, he always tried to maintain a strict separation between the juvenile legal system—with its predominant focus on rehabilitation and the child's best interests—and the severe sentencing and dispositions of the criminal legal system. And he led a court that pushed almost as far as any in the country in sentencing reform for juvenile homicide offenders. He even used one of his final decisions to admonish the Parole Board and urge it to ensure a meaningful opportunity for release for those offenders going forward.

Where might he have led us in the future?

First, he likely would have advocated to raise the age of juvenile court jurisdiction and strengthen constitutional protections for those young adults developmentally indistinguishable from juveniles. Indeed, three years before his death he announced the creation of special "Young Adult Court" sessions in the Boston Municipal and District Courts to serve so-called "emerging adults" previously served in the adult sessions.[74] Either through speeches or other writings, Chief Justice Gants certainly would have championed these sorts of specialty courts, or other programs that extend juvenile diversion to an older age cohort, if the data proved their success.[75] Although he had no authority over

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intercourse); Commonwealth v. Mogelinski, 1 N.E.3d 237, 253 (Mass. 2013) (Gants, J., concurring in part) (disagreeing with the majority holding that, in his view, would have "needlessly" removed juveniles who engaged in unlawful conduct between the ages of fourteen and seventeen from the juvenile system and brought them into the adult system); Commonwealth v. Porges, 952 N.E.2d 917, 918 (Mass. 2011) (holding that the Superior Court has jurisdiction over crime undertaken before a person reaches the age of fourteen who is detained after the age of eighteen, so long as the conditions for a transfer hearing are satisfied); Abbott A. v. Commonwealth, 933 N.E.2d 936, 939, 944 (Mass. 2010) (holding that a judge may conduct a dangerousness hearing of an incompetent juvenile because the state "bears the burden of proving dangerousness by clear and convincing evidence" and counsel for the juvenile can effectively vindicate their rights to present and confront evidence "to diminish the risk of factual mistake"); Commonwealth v. Porter P., 923 N.E.2d 36, 45 (Mass. 2010) (holding that the juvenile maintained a "reasonable expectation of privacy in his room" at a transitional family shelter).

[74] *See* SELEN SIRINGIL PERKER & LAEL CHESTER, PROGRAM IN CRIM. JUST. POL'Y & MGMT, HARVARD KENNEDY SCH., EMERGING ADULTS: A DISTINCT POPULATION THAT CALLS FOR AN AGE-APPROPRIATE APPROACH BY THE JUSTICE SYSTEM 1, 4 (2017), https://justicelab.columbia.edu/sites/default/files/content/MA_Emerging_Adult_Justice_Issue_Brief_0.pdf [https://perma.cc/U9DH-6A6D] (noting that at eighteen years of age, individuals do not automatically become completely developed adults).

[75] *See* Ivy Scott, *'Here to Help': Springfield's Diversion Court Points Young Adults from Prison to Promise*, BOS. GLOBE, https://www.bostonglobe.com/2021/06/19/metro/here-help-springfields-diversion-court-points-young-adults-prison-promise/ [https://perma.cc/SK6G-LAHV] (June 19, 2021) (describing Hampden County's Emerging Adult Court of Hope program, as well as a program in

the Juvenile Court's jurisdictional age boundaries—either the minimum age of competency for Juvenile Court jurisdiction or the cutoff age at which a young person is treated as an adult—he perhaps would have wanted to see the Legislature raise both even higher than it did in the 2018 Criminal Justice Reform Act. A bill pending right now would do just that: end the automatic prosecution of teens as adults and gradually shift eighteen- to twenty-year-old individuals into the juvenile legal system.[76]

For all of the flaws of the juvenile legal system, "[t]he differences between being tried in the Superior Court and in the Juvenile Court are considerable."[77] The juvenile legal system is not a punitive one, its proceedings and records are closed to the public to preserve confidentiality and reduce stigma, and its dispositional options are vastly different (and less severe) than the criminal legal system.[78] If it is best to keep young children out of the juvenile court altogether, as the Chief recognized in *Lazlo L.*, then it is best to keep young adults out of the criminal court for as long as possible.[79] Data show that similarly-situated young people discharged from juvenile commitments have far lower rates of recidivism than young adults formerly incarcerated in the criminal system.[80] "Age-appropriate responses" would reduce crime and better protect public safety.[81] Additional data are also in the offing: a juvenile legal system data website created by the Juvenile Justice Policy and Data Board—a board itself created by the 2018 Criminal Justice Reform Act—went live in November 2020, just two months after the Chief's passing.[82] He would have followed where the data led him.[83]

Middlesex County, that extend juvenile diversion to young adults above the age of juvenile jurisdiction).

[76] *See* H.B. 1826, 192nd Gen. Ct. (Mass. 2021) https://malegislature.gov/Bills/192/H1826 [https://perma.cc/6RQE-ATYV] (setting forth the provisions of the act to enhance community security and improve conditions for young adults).

[77] Commonwealth v. Walczak, 979 N.E.2d 732, 748 (Mass. 2012) (Lenk, J., concurring).

[78] *See id.*; *supra* notes 17–38 and accompanying text.

[79] *See* Lazlo L. v. Commonwealth, 122 N.E.3d 532, 542 (Mass. 2019) (describing the harm experienced by juveniles involved in the justice system).

[80] *See* CITIZENS FOR JUV. JUST., TESTIMONY TO THE CRIMINAL JUSTICE TASK FORCE ON JUVENILE AGE 1, 2 (2019), https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5e18d4885335261938542 22a/1578685577398/CfJJ+Recommendations+to+EAJ+Task+Force.pdf [https://perma.cc/GU2F-YQNC] (stating that CDC data demonstrates that comparable juveniles experienced a 34% increased recidivism rate when treated in court as adults compared to those treated as juveniles).

[81] *See* PERKER & CHESTER, *supra* note 74, at 2 (noting that modified interventions for young adults can better combat recidivism).

[82] *See* Off. of the Child Advoc., *Massachusetts Juvenile Justice System: Data and Outcomes for Youth*, MASS.GOV, https://www.mass.gov/resource/massachusetts-juvenile-justice-system-data-and-outcomes-for-youth [https://perma.cc/RFW5-242Z] (providing data on various aspects of the juvenile legal system).

[83] Of course, there is a limited role for the SJC to play directly on a related issue: whether the treatment of juvenile homicide offenders under Article 26 of the Massachusetts Constitution should be

Just as in *Lazlo L.*, where the court, with the Chief writing, held that the Criminal Justice Reform Act's revision of the age of juvenile court jurisdiction applied retroactively, Chief Justice Gants would likely have urged that the Act's expungement provisions be read with similar breadth.[84] Such an interpretation follows straight from the reasoning of *Lazlo L.*: a narrow reading of the expungement statute would be "repugnant" to its purpose of lessening the impact that juvenile court involvement has on a person later in life.[85] The Legislature's purpose was also one of the core principles of the Chief's juvenile justice legacy.

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extended to the older cohort of emerging adults. *See* MASS. CONST. art. XXVI (setting forth the state constitutional prohibition against cruel or unusual punishment). Although the court has rejected such an extension in the past, that has often been due to a failure of preservation and presentation of evidence in the trial court. *See* Commonwealth v. Chukwuezi, 59 N.E.3d 380, 393 (Mass. 2016) (affirming the defendant's conviction of first-degree murder); Commonwealth v. Garcia, 123 N.E.3d 766, 771 (Mass. 2019) (noting the minimal record and "rapidly changing field" regarding neurological development of juveniles). More recently, the SJC has said that it is probably time to reassess the distinction between defendants aged seventeen and eighteen years. Commonwealth v. Watt, 146 N.E.3d 414, 428 (Mass. 2020). The court remanded a case to create a record regarding available data on neurological development beyond seventeen years of age so it could make an educated determination about the "constitutionality of sentencing young adults to life without the possibility of parole." *Id.* The remanded hearing was held, and the case transmitted back to the SJC. In the cases of *Commonwealth v. Mattis* and *Commonwealth v. Robinson*, the defendants argue that full *Diatchenko v. District Attorney for the Suffolk District* protections should apply to this group of young adults such that no sentence of life without the possibility of parole could ever be imposed. *See* Joint Brief for the Defendants/Appellants on Appeal from the Suffolk County Superior Court at 71–78, Commonwealth v. Watt, 146 N.E.3d 414 (Mass. 2020) (No. SJC-11693), 2019 WL 5540132, at *71–78; Defendant's Post-Hearing Memorandum of Law in Support of Defendant's Motion for a New Trial at 21–28, Commonwealth v. Robinson, Case No. 0084CR10975, Doc. 109 (Suffolk Superior Ct. Apr. 12, 2021). The Suffolk County District Attorney takes the position that *Miller* and *Montgomery* should apply to those between the ages of eighteen and twenty, but not *Diatchenko*. *See* Commonwealth's Response to Defendant's Motion for Relief Under MASS. R. CRIM. P. 30(b) at 26–32, Commonwealth v. Robinson, Case No. 0084CR10975, Doc. 110 (Suffolk Super. Ct. Apr. 14, 2021). Thus, in the District Attorney's view, these defendants are entitled to an intermediate level of protection: an individualized hearing where the *Miller* factors are considered, but life without the possibility of parole may still be constitutionally imposed after that hearing. *See id.*

[84] *See Lazlo L.*, 122 N.E.3d at 543 (retroactively applying the updated definition of "delinquent child" to pending cases).

[85] *See id.* at 541–42 (noting that juveniles involved in the justice system experience elevated rates of recidivism); *see also* MASS. GEN. LAWS ch. 276, § 100K (2020) (setting forth the provisions for expungement of a criminal record relating to juvenile court proceedings under specific circumstances); Impounded Case, SJC-13107 (Mass. 2021), https://www.ma-appellatecourts.org/docket/SJC-13107 [https://perma.cc/GUE6-34NH] (assessing the question of whether the law's phrase "demonstrable error by court employees" includes judicial error or just mere clerical error). The same case also raises the question of whether a juvenile who appears incompetent may be arraigned before a competency evaluation. *Id.* Chief Justice Gants wrote multiple decisions bearing on that question as well. *See In re* Juvenile, 152 N.E.3d 1128, 1129 (Mass. 2020) (disallowing transfer hearings for incompetent *adults* whose crimes occurred when they were minors); Commonwealth v. Humberto H, 998 N.E.2d 1003, 1014–15 (Mass. 2013) (allowing pre-arraignment dismissal of complaints against juveniles unsupported by probable cause).

Conclusion

In juvenile justice, Chief Justice Gants's decisions had a clear theme: we should treat children as children. If possible, children should be kept out of the system altogether. Once in the system, children should have every opportunity to get out and move on; a delinquency adjudication should not shadow them for the rest of their lives. Children should never be treated like criminals, and the things that they do should never mandate later criminal punishments. Even children who commit heinous crimes deserve consideration of their status as juveniles and a chance for release upon proven rehabilitation. Chief Justice Gants surely would have continued speaking out and pushing the Legislature and the Executive to make the changes he saw necessary to a system that has failed far too many children. Our future system of juvenile justice is surely far worse for his loss. In this way, as in countless others, he will be sorely missed.