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PROBLEM SOLVING DURING THE PANDEMIC: HOW MASSACHUSETTS HAS PROVIDED ACCESS TO THE COURTS AND TO JUSTICE DURING THE COVID-19 PANDEMIC

It is a great privilege for me to speak with you today as part of the Donahue Lecture Series. Judge Frank Donahue was a leading figure in the history of both the Massachusetts courts and Suffolk University Law School, and I am honored to be invited to speak in a series named for him. I am going to discuss the steps that the Supreme Judicial Court (SJC) and other Massachusetts courts have taken in response to the tremendous challenges presented by the COVID-19 pandemic, and what we have learned from that experience. As with businesses, small and large, the medical community, universities, and public schools, the court system was abruptly and thoroughly challenged by the pandemic. I am going to address four aspects of the effect of the pandemic on the court system: first, the advancement by former Chief Justice Gants of the concept of problem-solving courts; second, reinventing the court system in response to the pandemic; third, access to justice during the pandemic; and fourth, the development of Massachusetts case law related to the pandemic.

I. CHIEF JUSTICE GANTS AND THE CONCEPT OF PROBLEM-SOLVING COURTS

In addressing the work of the courts in responding to COVID-19, I would like to begin by acknowledging the important leadership provided by the Chief Justices of the SJC: Chief Justice Ralph Gants, who deftly guided us through the first six months of the pandemic until his untimely and unexpected death in September;¹ Associate Justice Barbara Lenk, who served as acting chief until her retirement; and now Chief Justice Kimberly Budd, who has boldly stepped forward to take the helm even in the midst of all of the difficulties and uncertainties we are still facing.² As you know, in addition to being the Commonwealth's *184 highest appellate court, the SJC is also responsible for supervising our entire state court system. It is a responsibility that all of us on the court take very seriously. But it falls especially on the Chief Justice as the leader of the SJC.

The approach of Chief Justice Gants to meeting the needs of court users during the pandemic, and his thinking about the role of courts in our society, provide a useful starting point for our discussion. During the last months of his extraordinary life, Chief Justice Gants was constantly considering the changes we needed to make to keep the courts operating and accessible as much as possible while simultaneously protecting the health of court staff and court users, and mitigating the spread of the virus. But beyond that, he was also thinking about how the courts might confront the broader economic and social disruptions caused by the pandemic that would surely arrive at our courthouse doors.

Chief Justice Gants's response to the pandemic was shaped by his view that the job of the courts is not just to resolve cases but to solve problems. The term "problem-solving courts" commonly refers to specialized dockets--such as drug courts and mental health courts--that seek to address the underlying problems that may have contributed to a litigant's involvement with the justice system.³ But Chief Justice Gants believed that "every court is a problem-solving court."⁴ In taking that view, he was quick to point out that he

[did] not mean that we seek to transform judges into social workers, or that we no longer resolve cases in accordance with law and instead seek to resolve them in accordance with our own vision of public policy, or that we care any less about principles of fairness and due process.⁵

In explaining his idea, he cited the principle from the Jewish religious tradition that "each of us has an obligation to repair the world," and he proposed that "[i]n our courts, we seek to repair the world, sometimes even save the world, one person at a time."⁶

Chief Justice Gants took the concept of courts repairing the world a step further. In a letter to the bar last March, he wrote about his view that our courts are "duct tape" courts.⁷ And now, in the face of the pandemic, they had to operate as a "MASH unit in times of war," figuring out how to communicate with the *185 public, provide guidance to lawyers and parties, and resolve matters through methods that were an anathema to the judges, court employees, and court users: by telephone, videoconference, and e-mail.⁸

Chief Justice Gants's reference to "duct tape" courts may have been a bit tongue-in-cheek, alluding to the physical condition of some of our older courthouses. But he meant more than that, of course. He recognized that, like homeowners scrambling to fix a leaky vent or broken window with duct tape, judges, clerks, probation officers, and other court staff must sometimes make do with the tools at hand to "get the job done."⁹ He was acknowledging the importance of a practical, "can-do" attitude in carrying on the work of the courts even in the midst of adversity. And in comparing courts during the pandemic to mobile army surgical hospitals, or MASH units, which were created to reduce casualties by moving medical operations closer to the battlefield, he suggested that courts must be ready to reinvent themselves when necessary to meet the needs of court users in a time of crisis.

As I discuss my second point, reinventing the court system in response to the COVID-19 pandemic, I think you will see how the work of the SJC and the other Massachusetts courts has put these concepts into action.

II. REINVENTING THE COURT SYSTEM IN RESPONSE TO THE PANDEMIC

On March 10, 2020, Governor Charlie Baker declared a state of emergency in the Commonwealth "to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of the people of the Commonwealth."¹⁰ Three days later, the SJC exercised its superintendence and rulemaking authority to issue the first of twenty-five orders regulating various aspects of court operations and legal practice during the pandemic.¹¹ In general, these orders sought to protect the health of both court personnel and court users by limiting the need for in-person contact at courthouses and moving as much of the work as we could online.

Making this shift from conducting in-person court business to handling most court business virtually required an enormous and rapid transformation in court operations. To give some sense of the complexity of this undertaking, it may be *186 helpful to recall the structure of our Massachusetts state court system. It comprises the SJC and the Appeals Court, as well as the Trial Court and its seven departments: the Boston Municipal Court, the District Court, the Superior Court, the Juvenile Court, the Probate and Family Court, the Housing Court, and the Land Court.¹² Each of those departments, except the Land Court, has multiple divisions in different locations. The Trial Court also includes the Massachusetts Probation Service and the Office of the Jury Commissioner.¹³ Altogether, the trial court system has over 6,000 employees who, at least before the

pandemic, were working in ninety-nine courthouses and other offices.¹⁴ In fiscal year 2019, the Trial Court handled more than 800,000 new case filings and the Probation Service supervised more than 60,000 cases.¹⁵

The SJC's orders established general parameters for courthouse access, court operations, case management, and court deadlines. Among other provisions, our orders:

- limited in-person proceedings in courthouses to emergency matters that could not be resolved through a videoconference or telephone hearing, either because such a hearing was not practicable or because it would be inconsistent with the protection of constitutional rights;

- instructed clerks, registers, and recorders to handle all court business virtually, such as filing documents, scheduling hearings, and answering questions, except in emergencies where such filings were impossible;

- continued all trials unless there was a showing of exceptional circumstances or if the parties in a civil case agreed to a virtual bench trial;

- excluded the resulting delays from speedy trial computations under [Rule 36 of the Massachusetts Rules of Criminal Procedure](#) after concluding that public health interests temporarily outweighed speedy trial rights; and

- temporarily tolled statutes of limitations; extended deadlines established by statutes, court rules, standing orders, or guidelines; and extended the expiration dates for injunctive orders issued after an adversarial hearing.¹⁶

***187** Gradually, as the initial wave of COVID-19 cases ebbed and we all became more familiar with ways to reduce the risk of exposure, we loosened some of these restrictions. We no longer limit in-person proceedings and in-person business at courthouses solely to emergency matters.¹⁷ And, we laid the foundation for resuming in-person bench trials, and eventually jury trials, in certain cases.¹⁸ In fact, to date, we have held several successful bench and jury trials. Nevertheless, most court business should still be conducted virtually unless it falls within certain exceptions established by individual trial court departments.¹⁹

To do this, the courts had to devise new modes of carrying out their work. For example, as I have noted, the essential functions of clerks, such as accepting documents for filing, scheduling hearings, and answering questions, are now primarily handled remotely. In some trial courts and in some kinds of cases, our courts are not yet set up to accept electronic document filing under our online e-filing system,²⁰ so these courts established dedicated e-mail addresses for litigants to use to file court documents electronically.²¹

To make it easier for litigants and attorneys to get answers to questions, the Trial Court established a help line staffed by representatives from each of the seven trial court departments and the probation service.²² That help line currently receives approximately over 300 calls per week. The court system has also established a central webpage entitled "Court System Response to COVID-19," which posts all new orders relating to the pandemic and related information on ***188** court procedures.²³ Some of our courts have created virtual online counters and registries to provide assistance to lawyers and litigants using videoconferences.²⁴ And our Court Service Centers, which focus on providing information to self-represented litigants, are now offering assistance through Zoom meetings for certain types of emergency cases.²⁵

Most hearings in the Trial Court are also now conducted virtually. To facilitate online hearings as well as internal court meetings, the Trial Court has established nearly 1,300 Zoom accounts, and it has conducted nearly 82,000 Zoom meetings--including both court hearings and internal court meetings-- involving more than one million participants.

At the SJC, all oral arguments before the full court and nearly all single-justice arguments have taken place by telephone or videoconference since March 31, 2020. We are contemplating returning to the courtroom next month, encased in plenty of plexiglass. Likewise, the Appeals Court has conducted all oral arguments by videoconference unless an in-person argument has been specifically ordered.

Some types of hearings are easier to handle virtually than others, of course. Appellate arguments and other court hearings that only involve arguments by counsel are the least difficult to conduct remotely, especially when they can be done by videoconference rather than telephone. Virtual hearings become more complicated, however, when they involve witnesses or self-represented litigants. Some lawyers contend that they cannot adequately cross-examine witnesses whom they see only as a small image on a screen, or hear as a disembodied voice over a telephone. Some judges think that they cannot adequately assess the credibility of these witnesses, while other judges think that they are better able to see the parties and assess credibility online. And it seems there are studies to support either side.²⁶ Self-represented litigants may be unfamiliar with the process for connecting with an online hearing or may lack access to the necessary technology, making it difficult for them to participate. In addition, interpreters are needed for some litigants and witnesses, introducing another layer of complexity.

For obvious reasons, trials, especially jury trials, are the most challenging to recreate in a virtual environment. Even in a bench trial, there are the *189 complications of presenting witnesses and tangible evidence online and facilitating confidential communications between counsel and clients. A criminal case raises questions as to whether and under what conditions the requirements of the Confrontation Clause²⁷ and other constitutional rights of the defendant and the public can be satisfied in an online proceeding. And in a jury trial, there is the further need to conduct jury voir dire and ensure consistent juror access to the proceedings while excluding them from sidebar conferences. The Trial Court has purchased over 300 new devices for this purpose.

Under our current orders, bench trials in civil matters may be conducted virtually at the discretion of the trial judge, but criminal bench trials are to be conducted in person unless the parties and the trial judge agree to a virtual trial.²⁸ As for jury trials, we have approved a pilot project for virtual empanelment. Otherwise, we are using a phased approach to resuming in-person jury trials.

In this regard, we are following the recommendations of our Jury Management Advisory Committee.²⁹ After consulting with a wide range of attorneys, the Committee concluded that “[m]embers of the bar unanimously and strongly prefer” in-person proceedings.³⁰

Accordingly, the Committee developed a comprehensive plan for gradually resuming in-person jury trials, beginning with a small number of trials using six-person juries in a few select locations, and later expanding to more locations and twelve-person juries, subject to careful assessment and making any necessary adjustments at each stage.³¹ The plan included extensive safety measures based on consultation with public health experts and a survey of courthouses that determined which ones can accommodate a jury pool and six-person or twelve-person juries while satisfying these safety protocols.³²

On January 12, 2021, our court system conducted its first jury trials in nearly ten months, one in Lowell District Court and one in Plymouth District Court.³³ By all accounts they proceeded smoothly, and there have been no subsequent reports of any spread of COVID-19 resulting from those trials. As a result of the recent spike in COVID-19 cases, we recently approved the Jury Management *190 Advisory Committee’s recommendation to pause jury trials until mid-February.³⁴

The energy and commitment that our court personnel have demonstrated during this difficult period, as we have shifted many court operations to a virtual environment and taken steps to protect the safety of court personnel and court users when in-person proceedings are necessary, have been nothing short of extraordinary. It has required a total team effort by judges,

clerks, court administrators, information technology (IT) specialists, staff attorneys, court officers, probation officers, and other court staff to make these changes. I also want to especially recognize the tireless leadership of Trial Court Chief Justice Paula Carey and the chief justices of each of the trial court departments in making the changes I have discussed. In addition, we have received tremendous support from the bar associations and from Suffolk University Law School. They all deserve our thanks. And, their efforts bring me to my third point, access to justice during the pandemic.

III. PRESERVING ACCESS TO JUSTICE DURING THE PANDEMIC

The phrase “access to justice” generally refers to whether members of the public--especially those who cannot afford an attorney to assist them--can effectively use the legal system to meet their essential civil legal needs.

One of the basic access to justice challenges that the courts have faced is simply how to communicate with the public during the pandemic, especially when courthouses are closed. In addition to the telephone help line, virtual Court Service Center, and virtual clerk’s counters and drop boxes, the Trial Court has also held virtual town halls with local partners for many cities to provide information about how to access the courts.³⁵ Many of these town halls were also translated into other languages, such as Arabic, Spanish, and Portuguese.³⁶

Another access to justice challenge that the courts have tried to address is how to support self-represented litigants in participating in virtual proceedings if they lack ready access to the computers or internet connection they need to take part in videoconferences. The Trial Court has sought to bridge this “digital divide” by creating “Zoom Rooms” in some of its courthouses, where litigants will find computers, telephones, and instructions for accessing online hearings, along with *191 safety precautions such as gloves, hand sanitizer, and partitions between computer stations.³⁷

We have also relied on our Massachusetts Access to Justice Commission, which consists of representatives appointed by the SJC from many different sectors of the legal community, including the courts, bar associations, law schools, legal aid organizations, social service organizations, and businesses, to communicate with the legal community and the public generally about changes in court operations and access to justice challenges.³⁸

In March of 2020, the Commission formed a COVID-19 Task Force to address access to justice challenges created by the pandemic.³⁹ The Task Force held virtual question and answer sessions for social service providers, participated in a webinar for public librarians, and produced informational videos on public benefits, the eviction moratorium, restraining orders, health insurance, and court procedures.⁴⁰

Finally, I have to recognize the work undertaken by the courts to address the potential eviction crisis arising out of the pandemic, and the courts’ related collaboration with the executive branch and other outside parties. Chief Justice Gants was deeply concerned about the potential wave of summary process cases that might eventually result from all of the economic dislocation caused by COVID-19 when the Governor’s eviction moratorium expired.⁴¹ He was concerned not only about ensuring that the courts were prepared to handle the anticipated volume of cases, but also about whether the legal and financial resources would be available to assist both landlords and tenants--many of whom would not be able to afford an attorney to advise them.

Spurred by those concerns, in August he convened an online meeting with over eighty participants in order, he said, to

join key stakeholders together so that, through cooperation, creativity, and commitment, we can find a path that will be fair to landlords and tenants, and avert the housing instability and homelessness that will trigger a public health and *192 mental health crisis, and further burden already fragile state and local government budgets.⁴²

The meeting included representatives from the courts, the executive branch, and the Legislature; legal aid organizations and landlord attorneys; regional and local housing agencies; community groups; and the Massachusetts Landlords Association,

among others.⁴³ Even after Chief Justice Gants's passing, the courts and other participants in that meeting continued to work both independently and collaboratively to address these concerns.⁴⁴ And of course, if you go to Suffolk University Law School's Legal Innovation and Technology web page, you will see their eviction moratorium assistant.⁴⁵

***193 IV. PUBLIC PROBLEM SOLVING DURING THE PANDEMIC**

Finally, I would now like to turn to my fourth point, another kind of problem solving that the SJC has undertaken in response to COVID-19--providing answers to major public questions arising out of the pandemic in cases that have been brought before us.

Interestingly, this is not the first time that the SJC has been in this position. More than a century ago, the SJC had to decide whether a state law authorizing local boards of health to enforce compulsory vaccination to prevent smallpox was constitutional.⁴⁶ The court cited a provision in our Massachusetts Constitution authorizing the Legislature to make "all manner of wholesome and reasonable ... laws ... as they shall judge to be for the good and welfare of this commonwealth."⁴⁷ The court concluded that "this power extends to the protection and preservation of the public health," and that "[t]he rights of individuals must yield, if necessary, when the welfare of the whole community is at stake."⁴⁸ The Supreme Court affirmed that decision in 1905 in *Jacobson v. Massachusetts*.⁴⁹ That opinion is relied on to this day.

I am going to turn to some contemporary examples of the SJC addressing these kinds of public law questions, with the important caveat that neither these cases nor anything that I say here today should be used to predict how I or any other member of the court may rule on future cases involving similar issues.

In a case that the SJC decided last December, *Desrosiers v. Governor*,⁵⁰ we confronted perhaps the single most significant public law question arising out of the pandemic in the Commonwealth: Were the Governor's emergency orders, which imposed extraordinary limitations on daily activities, statutorily authorized and consistent with state and federal constitutional principles?⁵¹ We concluded that they were.⁵²

In declaring a state of emergency in the Commonwealth and subsequently issuing emergency orders, Governor Baker relied on the state Civil Defense Act (CDA), a 1950 law that authorizes the Governor to declare a state of emergency upon the occurrence of certain events, including "any disaster or catastrophe resulting from ... other natural causes."⁵³ We concluded that this language encompasses a health crisis on the level of the COVID-19 pandemic.⁵⁴

***194** We further held that the Governor's exercise of emergency powers under the CDA did not violate the separation-of-powers doctrine reflected in article 30 of the Massachusetts Declaration of Rights, because he was acting under an express authorization of the Legislature, and because his emergency orders did not deprive the Legislature of its full authority to pass laws.⁵⁵ And finally, we held that the Governor's emergency orders did not violate the plaintiffs' procedural and substantive due process rights, nor did they unconstitutionally burden the plaintiffs' right of free assembly.⁵⁶

In upholding the Governor's exercise of his emergency powers under the CDA, however, we also included an important cautionary note. We said:

[A]lthough we hold that the COVID-19 pandemic falls within the CDA, we do not hold that all public health emergencies necessarily will fall within the CDA, nor do we hold that when the public health data regarding COVID-19 demonstrates stable improvement, the threshold will not be crossed where it no longer constitutes an emergency under the CDA.⁵⁷

The SJC addressed another fundamental public law issue arising out of the pandemic in several cases involving our election laws. Most notably, in *Goldstein v. Secretary of the Commonwealth*,⁵⁸ we held that the statutory minimum signature requirements for a candidate to appear on the primary ballot⁵⁹ constituted an undue burden on prospective candidate's

constitutional right to seek elective office as applied within the context of the state of emergency caused by the COVID-19 pandemic.⁶⁰

In this case, we had to consider the need for equitable relief to protect the plaintiffs' fundamental constitutional rights, given that the filing deadline for nomination papers was fast approaching and the Legislature had yet to take decisive action to address the issue.⁶¹ But, we also recognized that the remedy should be no more intrusive than necessary, because extraordinary circumstances compelled us to make policy judgments that in ordinary times would be best left to the Legislature.⁶² Accordingly, the remedy that we adopted--reducing by 50% the number of required signatures, extending the deadlines for nomination papers, and permitting candidates to circulate nomination papers online and collect electronically signed documents--essentially followed the proposals suggested by the Secretary of the Commonwealth.⁶³

***195** Another major public law question that came before the SJC was whether, and to what extent, defendants who are detained before trial or who are incarcerated pursuant to a sentence should be released in order to mitigate the spread of COVID-19 in jails, houses of correction, and state prisons. We addressed this issue in *Committee for Public Counsel Services v. Chief Justice of the Trial Court*.⁶⁴

With regard to pretrial detainees, we concluded that the risks inherent in the COVID-19 pandemic constituted a changed circumstance under our bail statutes, justifying reconsideration of bail.⁶⁵ To decrease exposure to COVID-19 within correctional institutions, we ordered that all pretrial detainees, except those being held without bail due to dangerousness or charged with certain violent or serious offenses, should be released on personal recognizance unless the Commonwealth established, by a preponderance of the evidence, that release would result in an unreasonable danger to the community or that the individual presented a high risk of flight.⁶⁶

We also ordered that in cases involving new arrests, judicial officers should consider the risk that arrestees either may contract COVID-19 while detained, or may infect others in a correctional institution, as a factor in determining whether bail is needed as a means to assure the individual's appearance before the court.⁶⁷ Further, due to the high risk posed by COVID-19 for people who are more than sixty years of age or who suffer from a high-risk condition, we directed that the age and health of arrestees should be factored into bail determinations.⁶⁸ In addition, we outlined a process for rapidly processing motions for reconsideration of bail and provided for emergency review in the SJC's single justice session.⁶⁹ I handled 200 of these bail review cases in April and May of last year and I can report that balancing those interests was not an easy task.

With regard to persons already serving sentences, however, we concluded that the SJC lacked the power to order the broad relief requested by the plaintiffs, because of the limitations on our authority mandated by the separation-of-powers provision in article 30 of the Massachusetts Constitution.⁷⁰ Massachusetts is one of the few states to have such a strong separation-of-powers provision in its constitution, and therefore you may see other state courts releasing prisoners, but the ***196** SJC concluded that it could not.⁷¹ We noted that courts may revise or revoke defendants' custodial sentences, stay the execution of sentence, or order defendants' temporary release only in limited circumstances permitted under the Rules of Criminal Procedure or where a defendant's appeal is pending.⁷² But outside of these situations, the execution of a defendant's sentence is a function of the executive branch, specifically the parole board.⁷³ In light of the pandemic, however, we urged the Board to expedite parole hearings for eligible inmates and release of persons already approved for parole.⁷⁴

Also, in *Foster v. Commissioner of Correction*,⁷⁵ prisoners and detainees in the prisons and jails alleged that their custodians were deficient in protecting their constitutional rights and health during the COVID-19 pandemic.⁷⁶ Again, mindful of the separation of powers, we concluded that unless the conduct reached the level of deliberate indifference, we could not act.⁷⁷ We could, however, and we did appoint a special master to monitor the spread of COVID-19 throughout the prisons and jails and their efforts to control the virus within their facilities in an effort to collect data, so that if and when that line was crossed we would be able to identify it.⁷⁸ We also directed judges not to make civil commitments for substance abuse treatment unless they found that the danger posed by a person's substance use would outweigh the risk of transmission of COVID-19 in congregate settings.⁷⁹

There are certainly more cases like these that I could discuss if time permitted it, but these four suffice, I think, to illustrate

some significant themes. When presented with the need for decisive action to remedy problems caused by COVID-19, the SJC did not hesitate to do so within the scope of its authority, whether it was providing for release of pretrial detainees in the *Committee for Public Counsel Services* case⁸⁰ or revising the signature requirements for candidates to appear on the ballot in *Goldstein*.⁸¹ In a similar vein, in *Desrosiers* the court recognized the emergency powers granted to the Governor under the CDA *197 to protect the public health and safety of the Commonwealth's residents in the face of the pandemic.⁸² And in *Foster*, we acted within the limits of our authority to ensure that the prisons and jails were working to protect the health of their employees and inmates.⁸³

In each case, the court was sensitive to the limits on these governmental powers. In *Goldstein*, we were conscious that we had to be careful not to cross into terrain normally controlled by the Legislature, and accordingly adopted the least intrusive remedy that would suffice to protect the candidates' constitutional rights.⁸⁴ In the *Committee for Public Counsel Services* case, we declined to order release of inmates already serving sentences because it would have intruded upon the executive power exercised by the Parole Board and we established a method to monitor conditions in the prisons and jails to help ensure the safety of the staff and inmates, as well as ensure that the inmates had access to counsel.⁸⁵ In *Foster*, we similarly declined to order reductions in the prison population under existing conditions (although we also rejected the contention that the court lacked authority to do so); instead, we encouraged the Department of Correction to act on its own to accomplish that goal.⁸⁶ In *Desrosiers*, we cautioned that at some point, when the public health data regarding COVID-19 demonstrates stable improvement, it might no longer constitute an emergency under the CDA.⁸⁷

The authority to exercise extraordinary power to address a public emergency such as the COVID-19 pandemic is essential to the effective functioning of government in a time of crisis. But precisely because such power is extraordinary, its exercise must be carefully limited by the checks and balances that are a fundamental feature of our system of government.

We continue to hear cases related to the pandemic. In fact, we recently heard a case in which a defendant challenged an order of the trial judge that would require him to proceed with a motion to suppress on Zoom, even though he was prepared to waive his speedy trial rights.⁸⁸ His case raises issues of constitutional importance, such as the right to be present, the right to confrontation, the right to a public trial, and the right to effective assistance of counsel.⁸⁹

*198 V. CONCLUSION

The tragic loss of life and the scope of suffering caused by the COVID-19 pandemic have been so great that it may seem unfeeling to suggest that anything positive could possibly come out of it. And yet, just as wars have sometimes spurred beneficial technological innovations and social changes, perhaps there are some benefits that we have gained from our experience during the pandemic that will enable the court system to operate more efficiently and better meet the needs of court users and the Commonwealth in the future.

First, we have created new ways to conduct court business virtually and we should seriously consider retaining many of these innovations in the future. We have developed new means of communicating with and assisting court users, such as the Trial Court Help Line, virtual court counters and registries, and virtual Court Service Centers, which make it easier for attorneys and litigants to access information without traveling to a courthouse. We have moved many court proceedings online, and it appears that online proceedings can work effectively for at least for some kinds of cases.

Post-pandemic, courts may think twice about whether it is necessary to conduct every hearing in person, especially in civil cases, thereby saving attorneys and litigants time, travel, and expense. After having worked so hard to create these new ways of conducting court business, we should resist the temptation to abandon this online infrastructure in a rush to return to "normal" whenever we manage to conquer COVID-19. We should carefully review the potential advantages and disadvantages of each innovation in terms of convenience and cost savings for courts and all court users, keeping in mind that we may need them again in the event of a future catastrophe or pandemic.

Second, even as we have used new technologies to facilitate online communication and court proceedings, we have not lost

sight of the importance of supporting access to justice for those who may face challenges in using these technologies. As we move forward into this new world of online courts, we must ensure that new technology does not impede access to justice.

Third, we have demonstrated that the Massachusetts courts stand ready to act quickly and decisively to solve the problems that come before us in a time of crisis, while respecting the limits of our authority and the important roles of the other branches of government.

And finally, we have witnessed extraordinary collaboration among courts, other branches of government, and the legal community, in solving the problems presented by COVID-19. We have shown that we can work together effectively to advance the common good, and we have laid a strong foundation for facing future challenges. And that is very promising.

Footnotes

^{a1} Associate Justice, Massachusetts Supreme Judicial Court. This Article is based on the 123rd Donahue Lecture delivered electronically in affiliation with Suffolk University Law School on January 28, 2021.

¹ See Bryan Marquard, *SJC Chief Justice Ralph D. Gants, a Fearless Advocate for Racial Justice, Dies at 65*, BOS. GLOBE, <https://www.bostonglobe.com/2020/09/14/metro/sjc-chief-justice-ralph-d-gants-has-died/?event=event12> [https://perma.cc/KC4C-5TDR] (Sept. 14, 2020, 8:20 PM) (announcing passing of Chief Justice Gants).

² See Shelley Murphy, *Kimberly Budd Commended as ‘Superior Choice’ for Chief Justice of SJC at Confirmation Hearing*, BOS. GLOBE, <https://www.bostonglobe.com/2020/11/12/metro/kimberly-budd-cormriended-superior-choice-chief-justice-sjc-confirmation-hearing/> [https://perma.cc/A5RF-CH4F] (Nov. 12, 2020, 6:14 PM) (announcing confirmation of Chief Justice Budd).

³ See *Problem-Solving Courts*, NAT’L INST. OF JUST. (Feb. 20, 2020), <https://nij.ojp.gov/topics/articles/problem-solving-courts> [https://perma.cc/Q9JT-X3QJ] (defining problem-solving courts).

⁴ Ralph D. Gants, Chief Just. of the Mass. Supreme Jud. Ct, Annual Address: State of the Judiciary 2 (Oct. 20, 2015), <https://www.mass.gov/doc/2015-state-of-the-judiciary-address-by-sjc-chief-justice-ralph-d-gants-oct-20-2015/download> [https://perma.cc/28AF-JK4V].

⁵ *Id.* at 3.

⁶ *Id.*

⁷ Letter from Ralph D. Gants, C.J. of the Massachusetts Supreme Jud. Ct, to the Massachusetts Bar Ass’n and the Boston Bar Ass’n (Mar. 19, 2020), <https://www.mass.gov/news/letter-to-the-bar-from-supreme-judicial-court-chief-justice-ralph-d-gants> [https://perma.cc/P8MD-AVSS] (encouraging Massachusetts, Boston bar associations to keep faith in justice system).

at start of pandemic).

8 *See id.*

9 *Id.*

10 *See* Off. of the Governor of the Commonwealth of Massachusetts, Governor's Declaration of Emergency (Mar. 10, 2020), <https://www.mass.gov/doc/governors-declaration-of-emergency-march-10-2020-aka-executive-order-591/download> [<https://perma.cc/2BAV-MA4K>] [hereinafter Governor's Declaration].

11 *See* Order Regarding Empanelment of Juries, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (Mar. 13, 2020) (repealed Apr. 6, 2020), <https://www.mass.gov/doc/repealed-sjc-order-regarding-empanelment-of-juries-march-13-2020/download> [<https://perma.cc/P45C-575B>]; Order Regarding Access to State Courthouses & Court Facilities, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (Mar. 13, 2020) (repealed July 13, 2020), <https://www.mass.gov/doc/repealed-sjc-order-regarding-access-to-state-courthouses-and-court-facilities-march-13-2020/download> [<https://perma.cc/S7LT-EEY6>]; *see also* MASS. GEN. LAWS ch. 211, § 3 (2019) (granting SJC superintendence authority).

12 *The Massachusetts Court System*, MASS.GOV (July 1, 2012), <https://www.mass.gov/doc/court-system-organization-chart/download> [<https://penna.cc/6FAN-PH27>] (portraying Massachusetts court system).

13 *See id.*; *see also* *Executive Office of the Trial Court*, MASS.GOV, <https://www.mass.gov/orgs/executive-office-of-the-trial-court> [<https://perma.cc/74SL-P36M>] (describing Massachusetts Trial Court).

14 *See* COMMONWEALTH OF MASS. CT. SYS., ANNUAL REPORT ON THE STATE OF THE MASSACHUSETTS COURT SYSTEM 38-39 (2019), <https://www.mass.gov/doc/fy-2019-annual-report-for-the-court-system/download> [<https://perma.cc/B9UJ-79W2>].

15 *Id.* at 38.

16 *See* Order Regarding Court Operations Under the Exigent Circumstance Created by the COVID-19 (Coronavirus) Pandemic, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (Apr. 1, 2020) (repealed May 4, 2020), <https://www.mass.gov/doc/repealed-sjc-order-regarding-court-operations-under-the-exigent-circumstances-created-by-the/download> [<https://perma.cc/KPJ6-G7ZC>] [hereinafter SJC Paper 7]; Order Limiting In-Person Appearances in State Courthouses to Emergency Matters that Cannot Be Resolved Through a Videoconference or Telephonic Hearing, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (Mar. 17, 2020) (repealed Apr. 6, 2020), <https://www.mass.gov/doc/repealed-sjc-order-limiting-in-person-appearances-in-state-court-houses-to-emergency-matters/download> [<https://perma.cc/6YK3-9CPL>] [hereinafter SJC Paper 10]; Updated Order Regarding Court

Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (Apr. 27, 2020) (repealed May 26, 2020), <https://www.mass.gov/doc/repealed-sjc-updated-order-regarding-court-operations-under-the-exigent-circumstances-created/download> [<https://perma.cc/37L9-X7XD>] [hereinafter SJC Paper 11]; Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (May 26, 2020) (repealed July 1, 2020), <https://www.mass.gov/doc/repealed-sjc-second-updated-order-regarding-court-operations-under-the-exigent-circumstances/download> [<https://perma.cc/LY76-R7S8>] [hereinafter SJC Paper 13]; Third Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (June 24, 2020) (repealed Sept. 17, 2020), <https://www.mass.gov/doc/repealed-sjc-third-updated-order-regarding-court-operations-under-the-exigent-circumstances/download> [<https://perma.cc/LPS2-TNL9>] [hereinafter SJC Paper 19]; Fourth Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, *In re* COVID-19 (Coronavirus) Pandemic, No. OE-144 (Sept. 17, 2020) (repealed Mar. 1, 2021), <https://www.mass.gov/doc/sjc-fourth-updated-order-regarding-court-operations-under-the-exigent-circumstances-created-by/download> [<https://perma.cc/FK6W-WQC8>] [hereinafter SJC Paper 24].

¹⁷ See SJC Paper 19, *supra* note 16, ¶ 3; SJC Paper 24, *supra* note 16, ¶ 3.

¹⁸ See SJC Paper 19, *supra* note 16, ¶ 9; SJC Paper 24, *supra* note 16, ¶¶ 9, 11.

¹⁹ See SJC Paper 19, *supra* note 16, ¶ 3; SJC Paper 24, *supra* note 16, ¶ 3.

²⁰ *Active Courts*, EFILEMA, <http://www.efilema.com/active-courts.htm> [<https://perma.cc/37QX-JX3P>].

²¹ See *Clerk of Court Policies on Filing in the Superior Court*, MASS.GOV, <https://www.mass.gov/info-details/clerk-of-court-policies-on-filing-in-the-superior-court> [<https://perma.cc/65ZQ-ZBHQ>] (Jan. 5, 2021) (listing e-mail addresses various courts use for electronic document filing).

²² See *Get General Court Information Through the Trial Court Help Line*, MASS.GOV, <https://www.mass.gov/info-details/get-general-court-information-through-the-trial-court-help-line> [<https://perma.cc/9MG4-MTTJ>].

²³ See *Court System Response to COVID-19*, MASS.GOV, <https://www.mass.gov/resource/court-system-response-to-covid-19> [<https://perma.cc/7FLX-YDBX>] (Mar. 2, 2021).

²⁴ See *Remote/Virtual Court Services*, MASS.GOV, <https://www.mass.gov/info-details/remotevirtual-court-services> [<https://perma.cc/R3MY-45KC>] (Feb. 4, 2021).

²⁵ See *id.* (highlighting services available for proceedings involving restraining orders, guardianships, and housing issues among others).

²⁶ See Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1296-97 (2020) (describing difficulty judging demeanor, although some witnesses more coherent and less intimidated); Christopher A. Suarez, *Disruptive Legal Technology, COVID-19, and Resilience in the Profession*, 72 S.C. L. REV. 393, 427 (2020) (noting complex bench trial in which judge claimed evaluation of witnesses improved); Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008) (reporting asylum seekers testifying by video less likely to prevail compared to those testifying live).

²⁷ See U.S. CONST. amend. VI.

²⁸ See SJC Paper 19, *supra* note 16, ¶ 3; SJC Paper 24, *supra* note 16, ¶ 11.

²⁹ See generally JURY MGMT. ADVISORY COMM., REPORT AND RECOMMENDATIONS TO THE JUSTICES OF THE SUPREME JUDICIAL COURT ON THE RESUMPTION OF JURY TRIALS IN THE CONTEXT OF THE COVID-19 PANDEMIC 16-36 (2020), <https://www.mass.gov/doc/jury-management-advisory-committee-jmac-report-and-recommendations-to-the-justices-of-the/download> [<https://perma.cc/8AJC-J3ZG>] (providing recommendations on recommencement of jury trials).

³⁰ *Id.* at 9.

³¹ See *id.* at 16-19 (setting forth plan phases for resuming in-person jury trials).

³² See *id.* at 12-16, 37-40 (recommending public health expertise guide recommendations and surveying courthouses).

³³ See Tonya Alanez, *Jury Trials Resume on a Test Basis After Monthslong Pandemic Hiatus*, BOS. GLOBE, <https://www.bostonglobe.com/2021/01/13/metro/jury-trials-resume-test-basis-after-monthslong-pandemic-hiatus/> [<https://perma.cc/Y9DP-QWJW>] (Jan. 13, 2021, 9:13 PM).

³⁴ See Tonya Alanez, *Two Weeks into a Test Run, Mass. Jury Trials Go on Pause*, BOS. GLOBE, <https://www.bostonglobe.com/2021/01/25/metro/two-weeks-into-test-run-mass-jury-trials-go-pause/> [<https://perma.cc/Q9HW-9GHE>] (Jan. 25, 2021, 11:11 PM) (noting jury trials on hold until February 12, 2021).

³⁵ See *Trial Court Virtual Town Halls Schedule*, MASS.GOV, <https://www.mass.gov/info-details/trial-court-virtual-town-halls-schedule> [<https://perma.cc/P8D4-8WHN>] (Jan. 10, 2021).

³⁶ See, e.g., *Trial Court Virtual Town Halls in Worcester*, MASS.GOV (Sept. 3, 2020), <https://www.mass.gov/info-details/trial-court-virtual-town-hall-in-worcester> [<https://perma.cc/HTY5-RCGL>] (offering town hall translations).

³⁷ See *Trial Court Zoom Rooms*, MASS.GOV, <https://www.mass.gov/lists/trial-court-zoom-rooms> [<https://perma.cc/TY4G-XN3F>] (outlining purpose of Zoom Rooms).

³⁸ See *Members of the Massachusetts Access to Justice Commission*, MASS. ACCESS TO JUST. COMM'N, https://massa2j.org/?page_id=556 [<https://perma.cc/SM9T-GXT3>].

³⁹ See Press Release, Massachusetts Access to Just. Comm'n, Massachusetts Access to Justice Commission Update (Apr. 9, 2020), <http://www.massa2j.org/a2j/?p=1170> [<https://perma.cc/Y2TU-F685>].

⁴⁰ See MASS. ACCESS TO JUST. COMM'N, ANNUAL REPORT ON ACTIVITIES, AUGUST 2020, at 6 (2020), <http://www.massa2j.org/a2j/wp-content/uploads/2020/08/Access-to-Justice-Commission-Annual-Report-August-2020.pdf> [<https://perma.cc/URE5-JCWN>].

⁴¹ See *Expiration of Moratorium on Evictions and Foreclosures*, MASS.GOV, <https://www.mass.gov/info-details/expiration-of-moratorium-on-evictions-and-foreclosures> [<https://perma.cc/66UH-MNWF>] (noting moratorium ended on October 17, 2020); see also Adrian Walker, *Extending Eviction Moratorium Would Finish Ralph Gants's Last Project*, BOS. GLOBE, <https://www.bostonglobe.com/2020/10/18/metro/extending-eviction-moratorium-would-finish-ralph-gantss-last-project/> [<https://perma.cc/KX3S-N3C3>] (Oct. 18, 2020, 11:14 PM) (discussing Chief Justice Gants's moratorium concerns).

⁴² Memorandum from Chief Just. Ralph D. Gants on Purpose, Limitations, and Protocol for August 19 Virtual Convening of Housing Stakeholders to All Participants 1 (Aug. 17, 2020) (on file with the Massachusetts Supreme Judicial Court).

⁴³ *Id.*

⁴⁴ One problem particular to the eviction issue that the courts sought to solve was how to make information, legal assistance, financial resources, and mediation assistance available to unrepresented litigants in an online environment. Before the pandemic, unrepresented litigants appearing for their first court event in a summary process case could often get assistance at the courthouse through Court Service Centers or lawyer-for-the-day programs. But connecting unrepresented litigants with that assistance in the course of a virtual proceeding was more difficult. The problem was exacerbated by the fact that, under existing court summary process rules, the first court date was also the trial date. To address this issue, the Housing Court, Boston Municipal Court, and District Court, which have primary jurisdiction over eviction cases, each issued new standing orders. See First Amended Housing Court Standing Order 6-20: Temporary Modifications to Court Operations Based on the Coronavirus (COVID-19) Pandemic and Recent Legislation Affecting Summary Process Cases (Oct. 5, 2020), <https://www.mass.gov/housing-court-rules/first-amended-housing-court-standing-order-6-20-temporary-modifications-to> [<https://perma.cc/G6QU-A9J2>] [hereinafter Standing Order 6-20]; Boston Municipal Court Second Revised Standing Order 11-20: Court Operations for the Adjudication of Summary Process Matters During the Continuing COVID-19 State of Emergency (Oct. 5, 2020), <https://www.mass.gov/boston-municipal-court-standing-orders/boston-municipal-court-second-revised-1-standing-ord>

er-11-20 [<https://perma.cc/4R3N-XTCW>] [hereinafter Standing Order 11-20]; District Court Second Amended Standing Order 10-20: Court Operations for the Adjudication of Summary Process Cases Under the Exigent Circumstances Created by COVID-19 (Oct. 5, 2020), <https://www.mass.gov/district-municipal-court-rules/district-court-second-amended-standing-order-10-20-court-operations> [<https://perma.cc/PXE9-PAW5>] [hereinafter Standing Order 10-20]. They restructured summary process cases to make the first court date a status date, in which litigants would either meet with a housing specialist in the Housing Court, or attend a case management conference with a judge in either the Boston Municipal Court or the District Court. The purpose of this first court event is to assess the case, provide information to the litigants about available resources including assistance with housing costs, consider any applicable eviction moratorium, and explore the possibility of a mediated settlement. *See* Standing Order 6-20, *supra*, ¶ 2(b)(iii)(2); Standing Order 11-20, *supra*, ¶ II(B); Standing Order 10-20, *supra*, ¶ 11(3).

Meanwhile, the executive branch has been working to expand funding for rental assistance, to speed the process of applying for this assistance, and to carry out a public information campaign about its availability. Bar associations, law firms, legal aid organizations, and the executive branch have also collaborated to increase the pool of pro bono and legal aid lawyers available to assist eligible unrepresented tenants and landlords.

⁴⁵ *See Legal Innovation & Technology Lab, SUFFOLK LIT LAB, <https://suffolklitlab.org> [<https://perma.cc/2HMA-RQM4>] (offering eviction moratorium assistant).*

⁴⁶ *See Commonwealth v. Pear, 66 N.E. 719, 720 (Mass. 1903), aff'd sub nom. Jacobson v. Massachusetts, 197 U.S. 11 (1905).*

⁴⁷ *Id.*; MASS. CONST. pt. II, ch. 1, § 1, art. IV.

⁴⁸ *Pear, 66 N.E. at 720.*

⁴⁹ *See Jacobson, 197 U.S. at 39.*

⁵⁰ 158 N.E.3d 827 (Mass. 2020).

⁵¹ *See id. at 835.*

⁵² *See id. at 847.*

⁵³ *See Civil Defense Act, 1950 Mass. Acts 639, § 5; Desrosiers, 158 N.E.3d at 833, 837 (discussing whether CDA's "other natural causes" language encompasses pandemics); Governor's Declaration, supra note 10 (citing CDA authority for declaration).*

⁵⁴ *Desrosiers, 158 N.E.3d at 837.*

- 55 *See id.* at 840-41 (noting Legislature passed multiple pieces of legislation to address COVID-19); MASS. CONST. pt. 1, art. XXX.
- 56 *See Desrosiers v. Governor*, 158 N.E.3d 827, 843 (Mass. 2020).
- 57 *Id.* at 839.
- 58 142 N.E.3d 560 (Mass. 2020).
- 59 *See* MASS. GEN. LAWS ch. 53, §§ 7, 44 (2019).
- 60 *See Goldstein*, 142 N.E.3d at 571.
- 61 *See id.* at 571.
- 62 *Id.* at 571-72.
- 63 *See id.* at 572-74.
- 64 *See* Comm. for Pub. Couns. Servs. v. Chief Just. of the Trial Ct., 142 N.E.3d 525, 539 (Mass. 2020) (considering totality of circumstances in determining whether release appropriate for pretrial detainee during pandemic); *see also* Commonwealth v. Nash, 159 N.E.3d 91, 94 (Mass. 2020) (weighing “COVID-19 pandemic as a factor in determining whether a stay is appropriate”).
- 65 *See Comm. for Pub. Couns. Servs.*, 142 N.E.3d at 529-30, 539.
- 66 *See id.* at 539.
- 67 *See id.* at 540.
- 68 *See id.*
- 69 *See Comm. for Pub. Couns. Servs.*, 142 N.E.3d at 539-40 (discussing process in SJC’s single justice session).
- 70 *See* Comm. for Pub. Couns. Servs. v. Chief Just. of the Trial Ct., 142 N.E.3d 525, 542 (Mass. 2020) (asserting relief requested by petitioners violates article 30 of Massachusetts Constitution).

- 71 See MASS. CONST. pt. 1, art. XXX (delineating separation of powers amongst three branches); see also *Comm. for Pub. Couns. Servs.*, 142 N.E.3d at 537 (holding article 30 prohibits SJC from modifying Rule 29).
- 72 See *Comm. for Pub. Couns. Servs.*, 142 N.E.3d at 541 (noting limited circumstances under which SJC can revoke or revise defendant's sentence).
- 73 See *id.* at 542.
- 74 See *id.* at 543 (urging Board to expedite release of certain individuals).
- 75 146 N.E.3d 372 (Mass. 2020).
- 76 See *id.* at 378 (outlining plaintiff's claim conditions constituted cruel and unusual punishment and violated substantive due process requirements).
- 77 See *id.* at 379, 395-96 (concluding plaintiffs unlikely to meet their burden of showing deliberate indifference).
- 78 See *id.* at 380 (highlighting SJC's appointment of special master to monitor spread of COVID-19).
- 79 See *Foster*, 146 N.E.3d at 379-80 (outlining Trial Court should balance potential benefits and risk of transmission of COVID-19).
- 80 See *supra* notes 65-67 and accompanying text (explaining release of pretrial detainees during COVID-19 pandemic).
- 81 See *supra* notes 58-63 and accompanying text (explaining signature requirements and equitable relief during COVID-19 pandemic).
- 82 See *Desrosiers v. Governor*, 158 N.E.3d 827, 837 (Mass. 2020) (explaining "other natural causes" encompasses health crises like COVID-19 pandemic).
- 83 See *Foster v. Comm'r of Corr.*, 146 N.E.3d 372, 380 (Mass. 2020) (explaining limits of judiciary in helping prisons and jails during COVID-19 pandemic).
- 84 See *Goldstein v. Sec'y of the Commonwealth*, 142 N.E.3d 560, 564 (Mass. 2020).
- 85 See *Comm. for Pub. Couns. Servs. v. Chief Just. of the Trial Ct.*, 142 N.E.3d 525, 537-38, 543 (Mass. 2020).

⁸⁶ See *Foster*, 146 N.E.3d at 379, 395-96, 402; see also *id.* at 404-07 (Gants, C.J., concurring).

⁸⁷ See *Desrosiers*, 158 N.E.3d at 839.

⁸⁸ See Brief for Petitioner at 9-10, *Vazquez Diaz v. Commonwealth*, No. SJC-13009 (Mass. 2020); see also Oral Argument, *Vazquez Diaz*, No. SJC-13009, https://boston.suffolk.edu/sjc/pop.php?csnum=SJC_13009 [<https://perma.cc/V3YM-29CH>].

⁸⁹ See Brief for Petitioner, *supra* note 88, at 9-10.

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