December 2021

Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention

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CONNECTICUT
LAW REVIEW

VOLUME 53 SEPTEMBER 2021 NUMBER 3

Essay

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The prison abolition movement encompasses a range of objectives and perspectives. While dismantling the carceral system may be the ultimate goal, incremental steps can be an important component of this long-term project. This Essay makes a case for the constitutional elimination of pretrial detention as one part of an incremental abolitionist agenda. The analysis pays particular attention to the Massachusetts Supreme Judicial Court's recent decision in Commonwealth v. Lougee*, which illustrates some of the ways in which the COVID-19 crisis has exacerbated preexisting injustices and inequities in the pretrial detention system. Although* Lougee *itself affords only limited avenues of relief for unconvicted individuals languishing in custody, the decision nevertheless highlights the important role that state constitutional law can play in advancing the cause of abolition when federal constitutional law falls short.*

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Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention

RENÉ REYES [*]

INTRODUCTION

Prison abolition is a long-term project that encompasses a range of objectives and perspectives.[1] While many abolitionists may share the goal of dismantling the carceral system and the broader prison industrial complex,[2] they may differ over the most productive means of achieving those ends. The use of constitutional law in the abolition movement is an instructive example. As University of Pennsylvania Carey Law School Professor Dorothy Roberts has observed, some activists "not only have eschewed constitutional law as a means to achieve prison abolition but also have argued that constitutional law serves to facilitate and legitimate state violence against black and other marginalized people."[3] But Professor Roberts has also offered a more optimistic assessment of constitutional law's capacity to help "build a society based on principles of freedom, equal humanity, and democracy—a society that has no need for prisons."[4] Incremental steps can be an important part of this process.[5] Similarly, "non-reformist reforms" can also be important.[6] Such measures do not

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[1] *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6–8 (2019) (noting that activists "have resisted 'closed definitions of prison abolitionism' and have instead suggested a variety of terms to capture what prison abolitionists think and do"); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617–18 (2019) (surveying various visions of abolition).

[2] *See* Roberts, *supra* note 1, at 6 (discussing origins of the term "prison industrial complex").

[3] *Id.* at 8.

[4] *Id.* at 110.

[5] *See id.* at 108 ("[P]rison abolitionists acknowledge that building a prisonless society is a long-term project involving incremental achievements."). *See also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) ("[A]bolition may be understood . . . as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.").

[6] *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007) (describing non-reformist reforms as "changes that, at the end of

aim to increase the efficiency or legitimacy of the prison industrial complex, but rather to "reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates."[7]

This Essay makes a case for the constitutional abolition of pretrial detention as part of an incremental, non-reformist reform agenda. The analysis pays particular attention to the Massachusetts Supreme Judicial Court's recent decision in *Commonwealth v. Lougee*, which illustrates some of the ways in which the ongoing COVID-19 crisis has exacerbated preexisting injustices and inequities in the pretrial detention system.[8] I argue that while *Lougee* itself affords only limited avenues of relief for unconvicted individuals languishing in custody, the decision nevertheless highlights the role that state constitutional law can potentially play in advancing the cause of abolition when federal constitutional law falls short.

I. RACIAL BIAS AND PRETRIAL DETENTION

In 2018, Senator Elizabeth Warren declared before an audience at Dillard University that the U.S. criminal justice system is "racist . . . front to back."[9] While Warren received considerable criticism for her remarks,[10] racial bias in the criminal justice system is pervasive and amply documented. For instance, a 2015 study by the Sentencing Project found that people of color face disparities at every stage of the criminal process: they are more likely than whites to be arrested, to be harshly charged, to be convicted, and to face longer sentences—"all after accounting for relevant legal differences such as crime severity and criminal history."[11] Similarly, a 2020 report from the Bureau of Justice Statistics showed that Black and Hispanic people continue to be imprisoned

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the day, unravel rather than widen the net of social control through criminalization"); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 695 (2020) (citing Gilmore's definition).

[7] Roberts, s*upra* note 1, at 114 (internal quotations omitted).

[8] Commonwealth v. Lougee, 147 N.E.3d 464, 468, 476 (Mass. 2020).

[9] Bill Barrow, *Elizabeth Warren Calls US Criminal Justice System 'Racist*,' BOS. GLOBE (Aug. 4, 2018, 3:06 PM), https://www.bostonglobe.com/news/nation/2018/08/04/warren-calls-criminal-justice-system-racist/B6mdqVFWRPQfVDJ03S02yL/story.html.

[10] Laura Crimaldi, *Police Chiefs Criticize Elizabeth Warren for Calling Criminal Justice System 'Racist*,' BOS. GLOBE (Aug. 11, 2018, 6:55 PM), https://www.bostonglobe.com/metro/2018/08/11/police-chiefs-criticize-warren-for-calling-criminal-justice-system-racist/Jz4PJJhfeFS3iVYD8KLsPN/story.

[11] NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 12 (2015), http://sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf. *See also* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1427 (2016) (discussing disparities and citing Sentencing Project study).

at much higher rates than whites.[12] Professor Paul Butler has argued that such statistics do not merely represent "problems" in the criminal justice system, "but are instead integral features of policing and punishment in the United States. They are how the system is supposed to work."[13] Stated plainly, much of American criminal procedure jurisprudence over the past several decades "evidence[s] a racial project by the U.S. Supreme Court to allow the police to control African-American men."[14] Dorothy Roberts draws a similar conclusion, writing that "criminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished."[15]

The kinds of racial disparities that characterize the criminal justice system in general are also present in the pretrial detention context in particular.[16] University of Alabama School of Law Professor Jenny Carroll has noted that since the passage of state and federal bail reform statutes in the 1980s, "rates of pretrial detention across the nation have continued to rise and to disproportionately affect poor and minority populations."[17] In Massachusetts, for example, recent analyses of state and county statistics show that people of color are detained pretrial at levels highly disproportionate to their share of the population.[18] An April 2020 report indicated that Black and Hispanic people each made up more than 20% of the pretrial detention populations in Massachusetts Department of Corrections facilities,[19] despite the fact that those communities respectively constitute only 9% and 12% of the state's population as a whole.[20] The disparities are even more extreme in some county jail facilities, where Black detainees have been overrepresented relative to their share of the local population by factors as high as ten to one.[21]

The consequences of such detention can be extreme. Professor Roberts has discussed some of the ways in which the criminal justice system "extends its subordinating impact beyond prison walls by imposing

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[12] E. ANN CARSON, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., PRISONERS IN 2018, (2020), https://www.bjs.gov/content/pub/pdf/p18.pdf.

[13] Butler, *supra* note 11, at 1425.

[14] *Id.* at 1450.

[15] Roberts, *supra* note 1, at 4.

[16] *See* Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 69–71 (2020) (discussing racial bias and its disproportionate impact in pretrial detention).

[17] *Id.* at 70.

[18] MASS. DEP'T OF CORR., PRISON POPULATION TRENDS 2019 18 (2020), https://www.mass.gov/lists/prison-population-trends.

[19] *Id.*

[20] *QuickFacts: Massachusetts*, U.S. CENSUS BUREAU (Jul. 1, 2019), https://www.census.gov/quickfacts/MA.

[21] *See* Alexander Jones & Benjamin Forman, *Exploring the Potential for Pretrial Innovation in Massachusetts*, MASSINC 2 (2015), https://massinc.org/research/exploring-the-potential-for-pretrial-for-pretrial-innovation-in-massachusetts/.

collateral penalties that deny critical rights and resources to formerly incarcerated people,"[22] and it should be emphasized that the collateral effects of pretrial detention will be suffered by individuals who are legally presumed to be innocent and may not be factually guilty of any offenses at all. There are obvious costs to those held in custody themselves: lost wages, interrupted family relationships, barriers to participation in the preparation of one's own defense, and reduced access to mental health and addiction services.[23] Perhaps less obviously, there are also costs to the broader community. As highlighted by Professor Carroll, the community "not only loses one of its own, but also loses all of the benefits of that defendant's presence. In custody, defendants do not earn a wage to support their families or pay their rent. They are absentee parents, partners, and mentors."[24] Just as importantly, "pretrial detention serves to disrupt and destroy the very ties between defendants and their communities that might, in the long run, protect and promote community safety."[25] In other words, pretrial detention is antithetical to abolition's twin goals of dismantling unjust carceral institutions while simultaneously building toward a more fair and equitable collective life in which policing and prisons are unnecessary.[26]

II. THE LIMITS OF CURRENT DOCTRINE

Current constitutional doctrine makes challenges to pretrial detention difficult. Indeed, it may be an apt illustration of Professor Roberts's observation "that so much of the Supreme Court's constitutional jurisprudence since its inception in the slavery era has been anti-abolitionist."[27] The leading case is *United States v. Salerno*.[28] There, the defendant brought a facial challenge to the federal Bail Reform Act of 1984, arguing that it violated both the Fifth Amendment's Due Process Clause and the Eighth Amendment's Excessive Bail Clause by allowing for pretrial detention based on a judicial finding of future dangerousness.[29] The Court rejected both constitutional arguments.[30] With respect to Due Process, the majority held that pretrial detention was not necessarily a "punishment" imposed without benefit of a trial, but rather a permissible "regulatory" measure designed to further the government's legitimate goal of preventing

[22] Roberts, *supra* note 1, at 37.

[23] *See* Carroll, *supra* note 16, at 71 (describing the "downstream consequences" of pretrial detention).

[24] *Id.*

[25] *Id.* at 72.

[26] *See* McLeod, *supra* note 1, at 1617–20 (highlighting the relationship between deconstructive and world-bulding elements of prison abolition); Roberts, *supra* note 1, at 43–48 (discussing the same).

[27] Roberts, *supra* note 1, at 8.

[28] 481 U.S. 739 (1987).

[29] *Id.* at 746.

[30] *Id.* at 755.

danger to the community.[31] As to the Eighth Amendment argument, the Court noted that the prohibition against excessive bail was not the same thing as a guarantee that bail would be available at all,[32] and rejected the claim that the amendment prohibited the government from pursuing its "admittedly compelling interests through the regulation of pretrial release."[33]

The majority's reasoning is dubious in both of its key elements. As Professor Laura Appleman has argued, "the conditions of most pretrial detention differ little from punitive incarceration, subjecting these offenders to the worst of conditions without even a guilty verdict."[34] Appleman has likewise found the Court's conclusions under the Eighth Amendment to be "undersupported at best."[35] But despite its analytic weaknesses, the *Salerno* decision continues to stand as a significant doctrinal barrier to constitutional abolition of pretrial detention. The consequences of allowing the practice to endure are particularly severe in this current era of COVID-19. Professor Carroll has summed up the realities that detainees face in stark terms:

> Inmates in jails are often housed in large dormitories or shared cells with poor ventilation. They are denied freedom of movement. They eat in large dining halls and share shower and toilet facilities. They lack access to adequate medical care, soap, cleaning supplies, and personal protective equipment like face masks or gloves. In addition, a greater percentage of detainees qualify as "high risk" for COVID-19 due to age and preexisting health conditions than the general population. Each of these factors compound the risk for infection, severe symptoms, and death.[36]

And at the very moment when these unconvicted individuals are being exposed to increased risk of illness and death from COVID-19, they are also finding that states are citing the virus as a reason to extend the period of their detentions. Consider the case of *Commonwealth v. Lougee*.[37] Although the Massachusetts Supreme Judicial Court ("SJC") had ordered in April 2020 that some pretrial detainees were entitled to a rebuttable presumption of release on personal recognizance as a result of the COVID pandemic, the court excepted individuals charged with a range of violent offenses as well as those found by a judge to pose a danger to the community.[38] The SJC had also ordered that all criminal jury trials be continued until no earlier than

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[31] *Id.* at 747.

[32] *Id.* at 752.

[33] *Id.* at 753.

[34] Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1302 (2012).

[35] *Id.* at 1335.

[36] Carroll, *supra* note 16, at 62 (footnotes omitted).

[37] 147 N.E.3d 464 (Mass. 2020).

[38] Comm. for Pub. Couns. Servs. v. Chief Just. of the Trial Ct., 142 N.E.3d 525, 530 (Mass. 2020).

September 2020.[39] The combination of these two orders meant that some unconvicted individuals remained in custody during the height of the COVID crisis and that they stood to be detained under unsafe conditions for months to come until trials resumed. In *Lougee*, these months-long extensions also meant that the defendants would be held far longer than would ordinarily be permissible under state law; the Massachusetts statute authorizing pretrial detention for dangerousness provides that a defendant shall not be held on that basis for more than 180 days.[40] According to these statutory limits on pretrial detention, the defendants in *Lougee* were entitled to be released in May 2020.[41] Yet the SJC held that the period of delay occasioned by their order continuing jury trials was to be excluded from the time calculations under that statute.[42] Consequently, the defendants could be held in custody under potentially hazardous health conditions for another four months—nearly twice as long as the maximum time period normally provided for under state law, and notwithstanding their constitutionally-mandated presumption of innocence.[43]

III. AN ABOLITIONIST PATH FORWARD?

The *Lougee* case vividly demonstrates both the costs of pretrial detention and the obstacles that unconvicted defendants face in challenging their confinement. It also serves as a reminder that the problems with pretrial detention go beyond problems with the bail system, for some pretrial detainees are not eligible for bail, even if they are in a position to afford it. Thus, as valuable as measures like community bail funds may be in supporting the abolitionist ethos,[44] they are not sufficient to address the plight of those who have been deemed too dangerous to qualify for bail at all. Yet however grim the implications of *Lougee* may be for the defendants involved in the case itself, the decision may also suggest that there is an abolitionist path forward to be pursued in future cases.

What might that abolitionist path look like? As noted above, federal constitutional law has not been interpreted in a way that is particularly hospitable to abolitionist claims—neither as a general matter[45] nor in the

[39] *Lougee*, 147 N.E.3d at 468.

[40] MASS. GEN. LAWS ch. 276, § 58A (2018).

[41] *Lougee*, 147 N.E.3d at 469–71.

[42] *Id.* at 472–74.

[43] *In re* Winship, 397 U.S. 358, 363 (1970) (describing presumption of innocence as "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law") (internal quotations omitted).

[44] *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 589 (2017) (noting that some community bail funds "are run by mobilized grassroots groups intent on abolishing the criminal justice system as we know it").

[45] *See* Roberts, *supra* note 1, at 71–99 (surveying and analyzing the Supreme Court's "anti-abolition jurisprudence").

narrower context of pretrial detention.[46] Nevertheless, scholars have continued to develop arguments against the pretrial detention system that are grounded in federal constitutional principles and provisions. Professor Laura Appleman has advanced an argument rooted in the Sixth Amendment, contending that "the spirit of the Sixth Amendment jury trial right might apply to many pretrial detainees, due to both the punishment-like conditions of their incarceration and the unfair procedures surrounding bail grants, denials, and revocations."[47] Given that the Supreme Court has held that a right to a jury trial applies to offenses carrying a possible sentence of greater than six months,[48] the Sixth Amendment argument would seem to be especially strong in cases like *Lougee* in which detainees are held for periods well beyond that temporal threshold without ever even having been convicted. Other arguments have focused on the Eighth Amendment's Cruel and Unusual Punishment Clause. Professor Carroll has noted that the Supreme Court has recognized a prisoner's right to necessary medical care, and has emphasized the logical applicability of this line of cases to pretrial detention in the time of COVID.[49] Carroll acknowledges that the Court has distinguished pretrial detention from punishment but concludes that "it would seem odd that a detainee should have more rights after conviction than before. Rather it seems clear that a pretrial detainee, like post-conviction detainees, has a liberty interest in physical safety during periods of pretrial detention."[50]

As compelling as these federal constitutional arguments may be, they are probably not likely to be embraced by the Supreme Court's conservative majority any time soon. But perhaps state courts like the Massachusetts SJC may step in to fill the gap. For even in the course of rejecting the detainees' claims to automatic entitlement to release in *Lougee*, the court left open the possibility of release based on a reconsideration of each individual's particular situation.[51] The court suggested that "where the duration of pretrial confinement approaches or exceeds the length of sentence a defendant would be likely to receive if he or she were found guilty of the

[46] *See supra* notes 27–33 and accompanying text.

[47] Appleman, *supra* note 34, at 1303. While the extension of jury rights to pretrial detention hearings might well represent a significant improvement over current practices, it should be borne in mind that the jury system itself has long been fraught with issues of racial bias and injustice. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) (overturning the conviction of a Black defendant who had been tried for murder six times by same lead prosecutor, during which the state used peremptory challenges to strike forty-one of forty-two Black prospective jurors); Roberts, *supra* note 1, at 96 (analyzing *Flowers* and discussing "the white supremacist logic behind keeping black people off juries" along with "the systemic role of all-white juries in preserving white domination of criminal punishment").

[48] *See* Baldwin v. New York, 399 U.S. 66, 69 (1970) ("[W]e have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized.").

[49] Carroll, *supra* note 16, at 78–79.

[50] *Id.* at 79.

[51] Commonwealth v. Lougee, 147 N.E.3d 464, 476 (Mass. 2020).

crimes charged," the reviewing judge should take that fact into account when assessing the equities of the case.[52] With respect to the specific risks posed by COVID-19, the court noted that the health crisis might constitute a "material change in circumstances" favoring release, and indicated that judges should "consider the health risks to the defendant in determining whether there are conditions of release that will reasonably assure the safety of any other person or the community."[53] More broadly, the court also noted "that when the period during which a defendant is held awaiting trial is indefinitely prolonged, due process may require a hearing to determine whether the length of pretrial detention has become unreasonable."[54]

Admittedly, these potential avenues of relief are limited in scope and fall well short of guaranteeing release for the *Lougee* defendants. The court's analysis falls far shorter still of calling the entire apparatus of pretrial detention into question. But at the same time, *Lougee* does suggest an openness on the part of the court to confront the practical consequences of pretrial detention and to acknowledge constitutional problems that the system creates. *Lougee* may therefore represent a small incremental step toward the larger goal of abolishing pretrial detention, which is itself an incremental step toward the ultimate goal of dismantling the carceral state.

Moreover, it should be emphasized that state courts have sometimes taken the lead and moved far more decisively and quickly than the federal courts in matters of justice and equality. The Massachusetts SJC famously held that same-sex couples had a right to marry under the state constitution in *Goodridge v. Dept. of Public Health*,[55] more than a decade before the U.S. Supreme Court recognized such a right under the Federal Constitution in *Obergefell v. Hodges*.[56] In the context of criminal justice, the SJC has likewise shown a willingness to offer more robust protection to defendants than mandated under the Supreme Court's jurisprudence.[57] For example, the SJC has concluded that the state constitution "provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause,"[58] and has opted to "reject the 'totality of the circumstances' test now espoused by a majority of the United States

[52] *Id.* at 475.

[53] *Id.* at 474–76.

[54] *Id.* at 476.

[55] 798 N.E.2d 941 (Mass. 2003).

[56] 576 U.S. 644 (2015).

[57] *See* Herbert P. Wilkins, *The Massachusetts Constitution—The Last Thirty Years*, 44 SUFFOLK U. L. REV. 331, 345 (2011) ("By far, most cases in which Massachusetts has not followed the Supreme Court on constitutional issues have concerned the rights of criminal defendants."). *See also* D. Christopher Dearborn, *"You Have the Right to an Attorney," But Not Right Now: Combating* Miranda*'s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 394–98 (2011) (discussing criminal cases in which the SJC has offered greater protection to defendants than the Supreme Court).

[58] Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985).

Supreme Court. That standard is flexible but is also 'unacceptably shapeless and permissive.'"[59]

The SJC has also arguably done a better job than its federal counterpart in confronting some of the realities of race in criminal justice and in incorporating those realities into its jurisprudence. Take the example of an individual's decision to avoid or flee from a police officer. The U.S. Supreme Court has described flight from a police officer as "the consummate act of evasion"[60]—an act that is "certainly suggestive" of wrongdoing and which may properly support an officer's reasonable suspicion of criminal activity.[61] While the SJC has not gone so far as to eliminate flight as a factor in evaluating police stops, the court has noted that where the fleeing suspect is a Black male, "the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department . . . report documenting a pattern of racial profiling of black males in the city of Boston."[62] This report "suggests a reason for flight totally unrelated to consciousness of guilt"[63]—namely, the fleeing individual "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."[64]

To be sure, these decisions themselves are not abolitionist in language or effect. At most, they suggest an openness to reforming rather than ending the modern prison-industrial complex. But the SJC's candid acknowledgement of racial bias in the criminal justice system, combined with its history of breaking with federal constitutional law in the service of equality and inclusivity, may presage further movement in the direction of abolition in the future. Such movement is likely to be gradual, but most abolitionists recognize "that building a prisonless society is a long-term project involving incremental achievements."[65] And it is worth noting that the influence of abolitionist thought is spreading rapidly.[66] There may thus be reason to hope that courts like the SJC will not always "be shackled to the prevailing constitutional jurisprudence in advancing the unfinished freedom struggle."[67]

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[59] *Id.*

[60] Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

[61] *Id.* at 124–25.

[62] Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016).

[63] *Id.*

[64] *Id.*

[65] Roberts, *supra* note 1, at 108.

[66] *See Introduction*, 132 HARV. L. REV. 1568, 1571–72 (2019) (discussing abolition's "unmistakable surge in influence").

[67] Roberts, *supra* note 1, at 105.

CONCLUSION

Prison abolition is not about the immediate dismantling of prison walls and the unleashing of dangerous convicted persons on an unprotected populace.[68] It is rather a constructive and aspirational movement, one which "entails an array of alternative nonpenal regulatory frameworks and an ethic that recognizes the violence, dehumanization and moral wrong inherent in any act of caging or chaining—or otherwise controlling by penal force—human beings."[69] The abolition of pretrial detention can be an important incremental step toward this aspirational goal. The costs to detainees and their communities are grave, the racial and class-based inequities are severe, and the inconsistencies with the presumption of innocence and other constitutional values are manifold.

But what of the truly dangerous among us? Abolitionism does not necessarily deny that there may be a "dangerous few" who require some degree of constraint for public safety.[70] Yet the number of such persons is likely to be vanishingly small relative to the total number of the incarcerated,[71] and pretrial detainees have not even had their "dangerousness" assessed in a full trial before a jury of their peers.[72] At most, the existence of some number of dangerously violent individuals should militate in favor of a narrow exception to a general rule of decarceration.[73]

Existing federal constitutional doctrine is not likely to lead to such a general rule in the foreseeable future. But there may be a role for state constitutional law to play, as evidenced by the willingness of courts like the Massachusetts SJC to recognize the racial inequities in criminal justice and to afford greater protection for the rights of criminal defendants. Perhaps these state courts will prove to be the strategically firmer ground upon which abolitionists can "build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social

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[68] *See id.* at 114 (noting that "[n]o abolitionist expects all prison walls to come tumbling down at once"); *see also* McLeod, *supra* note 5, at 1172 (explaining that "[a]bolition is not a simple call for an immediate opening or tearing down of all prison walls").

[69] McLeod, *supra* note 5, at 1172.

[70] *Id.* at 1168–91.

[71] *See id.* (arguing that "there are many millions of the one in thrity five American adults presently living under criminal supervision who fall outside any such small category [of the dangerous few] that may exist.").

[72] Moreover, defendants who have been detained pretrial may not be any more dangerous than other individuals who do not happen to have been accused of criminal activity, which raises further questions of justice and equity. *See* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 499 (2018) (arguing that "[t]he parity principle holds that the state has no greater authority to preventively restrain a defendant than it does a non-defendant who poses an equal risk").

[73] *See* McLeod, *Prison Abolition and Grounded Justice*, *supra* note 5, at 1171 (arguing that "even if a person is so awful in her violence that the threat she poses must be forcibly contained, this course of action ought to be undertaken with moral conflict, circumspection, and even shame, as a choice of the lesser of two evils, rather than an achievement of justice").

problems"[74] and in which they can "imagine a new freedom constitutionalism to guide and govern the radically different society they are creating."[75]

[74] Roberts, *supra* note 1, at 7–8.
[75] *Id.* at 122.