

Remaking Carceral Policy: A Response to Littman

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Aaron Littman’s *Jails, Sheriffs, and Carceral Policymaking* marshals an immense amount of empirical data, drawn from a dizzying array of legal and policy sources, to reframe our thinking about what is and should be possible in criminal justice reform at the local level.¹ Littman centers local-level sheriffs, who are too often neglected in legal, political science, and criminological literatures alike; he analyzes the local sheriff as both “site and agent of carceral policymaking.”² Through this focus on sheriffs, describing their legal powers, tracing the incentives that motivate their exercises of power, and analyzing dozens of actual examples of sheriffs making carceral policy, Littman identifies surprisingly simple regulatory and electoral interventions likely to have complex and far-reaching effects on decarceration agendas.³ The analysis is paradigm shifting in three specific ways. First, Littman attends to the implications of role consolidation in criminal justice policymaking. Second, Littman reframes the debate about whether to reform, or defund and decarcerate. Third, Littman provides a new framework for analyzing criminal justice policymaking (even beyond the jails context), functioning at the intersection of bed supply and body demand. I will discuss each in turn.

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1. Aaron Littman, “Jails, Sheriffs, and Carceral Policymaking,” 74 VAND. L. REV 101 (2021).
2. *Id.* at 866.
3. *Id.* at Part V, 929–44.

I. ROLE CONSOLIDATION

Littman frames his jail analysis as relevant to the broader criminal justice system, because it reveals how “role consolidation does not lead to restraint,” as others have theorized it might.⁴ In particular, Littman critiques Zimring and Hawkins’s idea of “a correctional free lunch” as incorrectly assuming that role consolidation (overseeing both sentencing and carrying out a punishment) will lead to restraint in imposing punishments on lawbreakers. Zimring and Hawkins coined the idea of the correctional free lunch in their 1991 monograph *The Scale of Imprisonment*, in which they argued that locally elected county-level officials, such as the prosecutors and judges who charge and convict defendants, do not bear the costs of incarcerating and punishing those defendants at the county level. Instead, states, which fund state prison systems, bear those costs.⁵ Littman interprets this free lunch concept as presuming that prosecutors and judges overseeing prisons and jails would actually spend less money on incarceration if the costs came out of their own pockets.⁶

Zimring and Hawkins, however, do not assume that the simple fact of role consolidation would lead to less spending on incarceration. Rather, they argue that role consolidation would force criminal justice system actors to more accurately weigh the benefits of incarceration against its costs. In the correctional free lunch paradigm (without role consolidation), local officials experience zero marginal cost when they make incarceration decisions paid for by the state. So even a minimal marginal benefit of incarceration outweighs this perceived zero cost for a local prosecutor choosing to charge a serious felony and secure a long state prison term. If, however, the actual “total marginal cost to all levels of government far exceeds the perceived benefit of imprisonment,” then local-level officials repeatedly make inaccurate cost-benefit analyses about incarceration decisions.⁷ If, however, the actual total marginal cost of incarceration is low or negative relative to the perceived benefit, as Littman repeatedly shows is the case in counties where sheriffs find myriad ways to literally profit off jail beds, then role consolidation (or elimination of the correctional free lunch) will not lead to restraint. In other words, as conceptualized by Zimring

4. *Id.* at 867.

5. *Id.* at 921; FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140, 211–15 (1991).

6. Littman, *supra* note 1, at 921–22 (citing Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677 (2016)).

7. ZIMRING & HAWKINS, *supra* note 5, at 212.

and Hawkins, the “correctional free lunch” argument does not necessarily presume that role consolidation will lead to restraint.

Role consolidation does, however, open up a possibility of (incentivized) restraint—of which Littman provides many examples within arrest and release powers, from minimizing misdemeanor arrests to using pre-trial diversion.⁸ Indeed, Zimring and Hawkins argued in 1991 that local jail populations increased, but marginally much less than state prison populations, between 1970 and 1987, suggesting that role consolidation produced at least some restraint in some cases.⁹ And while Littman focuses on the large jail population (and capacity) increases since the 1980s across the United States, these increases continue to pale in comparison to state prison population increases over this same period.¹⁰ This suggests, again, that role consolidation, and the multiple levers of restraint Littman identifies, might have constrained jail populations in the 1990s and early 2000s just as it likely did in the 1970s and 1980s.

Whether or not role consolidation has led to restraint in either supply of jail beds or demand of jail bodies is an empirical question, worthy of further analysis. Indeed, given the immense amount of data Littman has systematically collected across all fifty states about both what powers sheriffs have¹¹ and how they have exercised these powers in practice,¹² a sequel piece could (and arguably should) systematically assess both the varying degree of role consolidation sheriffs have in different jurisdictions and the contexts in which sheriffs do or do not tend to exercise restraint. As I suggest in the next sections, understanding how and when sheriffs exercise restraint has far-reaching consequences for implementing criminal justice system reform beyond the important but limited context of local jails.

II. REFORM VERSUS DEFUNDING & DECARCERATING: A FALSE BINARY

The quibble detailed above about the benefits of role consolidation only strengthens Littman’s larger argument: sheriffs have an immense amount of control over jail populations and

8. Littman, *supra* note 1, at 903–15.

9. ZIMRING & HAWKINS, *supra* note 5, at 212.

10. Littman, *supra* note 1, at 873, Figure 1. For prison and jail population increase comparisons, see *Incarceration over Time*, PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> (last visited Aug. 5, 2021) [<https://perma.cc/7J3L-MKPE>].

11. See Littman, *supra* note 1, at 946–50, apps. II, III (detailing sheriffs’ authorities to cite and release at arrest and at booking by state).

12. *Id.* at 945, app. I (describing percentage of marijuana possession arrests made by sheriffs, by state).

understanding the mechanisms of this control is critical to generating rational and sustainable reform proposals. In fact, the implications of Littman's work are more fundamental than any policy debate about the pros and cons of role consolidation. Littman's analysis of local-level sheriffs suggests a fundamental reframing of a more central debate in criminal justice policy conversations: to reform or to defund, decarcerate, and abolish? Defunding, decarcerating, and abolishing as alternatives to reforming are gaining mainstream traction, as evidenced by things like the *New York Times Magazine* profile of the once-marginalized "radical" abolitionist academic Ruth Wilson Gilmore, and the media storm about former U.S. President Barack Obama's opinions about whether "defund the police" is a useful phrase.¹³

Variations of the abolition and defunding controversies have been central in the recent debates over how to improve each stage of criminal justice system processing in the United States. In debates over policing: do we reform qualified immunity, improve officer training, and require body cameras, or do we just defund the police completely? In debates over sentencing: do we improve due process, ensure consistency, and reduce inequities in things like powder-versus-crack cocaine laws, or do we eliminate entire categories of crimes (drug) and sentences (death or life without parole)? In debates over incarceration: do we build newer, nicer jails and prisons, staff them better, and reduce overcrowding, or do we abolish prisons completely?¹⁴

Not only are the answers to these questions increasingly politically charged (and divisive), but they often lead to ethical conundrums on the ground. Should individual people be left to suffer in the moment, while more radical reform agendas inch forward towards a utopian vision that all too often feels out of reach? More specifically, while the most radical abolitionists and defunders insist on limiting any new spending on the criminal justice system, millions of people languish in jails and prisons, where no new spending means suffering in decrepit, overcrowded facilities, without access to meeting their most

13. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG., Apr. 17, 2019, at 37, <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/2GKZ-MS7T>]; Chandelis Duster, *Obama cautions activists against using 'defund the police' slogan*, CNN (Dec. 2, 2020), <https://www.cnn.com/2020/12/02/politics/barack-obama-defund-the-police/index.html> [<https://perma.cc/R5SA-5XD2>].

14. For explorations of these debates see, for example, Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120 (2021); Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN MAG. (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/54JC-6Q26>]; Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1634–37 (2019); Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32 (2021).

basic needs for clean water, healthcare, and human contact.¹⁵ A rich literature centers these debates, labeling the people focused on alleviating suffering in the moment, even at risk of reenforcing and bolstering a broken system, as reformists or incrementalists and the people focused on a more radical restructuring of the system, even at risk of letting some people suffer in the moment, as non-reformists or maximalists.¹⁶ Reformists point to the need to protect people in communities wracked by violence today, the human value of shortening even a few hundred people's sentences by a few months, and the need to improve lethally dangerous conditions in jails and prisons to save lives right now.¹⁷ Defenders and abolitionists counter that these "incremental" reforms are compromising, insufficiently radical, and resisting revolution.¹⁸

Margo Schlanger describes two broad categories of maximalist (or non-reformist) critiques of incrementalists (or reformists). First, maximalists critique the phenomenon of "normalization": misdirected reforms that presume the acceptability of a practice and ultimately lead to "entrench[ing]" (or re-entrenching) that practice.¹⁹ Second, maximalists highlight limited "bandwidth" and argue that misdirected or limited reforms "use[] up" attention that is "scarce."²⁰

One of the most salient and poignant of these incrementalist-versus-maximalist debates is whether to build new jails in some of our country's largest, densest, and most diverse cities, like New York and

15. For descriptions of the pervasiveness of constitutionally inadequate conditions across U.S. prisons, see generally Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POLY INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/62ZM-5UEP]; Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015). For a discussion of the importance of spending some energy and money now to improve prison conditions, see generally Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273 (2020) [hereinafter *Incrementalist vs. Maximalist Reform*].

16. See generally THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* (2016); *Incrementalist vs. Maximalist Reform*, *supra* note 15.

17. For two examples describing incremental reform, see Bill Keller, *Nine Lessons Learned About Criminal Justice Reform*, THE MARSHALL PROJECT, (July 19, 2017), <https://www.themarshallproject.org/2017/07/19/nine-lessons-about-criminal-justice-reform> [https://perma.cc/SC2X-CVHB]; *Criminal Justice Reform*, EQUAL JUST. INITIATIVE, <https://ej.org/criminal-justice-reform/> [https://perma.cc/7S3X-DT5L] (last visited Aug. 8, 2021).

18. For two examples of critiques of incrementalist reforms as insufficiently radical, see Justin George, *Van Jones Answers His Critics*, THE MARSHALL PROJECT (June 18, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/06/18/van-jones-answers-his-critics> [https://perma.cc/UZ6X-AABD]; Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER, (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [https://perma.cc/DNN3-2LMM].

19. *Incrementalist vs. Maximalist Reform*, *supra* note 15, at 275–76.

20. *Id.* at 276.

Los Angeles (“LA”). In both places, maximalists, non-reformists, and abolitionists have pushed city and county officials to consider closing down old jail systems entirely, while reformists have argued that newer, cleaner, safer, more modern facilities must be built to replace at least some of the unusable older jail beds.²¹

In the summer of 2019, I conducted a survey of staff working across LA county’s seven main jails and spent a total of two work weeks shuttling across the vast county, spending eight to ten hours daily inside facilities, encouraging multiple shifts of staff to complete the survey and answer questions.²² As I listened to debates about whether or not to build a new jail facility in Los Angeles, I saw images from my days in the jails: men abandoned naked in barren concrete cells with nothing but a drain in the ground and steel bars for windows; men pacing in cages, muttering to themselves, sometimes naked, or chained to tables in crowded common areas; staff sitting in work rooms with lights so dim I couldn’t see their faces, stalactites of dust dangling from the ceiling, empty fast food containers strewn about. And I wanted to imagine a new jail facility—clean and well-lit, full of trained healthcare staff—equipped to support the people who seemed no more likely to survive on Los Angeles’s streets than in Los Angeles’s crumbling jails. I could not see LA law enforcement officials ceasing to arrest anyone such that no jail space was needed, and so I could not see a way out of just investing more money in carceral spaces.

But Aaron Littman’s *Carceral Policymaking* presents a clear policy path forward out of the ethical conundrum about whether to build new jails (and other, associated, reform-versus-abolition conundrums). First, Littman re-frames the question. Rather than incrementalist-

21. In New York City, the campaign is called “No New Jails NYC.” For a history of the New York City campaign, see *Background*, NO NEW JAILS NYC, <https://www.nonewjails.nyc/background> [https://perma.cc/64CL-SF82] (last visited Aug. 8, 2021), and for an overview of the debates for and against the campaign, see Nadja Eisenberg-Guyot, *New York City Has a Jail Problem*, CURRENT AFFAIRS (Mar. 15, 2021), <https://www.currentaffairs.org/2021/03/new-york-city-has-a-jail-problem> [https://perma.cc/SEA6-GYW2]. In Los Angeles, the campaign is called “JusticeLA.” For a history of the Los Angeles campaign, see *We are JusticeLA*, JUSTICELA, <https://justicelanow.org/> [https://perma.cc/8ET5-YNKR] (last visited Aug. 8, 2021), and for an overview of the debates for and against the campaign, see Lauren Lee White, “*We Didn’t Stop*”: *The Los Angeles Abolitionist Coalition That’s Racking up Victories*, GUARDIAN, (Apr. 9, 2021 5:00 AM), <https://www.theguardian.com/global-development/2021/apr/09/justicela-los-angeles-abolitionist-coalition> [https://perma.cc/F5FC-VN8C].

22. See KERAMET REITER & JODY SUNDT, L.A. CNTY. OFFICE OF THE INSPECTOR GEN., THE WORK EXPERIENCES OF LASD CUSTODY PERSONNEL: RESULTS TO INFORM THE PROFESSIONAL DEVELOPMENT, SUPPORT, AND RETENTION OF AN EXCELLENT WORKFORCE (2020), https://content.govdelivery.com/attachments/CALACOUNTY/2021/03/25/file_attachments/1735083/Survey%20of%20Personnel%20in%20Los%20Angeles%20County%20Sheriff%27s%20Department%20Custody%20Services%20Division.pdf [https://perma.cc/YX2W-KNDA].

versus-maximalist, or reformist-versus-non-reformist, he shows how system actors—especially local sheriffs—generate, manipulate, and leverage these very debates. Sheriffs describe jails as beyond-their-control overcrowded when they want to justify creating more bedspace, but they also exercise discretion to decrease jail populations, when they want to protect individual well-being and improve conditions.²³ While sheriffs sometimes argue that they have to balance and weigh tough political choices, inspiring reformists to take one side, and non-reformists to take another, Littman shows how these are often manufactured choices. Sheriffs, unlike many other actors in complex bureaucracies, can actually choose to reduce jail populations *and* decrease jail bedspace.

After he reframes the question, Littman, second, outlines in detail exactly which kind of policymaking powers sheriffs exercise to simultaneously control people and space: exercising powers to arrest, book, or cite and release; diverting defendants to community-based treatment; releasing defendants to relieve overcrowding; granting goodtime credits; and signing contracts to re-allocate bedspace. And sheriffs can do all these things quickly, without engaging in a painstaking process of voter or legislative buy-in: changing arrest policies or release policies with a single order in one day, and choosing largely unilaterally to sign or to refuse to sign contracts to allocate more or less bedspace.²⁴

Third, Littman identifies specific, logical and feasible policy interventions to limit the number of number of beds and people available. For example, he suggests specific interventions to regulate the “bedspace market” in which sheriffs engage to create, buy, and barter jail beds: taxing building bonds at the federal level and changing state-level reimbursement models.²⁵ These interventions entirely sidestep the heated debate about whether to build or not build new jail beds in cities like Los Angeles and New York, focusing instead on altering the distorted incentives in the bedspace (and also jail body) market.

In sum, Littman demonstrates that there is no reason to choose between either keeping people in a decrepit overcrowded jail where they are dying unnecessarily in hopes of emptying that jail out soon (decreasing jail body demand), or building a newer, nicer, safer jail that will be all the harder to ever empty out (increasing jail bed supply). While in sites like New York and Los Angeles, abolitionists have argued

23. See Littman, *supra* note 1, at 882; see generally *id.* at 908–17.

24. *Id.*

25. *Id.* at 932.

for both reducing arrests and closing jails, Littman brings fresh nuance to the mechanisms by which this might happen. Through his systematic analysis, Littman reveals how sheriffs often create the false binary of building new beds or letting unconscionable conditions persist, identifies the specific powers sheriffs exercise in exacerbating this binary, and suggests interventions to incentivize better regulation and use of these powers— interventions that only indirectly implicate heated public debates about whether or not to build new jails. Advocates no longer have to choose between helping individuals survive jail now or getting rid of jails at some distant date; Littman provides a roadmap for implementing maximalist reforms now.

III. BED SUPPLY & BODY DEMAND: BEYOND JAILS

Littman's focus on the simultaneous movement of criminal justice bed supply and body demand has resonance beyond jails. First, his analyses, revealing how criminal justice system actors amplify (and sometimes initiate) incrementalist-versus-maximalist debates, and his suggestions, identifying distorted incentives and targeting disincentivizing reforms that sidestep these debates, could apply just as readily to questions about whether to defund police or to eliminate entire categories of crime and extreme sentences. In policing and courts segments of the criminal justice system, too, "judicial and administrative regulation" of criminal justice system profit-making (whether through arrests, imposition of fines and fees, or countless other mechanisms²⁶) and "local electoral and budgetary advocacy" seem both possible and promising.²⁷ Second, Littman's attention to the role consolidation of sheriffs, who control both bed supply and body demand, could apply to other criminal justice system actors, in other contexts, who control both bed supply and body demand.

As one example: prison officials within state and federal prisons control both the bed supply of solitary confinement (or restrictive housing) units and the body demand in these units. I explore the relevance and salience of this analogy here, but other criminal justice system actors whose role consolidation, and associated control over resource supply and body demand, would likely also prove fruitful to analyze in order to identify new pressure points for policy intervention. Although Littman is careful to differentiate prisons from jails, solitary

26. See generally KERAMET REITER, MASS INCARCERATION 70–75, 125–34 (2018) (discussing various ways the criminal justice system engages in profit-making, including imposing steep fines and fees on families of defendants and engaging in telecommunications contracts with extraordinarily high profit margins).

27. Littman, *supra* note 1, at 944.

confinement units bear some structural similarities to jails. Littman points out that jails are differently managed than prisons. First, unlike appointed corrections commissioners, who tend to serve short terms, sheriffs are elected and tend to serve longer terms.²⁸ Second, on any given day, “prisons hold [more] detainees for longer, but jails churn through more people,” “serve radically more diverse functions,” and are much less centralized than prisons.²⁹ In solitary confinement units, though, bureaucrats with years-long longevity and vast discretionary power tend to be in oversight roles.³⁰ Although, on any given day, only about five percent of a given prison population tends to be in solitary confinement, prisoners churn through solitary confinement; one-fifth or more of prisoners experience solitary confinement in a given year.³¹ And solitary confinement units tend to serve diverse functions—a catch-all for people who do not fit elsewhere in the prison system, including the mentally ill, the vulnerable (pregnant, transgender, sexual offenders), and the disruptive (assaultive, gang leaders, litigators).³² Most importantly, mid-level correctional administrators control both the bed supply and body demand in solitary confinement units. Prison officials impose solitary confinement, or “lockdown” conditions, on a moment’s

28. *Id.* at 937, n.355.

29. *Id.* at 869–70.

30. See KERAMET REITER, 23/7: PELICAN BAY AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 87–120 (2016); Keramet Reiter & Kelsie Chesnut, *Correctional Autonomy and Authority in the Rise of Mass Incarceration*, 14 ANN. REV. L. SOC. SCI. 49 (2018); Danielle Rudes, Shannon Magnuson, Sydney Ingel, & Taylor Hartwell, *Rights-in-Between: Resident Perceptions of and Accessibility to Rights Within Restricted Housing Units*, 55 LAW & SOC. REV. 296 (2021).

31. ASS’N OF STATE CORRECTIONAL ADMINS. & THE ARTHUR LIMAN PUB. INT. PROGRAM, YALE L. SCH., AIMING TO REDUCE TIME-IN-CELL 2 (2016), <https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducetic.pdf> [<https://perma.cc/6WJE-LW38>] (noting “median percentage of the prison population held in restricted housing was 5.1%”); ALLAN J. BECK, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011-12, at 1 (2015), <https://bjs.ojp.gov/content/pub/pdf/urhuspj1112.pdf> [<https://perma.cc/BEH4-SSW3>] (noting “nearly 20 percent of prison inmates . . . had spent time in restrictive housing”); David Lovell, Rebecca Tublitz, Keramet Reiter, Kelsie Chesnut & Natalie Pifer, *Opening the Black Box of Solitary Confinement Through Researcher–Practitioner Collaboration: A Longitudinal Analysis of Prisoner and Solitary Populations in Washington State, 2002–2017*, 37 JUST. Q. 1303, 1316 (2020) (finding that “more than [one] in [three] prisoners had spent at least a day in solitary confinement” in Washington State as of 2017); Ryan Sakoda & Jessica Simes, *Solitary Confinement and the U.S. Prison Boom*, 32 CRIM. J. POL. REV. 66, 92 (2021) (noting “more than two fifths of all incarcerated people and nearly half of incarcerated non-Hispanic Blacks spent time in solitary confinement during their prison term” in Kansas in the 1990s).

32. See Konrad Franco, Caitlin Patler & Keramet Reiter, *Punishing Status and the Punishment Status Quo: Solitary Confinement in U.S. Immigration Prisons, 2013–2017*, PUNISHMENT & SOC. 4 (“[S]olitary confinement is often the de facto holding place for prisoners who may be unsafe in the general prison population or those who administrators deem could make other prisoners feel unsafe[.]”); Keramet Reiter & Thomas Blair, *Superlative Subjects, Institutional Futility, and the Limits of Punishment*, 23 BERKELEY J. CRIM. L. 162, 165 (2018) (describing how solitary targets prisoners are “difficult to categorize or manage”).

notice: in response to unrest, like riots or uprisings, and in response to health crises, like the COVID-19 pandemic. They open and close solitary confinement units at their discretion, as populations fluctuate, and move incarcerated people from prison to prison, as needed to empty or fill solitary confinement units.³³ And they even fund new solitary confinement units through the same kinds of privatized bond measures (like lease-revenue bonds) Littman describes as being popular with sheriffs funding new jails.³⁴ Likewise, mid-level correctional officials also define who requires housing in solitary confinement units: labeling and unlabeling people as gang members, defining and redefining prison rule violations that justify placement in solitary confinement, and doling out determinate or indeterminate “sentences” to solitary confinement in cursory administrative hearings.³⁵

If mid-level correctional bureaucrats control both the bed supply and the body demand of solitary confinement units, perhaps they should be analyzed in the way Littman analyzes sheriffs: What laws, policies, and regulations imbue correctional bureaucrats with these powers, and what regulatory mechanisms might limit these powers? The answers may well be more complex for correctional bureaucrats, who are neither elected nor appointed, and who work deep within state prison systems that span many more local jurisdictions than a single county jail system. But Littman’s analysis suggests that attending simultaneously to bed supply and body demand will be as critical to solitary confinement reform as to jail reform.

IV. CONCLUSION: ON AGENCY

A tendency exists among criminal justice policy analysts to presume that many policy outcomes are either inevitable (e.g., resisting the penal populism of “tough-on-crime” rhetoric is impossible when people feel threatened) or unintended (e.g., reformers sought one outcome, like more equitable sentencing and accidentally got another, like longer sentences).³⁶ Margo Schlanger calls the latter “perversity

33. See REITER, *supra* note 30, at 53–58 (describing the imposition of solitary confinement following prison unrest); UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER (2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf> [<https://perma.cc/L9NQ-U73K>] (describing widespread lockdowns in prisons across the United States in response to COVID-19).

34. See REITER, *supra* note 30, at 97–99 (describing the use of lease-revenue bonds in California in the 1980s to fund construction of supermax, or long-term solitary confinement units).

35. *Id.* at 145–65 (describing administrative processes by which people are assigned to solitary confinement in California).

36. For examples of the penal populism argument, see JOSH PAGE, THE TOUGHEST BEAT (2011), and NAOMI MURAKAWA, THE FIRST CIVIL RIGHT (2014). For examples (and critiques) of the unintended consequences argument, see REITER, *supra* note 30, at 84–85, n.135.

arguments” and notes that they tend to make empirical claims from ideological and hypothetical arguments.³⁷ Littman’s work is an antidote to these futility-inspiring arguments: he traces the subtlest realms of discretion (to book or to cite) and identifies examples of individual actors choosing to exercise or refrain from exercising this discretion. In this way, he reveals the choices that produce the criminal justice policies we have, belying the lie that any criminal justice system outcome is either inevitable or unintended.

37. Margo Schlanger, *No Reason To Blame Liberals (Or, The Unbearable Lightness of Perversity Arguments)*, NEW RAMBLER (2015), <https://newramblerreview.com/book-reviews/law/no-reason-to-blame-liberals-or-the-unbearable-lightness-of-perversity-arguments> [<https://perma.cc/RC4X-2XTV>].