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The Armed Career Criminal Act and the Puzzle of Federal Crime Control in the Reagan Era: "It's at the state and local levels that problems exist"

Abstract: This article examines how Pennsylvania Senator Arlen Specter's Armed Career Criminal Act attempted to respond to the 1980s crisis of state prison overcrowding while also maintaining a political commitment to get tough on crime. Although commonly thought of as a straightforward punitive sentencing bill, this article shows that the Armed Career Criminal Act was also a desperate attempt to navigate a national crisis of state prison overcrowding in the 1980s that threatened to undercut racialized "get tough" politics and the burgeoning carceral state. In doing so, this article reshapes scholarship on the history of the United States carceral state by demonstrating that the United States' decentralized political structure and federal government hostility toward funding state correctional expansion created significant gaps between a national discourse of law and order and actual anticrime policy making in the Reagan era, suggesting a far more contested development of the United States prison nation.

Keywords: Armed Career Criminals Act (ACCA), Arlen Specter, carceral state, prison overcrowding, US crime

On December 10, 1981, *Philadelphia Daily News* columnist Chuck Stone took the stand at the Subcommittee on Juvenile Justice's hearings on Pennsylvania Senator Arlen Specter's Career Criminal Life Sentence Act (later Armed

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Career Criminal Act [ACCA]).[1] The bill was ostensibly concerned with toughening sentences, thus lengthening imprisonment, for "violent career criminals." In particular, it sought to impose life imprisonment in federal prison for anyone convicted for a third time of armed robbery or burglary. Yet, Specter invited Stone to testify about his recent role in negotiating the safe surrender of hostages being held by prisoners at Pennsylvania's Graterford State Correctional Institution. In reflecting on his experience, Stone pointed to prison overcrowding as a central catalyst for the unrest. "As you know … Pennsylvania prison systems are bulging at their population seams," he said, "some of the prisons are so overcrowded that inmate tensions are being exacerbated to a boiling point, capable of endangering prison security … and endangering human lives." Stone then described the "inhuman conditions" he saw at Graterford: rats and cockroaches running around cells, food so bad prisoners would skip meals, overcrowded cells that were "barely large enough for one," and "unfair treatment" and "racist practices" that led to the disproportionate and harsh disciplining of Black prisoners. He quoted one of the leaders of the uprising, Jo-Jo Bowen, as telling him, "The conditions here sum up to dying."[2]

Why did Specter have Stone testify on state prison overcrowding at a hearing on toughening sentencing against "career criminals"? At first, the passage of the Armed Career Criminal Act appears to straightforwardly deal with prosecution and sentencing at the apogee of the 1980s law-and-order era. But as this article will show, the ACCA also represented an attempt to navigate a national crisis of state prison overcrowding that threatened to undercut "get tough" politics and the burgeoning carceral state. Stone admitted that the bill might not "precipitate massive reductions" in state prison populations. But he noted that the bill would "help to decrease critical overcrowding and correspondingly help increase state prison budgets." In "these difficult economic times" Stone saw such measures as a necessity, given that Americans then had little interest in appropriating more tax dollars for costly prisons.[3]

This article examines how Senator Specter's Armed Career Criminal Act and his broader effort to expand the federal government's jurisdiction over the typically state and local realm of crime control developed out of a little-acknowledged crisis of state prison overcrowding that created significant challenges for lawmakers seeking to sustain political commitments to get tough on crime. Passed as part of the 1984 Comprehensive Crime Act and expanded under the 1986 Anti-Drug Abuse Act, the ACCA initially sought to make both the sentencing of "repeat offenders" and their incarceration a *federal* responsibility, an unprecedented move in US criminal legal policy

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making that reflected the gravity of the prison overcrowding crisis. Specter took that dramatic step in part because he knew that Ronald Reagan and members of the GOP would not support federal spending for state prison construction. So, he tried to shift the responsibility for prosecution and incapacitation of such "dangerous" career criminals to the federal criminal legal system.

In recent years, historians of the United States' carceral state have challenged explanations of the rise of racialized mass incarceration that place sole blame on a Republican-led, white conservative backlash to civil rights. In the process, they have located the carceral state's origins in earlier eras and expanded the range of participants and factors driving it forward.[4] But these important efforts to uncover the deeper roots of mass incarceration have also led historians to deemphasize the mechanics of carceral state building in the Reagan era. In cutting their analyses artificially short, this scholarship gives the impression that by the time of Reagan's election, retributive criminal legal policy making had become fully normalized and high functioning across a vast and decentralized territory. Historical scholarship on the carceral state has only just begun to grapple with the diffuse nature of American governance, where crime control in the United States is not dictated solely by top-down federal directives but rather is dependent on political arrangements and decision making at the state and local levels.[5]

The scholarship has also not contended with the fact that the Reagan administration and GOP-dominated Congress did not meaningfully fund the state correctional systems responsible for detaining the masses of individuals sent to prisons and jails, leaving the substantial task of prison construction largely up to states and localities themselves. As Joshua Guetzkow and Eric Schoon have written, "putting people in prisons was easy, building them was not."[6] Contrary to scholarly claims that the politics of federalism did not hamper the government's ability to "govern through crime," the Reagan-era federal government's fiscal abandonment of states sprinting to expand their correctional capacity threw penal politics into considerable disarray during an era normally considered the apex of law and order.[7] Examining this more complex "federal–state interaction," where the development of the modern carceral state occurred through the United States' distinctly decentralized political structure, thus reveals critical points of contestation, limitations, and paths not taken that disrupt the otherwise tidy tale of ascendant, uninterrupted punitive politics.[8]

This article demonstrates that the federal structure and the GOP's initial hostility toward funding correctional expansion in the states created

significant gaps between a national discourse of law and order and actual anticrime policy making in the Reagan era. Central to this dilemma was a crisis of state and local prison overcrowding, which triggered a stream of prisoner lawsuits, fueled prisoner uprisings and disturbances, and strained shrinking state budgets.[9] Despite Reagan and Republicans' rhetorical endorsements of carceral politics, their distaste for massive government expenditures on state corrections prevented significant allocations of federal funding for building more state and local prisons. This wave of carceral *in*capacity in the states at just the moment that tough sentencing policies and policing practices were causing prison populations to skyrocket caused policy makers committed to getting tough on crime to puzzle through a mass imprisonment regime that appeared unsustainable.[10] Specter's Armed Career Criminal Act, and the political debates and conundrums it raised, highlights this far more complex development of the United States carceral state, which was marked more by a process of fits and starts rather than unfettered or uniform growth.

"EVERYBODY IS UNHAPPY": STATE PRISON OVERCROWDING AND THE 1980S CARCERAL CRISIS

Prison overcrowding has plagued prisoners, correctional administrators, and legislators since the dawn of the United States penitentiary. Considered the first prison in America, Philadelphia's Walnut Street Prison faced debilitating overcrowding crises throughout the nineteenth century.[11] In 1931, President Herbert Hoover's National Commission on Law Observance and Enforcement lamented overcrowding in "some prisons" where the "population is more than double what it ought to be."[12] Severe prison overcrowding at New York's Attica Prison played a significant role in catalyzing the 1971 Attica Rebellion.[13] Attica's bloody conclusion alarmed federal legislators, who began raising concerns about prison overcrowding and explored ways to "prevent future Atticas" without backing down from a tough-on-crime approach.[14] As Senator Joe Biden (D-DE) lamented in a 1977 hearing before the Senate Committee on the Judiciary on state prison overcrowding, "We cannot have sure and swifter sentences and people in jail and not have more prisons."[15]

State prison overcrowding reached crisis levels, however, during the height of the incarceration boom in the late 1970s and 1980s, becoming "endemic" by the 1990s.[16] The escalation of prison overcrowding during this period developed alongside the unprecedented explosion in incarceration rates; as more and more people were confined in state and local correctional systems, a proliferation of overcrowding crises logically followed.[17] The

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number of sentenced state prison admissions grew by 17.5% between 1980 and 1981, compared with 8% between 1979 and 1980, and it continued to grow throughout the decade save for a slight dip in 1984. By the end of 1986, a striking 41 state prison systems were operating at approximately 100% or higher of their lowest capacity and 32 states contained prison populations that met or surpassed their highest reported capacity.[18] The number of state jurisdictions forced to detain state prisoners in local jails also drastically increased during the 1980s. In 1976, 7,725 state prisoners were held in local jails due to overcrowding, and in 1989 this number had jumped to 18,326, constituting 2.6% of the total state prison population.[19] Although state prisons did increase their capacity throughout the decade and into the 1990s, in 1996 27 states still reported holding a total of 31,508 state prisoners in local jails or other facilities because of overcrowding.[20]

Even these measurements likely did not capture the full extent of the prison overcrowding crisis unfolding in the 1980s. In a 1980 report on US prisons and jails, the National Institute of Justice asked jurisdictions to report the physical dimensions of all "confinement units" and then assessed these units against a long-accepted "uniform" standard of 60 square feet of living space. When the researchers applied this standard to states' reported cells, they found that many of the state's confinement units failed to meet the uniform standard, meaning the nation's actual prison capacity was only half of what states reported. In other words, state prison overcrowding was far, far worse than the official numbers revealed.[21]

Even when states did allocate the substantial funds necessary to build more prisons, the new institutions almost immediately became overfilled.[22] A 1983 *New York Times* investigation found that that in at least 18 states, prisoners were "sleeping on floors" in chapels and gymnasiums. "We've been cramming beds into almost every space we can find," lamented Kenneth Robinson, the press secretary for Pennsylvania's Bureau of Corrections.[23] This mounting incapacity crisis raised alarm for legislators, who worried that overcrowding undermined anticrime efforts by making judges hesitant to sentence harshly, bail commissioners reticent to detain accused individuals in jail pretrial, and parole boards pressured to let prisoners out early. Anecdotes from the local level appeared to confirm their fears. Edward Koren of the American Civil Liberties Union's National Jail Project reported that Louisiana judges placed a sign on the court room wall that listed the court-ordered capacity of the jail "so they know how many people they can place in the jail each day."[24] Prison overcrowding plagued Specter's home state as well, especially in Philadelphia, where he had served as District Attorney. On a

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1984 tour of Philadelphia's Holmesburg Prison, Specter called the overcrowded facility's conditions "deplorable." "There were three men to a cell, a stopped toilet," he reported, complaining that the three Common Pleas judges appointed to oversee improvements had been "lax" in enforcement.[25]

Prison overcrowding also made prisons more susceptible to disturbances.[26] When imprisoned people at New Mexico's State Penitentiary took control of the prison for three days, leading to the death of 33 people, many cited the prison's overcrowded conditions—what one report called a "festering storage bin"—as a central catalyst.[27] Indicative of the truly national character of the crisis, a Wyoming state prison warden responded to the violence at New Mexico by warning, "It's only a matter of time before we'll have the same thing."[28] In Washington, DC, frequent disturbances broke out at Lorton Jail, where in 1983 more than 2,400 prisoners were "stacked two each in 7- by 10-foot cells" in an institution built for only 1,355 prisoners. After Lorton's prisoners set fire to mattresses and prompted the evacuation of 430 prisoners, a jail administrator called the institution a "ticking bomb."[29]

Amid the proliferation of state and local correctional disasters, state policy makers repeatedly pleaded with the federal government to help states improve and expand their correctional systems.[30] In 1983, Illinois's Governor James Thompson wrote Specter to express support for federal assistance for prison construction, which Specter had been championing. "As you know, Illinois is continuing to experience significant shortfall in prison bed space," he wrote, "We are clearly finding that with recent court decision and sentencing patterns our prison population will continue to outrun capacity." Even though the state "embarked upon an ambitious building program," he worried "state resources will likely be inadequate to meet our continuing incarceration needs."[31] That same year, the Commissioner of Pennsylvania's Bureau of Corrections, Ronald Marks, testified that his agency also "felt the burden" of what he called "tougher justice." He listed numerous strategies his Bureau had deployed to try to reduce overcrowding—adding cells, improving classification, and placing eligible prisoners in community service centers—but noted "in spite of all these efforts to improve conditions and relieve prison overcrowding, the Bureau's overcrowding problems continue to escalate." He implored the government to provide financial assistance for prisons, which he deemed necessary "if any progress is to be made."[32] The director of the American Correctional Association, Anthony Travisono, also expressed his frustration with federal government indifference to state and local prison overcrowding. "To hold correctional leaders and inmates hostage until we

resolve the question of whether or not to continue building," he wrote in his statement, "is in itself a crime."[33]

The mismatch between accelerating prison populations and insufficient state prison capacity developed in part from the federal government's comparatively minimal investment in state and local corrections during the 1970s heyday of federal law enforcement assistance. The creation of the Law Enforcement Assistance Administration (LEAA) in 1968 catalyzed an explosion of federal funding for state and local law enforcement in the 1970s. Created as part of President Lyndon Johnson's War on Crime in the 1968 Safe Streets Act but significantly expanded under President Richard Nixon, the LEAA became one of the fastest-growing agencies in the federal government.[34] The LEAA made funds available to states for planning agencies (Part B); for block action grants (Part C); and as "seed money" for training, equipment, research, and professionalization.[35] Funding for state and local corrections came under Part C funds.[36] Yet between 1969 and 1977, the LEAA disbursed just over $75 million total for construction of corrections institutions, or just 1.7% of its total disbursements during this period.[37]

This is not to suggest that the LEAA played only a small role in laying the groundwork for the late twentieth-century US carceral state. The LEAA's unprecedented allocations for state and local law enforcement materially expanded the state's capacity to punish and created momentum for states and localities to invest even greater sums of public funds into crime control.[38] But the agency's sparse disbursements toward state prison construction left states and localities to fend for themselves when dealing with the influx of prisoners that tough on crime policies produced.[39] As Franklin Zimring and Gordon Hawkins mused, "unlike education and highway building, where state administrative responsibility has been accompanied by substantial federal financial aid" when it came to constructing and managing prisons, "state governments in the United States pa[id] the overwhelming majority of all bills."[40]

The discrediting of federal assistance for state and local law enforcement intensified the federal government's unwillingness to fund state prison construction. Reports that the LEAA failed to decrease crime, produced bureaucratic waste, and facilitated corruption tarnished its reputation, and President Jimmy Carter cut the program entirely in 1980.[41] Fresh off the LEAA's shuttering, the Reagan administration refused to prioritize federal funding for state and local corrections.[42] Ironically, given Reagan's reputation for loudly supporting tough-on-crime policies as a means of telecommunicating anti-Black politics to his base, the 1980s saw a *decrease* in federal funding for

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state corrections. Between FY1980 and FY1983, no federal funds were authorized for state prison construction despite the fact that these years saw the largest increase in prisoner populations in United States history.[43] As journalist Ted Gest writes, although the majority of the Republican Party during the 1980s "favored more incarceration," their leaders "were even more emphatic about not spending federal tax dollars to help states do the job."[44]

Not all GOP congressional leaders thumbed their nose at the idea of federal assistance for state prisons. Senator Specter was one of the more vocal politicians fighting for federal funding in a post-LEAA landscape. He believed that state prison overcrowding prevented states from incapacitating individuals convicted of violent crimes, which he believed was necessary to protect public safety. In a 1985 fact sheet entitled "The Case for Federal Assistance to States for Prison Construction," Specter warned that over 21,000 prisoners were "released from state prisons in 15 states because of overcrowding," along with thousands more released pretrial from overcrowded jails. "A federal commitment of $200 million, on a 4:1 matching basis, could lead to additional state and local construction expenditures of $1 billion, adding 25,000 new beds each year, for a total of 100,000 by 1990," the fact sheet proposed.[45]

Throughout the 1980s, Specter repeatedly sought to allocate more federal funds for the construction of state prisons and jails in the federal budget.[46] For FY84 and FY85, Specter introduced amendments to budget resolutions that would have allocated additional $700 and $200 million for state prisons and jails respectively, but both additions were defeated. Specter also attempted to pass omnibus legislation in the 98th and 99th Congresses to implement a National Violent Crime Program that would direct $1 billion annually for state prison construction. With Senator Bob Dole (R-KS), Specter did secure $25 million to support federal matching grants for new prison construction, a comparably small but still notable replacement to the lost LEAA funds. Accordingly, the 1984 Omnibus Reconciliation Act (Pub. L. 98-473) authorized $25 million each year from FY1984 through FY1988 for state prison construction. However, the administration never requested funds for the program, so none were appropriated. In 1986 and 1987, as state overcrowding crises raged on, Specter attempted but failed to pass an Emergency Prison Expansion Act, which would have authorized $500 million annually to alleviate state prison overcrowding for a five-year period.[47]

For state policy makers invested in getting tough on crime but concerned about strained correctional capacity, the dearth of federal funding for prison expansion could not have come at a worse time. Despite the clear ascension of a law-and-order politics committed to retributive incapacitation, the early

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1980s economic recession and mass popular politics against taxation and government spending initially stifled states' efforts to allocate funds for prison construction. When states did manage to fund new prisons, voters' hostility toward tax increases meant they financed new correctional construction through long-term, high-interest bonds that deepened states' economic precarity.[48] Making matters worse, the federal judiciary handed down numerous rulings throughout the 1970s and 1980s that deemed overcrowded, antiquated, and abusive prisons to be unconstitutional, sometimes even placing entire correctional systems under federal court receivership.[49] By the early 1980s, the entire penal systems of eight states had been ruled unconstitutional by federal courts due to overcrowding and poor conditions, causing one commentator to characterize corrections in the United States as "a city under siege."[50]

With federal funding for state and local law enforcement not forthcoming, correctional officials, politicians, and criminal legal experts predicted a worsening prison overcrowding crisis unless state legislators relaxed sentencing laws or raised funds for prison construction. Given the political popularity of punitive sentencing policies and the dire fiscal straits of states and localities, neither of those options appeared likely. How to continue cracking down on apparently rising crime without exacerbating correctional catastrophe for the states tasked with detaining skyrocketing numbers of imprisoned people was a central dilemma for lawmakers of all political stripes during the Reagan era.[51] Save for the abandonment of punitive anticrime policy making—a pathway that no federal legislator appeared interested in seriously considering—or for a major shift in political attitude toward expanding federal funding for state corrections, the future of corrections looked grim. Was it possible, federal legislators wondered, to meet what Commissioner Marks called the apparent "mood … for 'tougher justice" as prison overcrowding accelerated and federal funding for prison construction remained scant?[52]

SPECTER'S NEW FEDERALISM

With his Armed Career Criminal Act, Specter thought he knew an answer. Newly elected to the US Senate in 1980, Specter was especially eager to fix the "problem" of judges failing to sentence "career criminals" to long prison terms, and he saw prison overcrowding as one significant barrier to such harsher sentencing.[53] As Philadelphia District Attorney from 1965 to 1973, Specter had been plagued by what he viewed as too-lenient sentencing practices—namely through the use of plea bargaining—and attempted to implement reforms to encourage "appropriate sentences imposed with

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recalcitrant judges." One piece of the problem, Specter observed, was that more professionalized and aggressive policing had overloaded the system and caused court backlogs, creating a need for relief in the form of plea deals or other arrangements.[54] Specter had also seen firsthand how Philadelphia's overcrowded prison system generated crises for criminal legal bureaucrats that could encourage prisoner releases and/or greater leniency in the use of detention. While Specter was district attorney, a prisoner uprising broke out at Philadelphia's Holmesburg Prison on July 4, 1970, that resulted in 103 people being injured. The institution had crowded 1,310 prisoners, 85% of them Black, into just 684 cells. Turner DeVaughn, an imprisoned person at Holmesburg, likened it to a "plantation in the old South" and described how cells built only to hold one person crammed in "two to three dudes in a cell." Reporters also found that prison inspection a year prior "concluded that overcrowded conditions and deteriorating buildings were endangering the health and welfare of the inmates."[55]

In the aftermath of the uprising, Specter agreed that "that over-crowding was a definite factor" in the disturbance and routinely spoke out against overcrowded conditions in the city an across the state. But he also struggled with the limitations that prison overcrowding posed on his power to fight crime via incapacitation.[56] Immediately after the uprising, a three-judge panel of the Common Pleas Court ruled in habeas corpus suit *Commonwealth ex rel. Bryant v. Hendrick* (1970) that conditions at Holmesburg constituted cruel and unusual punishment, leading to the release of two imprisoned petitioners.[57] Later that year, Common Pleas Court President Judge Vincent A. Carroll directed Specter to "review the bail status of all defendants in custody every 30 days" and to make recommendations for individuals to be released so that they "do not crowd the city's prison facilities." Even more worrisome than court-ordered releases were the practical barriers overcrowding posed to aggressive crime fighting endeavors. When asked about a new unit Specter formed to seize individuals who fail to show up in court after paying bail, Specter admitted that if the unit was successful, it would so overload the city's prisons with "fugitives" that his office would "have to disband the unit."[58] Amid such pressures to limit tough justice as a means of remedying prison overcrowding, Specter called Philadelphia's prison system a "total failure" and even filed a suit against the Governor for not building a new prison, demonstrating the extent of Specter's perceived powerlessness.[59]

With prisons bursting at the seams and state and municipal agencies apparently riddled with structural barriers to tough sentencing, Specter searched for a federal solution to the prison overcrowding, plea bargaining,

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and judicial leniency that he felt hindered effective criminal justice administration at the state and local levels.[60] He knew that more funds for state and local courts and prisons would not be forthcoming from the GOP-controlled Senate. So, despite being a junior Senator without many connections, Specter got to work developing an alternative federal response to crime control focused on the interlocking problems of plea/judge bargaining and state correctional incapacity.

Specter outlined his vision for a more robust federal government intervention into crime control in an article he published in *The ANNALS of the American Academy of Political and Social Science* with Paul R. Michel, Specter's counsel and administrative assistant. They began by acknowledging the central tension embedded in the federal government response to rising crime: the public wants bold action on crime control, but because crime control and penal management are under the jurisdictions of states and municipalities, sweeping federal intervention into anticrime efforts threaten to run afoul of federalism. Specter and Michel argued that past approaches to federal anticrime intervention, such as the LEAA, had generated waste and failed to curb crime.[61] The LEAA's problem, however, was not its raison d'etre of federal assistance to state and localities, but rather its failure to privilege the speediest and most cost-efficient solutions. A better federal crime policy, Specter and Michel argued, would concentrate its resources more strategically by focusing on what most prominent criminologists at the time deemed "the most dangerous and determined criminals—armed, violent, repeat offenders" who committed the "most dangerous crimes—robbery, rape, kidnapping, contract, murder, and residential burglary" on a habitual basis.[62] At the same time, Specter and Michel reported that the "current difficulties of the economy" meant "additional funds are simply not available now," and so "many reforms must wait."[63] What was needed, then, was a fiscally lean and purposeful crime control program that imprisoned criminal offenders for long periods.

Specter and Michel's remedy was a "federal prosecutions" approach that would "remove armed career criminals from society quickly and surely" without straining federal resources.[64] They acknowledged that crime is largely a state and local responsibility but insisted that "states alone cannot do an adequate job of protecting the public from violent career offenders."[65] So they urged the federal government to reconceptualize its jurisdiction by expanding federal enforcement in prosecuting career criminals. Crimes already covered by federal law, such as commercial robberies, could be more readily enforced, and those not covered by federal law, such as residential robberies and

burglaries, could be brought under federal jurisdiction. Specter and Michel pointed out that many of the latter crimes contained elements that justified federal enforcement. Burglaries, they reasoned, affected interstate commerce because "professional burglars" often traveled or sold stolen goods across state lines. Similarly, the possession of a firearm by someone who has been convicted of a crime violated federal law under the 1968 Gun Control Act.[66] The federal government could use those powers to expand its prosecutorial reach over those who repeatedly committed violent crimes. Such a strategy would not violate federalism, Specter and Michel argued; in fact, it followed the interpretations of numerous federal laws, such as the Racketeering Influenced and Corrupt Organization statute, that justified federal intervention into the prosecution of so-called violent street crimes.

At the center of Specter and Michel's new federalism was its proposal to flex federal prosecutorial power over burglaries and robberies, which "go to the heart of the street crime problem" and thus required, in their view, particular targeting by the federal government. This deployment of federal prosecutorial power would ease the burden on states and localities drowning in court backlogs and overcrowded prisons. Specter sought to transform that principle into policy with his S. 1688, the Armed Career Criminal Act. The law would make the commission of armed robbery or a burglary by someone with two or more prior convictions a federal offense that carried a 15-year mandatory sentence in federal prison. In addition to slapping a lengthy sentence on such offenses, Specter and Michel reasoned that the federal court system moves more swiftly than state courts, thus eliminating delays from backlogs or overcrowding.[67] This was the beauty of S. 1688: it could bring prosecutions forward "without increasing the resources materially at any stage of the criminal process." Specter acknowledged that federal prisons might be affected by increased populations. But he argued that federal prisons were less overcrowded than state prisons and that prosecuting "armed career robbers and burglars" should be the priority of limited federal resources.[68]

In devising the ACCA, Specter was at the "vanguard" of new federal approaches to crime control in the 1980s.[69] For Specter, the federalization of crime control reflected both his frustrations as a district attorney stymied by carceral crisis and a pragmatic assessment of the core political tension around crime control in Washington, where Reagan and some GOP lawmakers desired the political payoff of tough-on-crime policies but recoiled at the costs of implementing those policies on the ground. With municipal and state budgets facing "reductions" in funding under the Reagan administration's call for more "restraint," Specter and Michel lamented that state and local

governments could not meet those material costs on their own.[70] "Perhaps over a period of twenty years, the criminal justice systems in … large cities can be improved to the point that they are fully effective and need no federal help against career criminals," they wrote, "But society cannot wait that long."[71] In Specter's estimation, federalizing crime control was not about implementing a federal power grab, although some legislators certainly saw it this way.[72] Rather, it was a response to an urgent carceral crisis that threatened to thwart his and his colleagues' efforts to get tough on crime.

Specter certainly did not see the ACCA purely as a way to ease the crisis of state prison and local jail overcrowding. As he said when he introduced the bill, he wanted to "employ federal prosecutorial forces against violent crime" in the hope that those forces could more effectively prosecute the people he thought most responsible for rising violent crime rates.[73] Yet the idea of leveraging federal prosecutorial power to prosecute so-called career criminals developed out of Specter's acute awareness of the carceral crisis of prison overcrowding and court backlogs that, in his estimation, prevented states and localities from properly attending to violent crime. The ACCA's potential for mitigating these crises by taking the most dangerous offenders out of the hands of local criminal legal systems ill-equipped to sentence them quickly and sufficiently was central to its appeal, particularly for state and local officials who might otherwise resist such sweeping federal intervention into the decentralized realm of crime control.

As Specter attempted to move the legislation through committees, the ACCA's capability for easing the problem of state prison overcrowding and court backlogs became a recurring theme. At the same hearing in which Chuck Stone spoke of Graterford's hostage crisis, the District Attorney of Massachusetts' Suffolk County, Newman Flanagan, celebrated S. 1688's accelerated and mandatory sentencing and its transfer of offenders from overburdened state correctional institutions to less crowded federal ones.[74] Many jurisdictions faced court orders to reduce their prison populations, he said, and in others "prisons are so overcrowded that judges are reluctant to sentence a convicted felon to a long term sentence."[75] A year later Deputy Assistant Attorney General Roger M. Olsen described Specter's bill as a "safety valve to relieve some of the pressure from the State systems with a minimum use of Federal resources." When pushed by Congressman William Hughes about whether expanding federal jurisdiction over repeat offenders was the best strategy, Olsen again pointed to state and local prison overcrowding. "I think the idea is that States now have prisons that are overcrowded, that cause early release of offenders, that their courts are more crowded than the federal system is,"

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Olsen contended, suggesting that the ACCA was "perhaps one way of reevaluating that and providing direct assistance to States and locals."[76] The Committee on the Judiciary's 1982 Report on the Armed Career Criminal Act of 1982 similarly emphasized the legislation's benefits for reducing state and local prison overcrowding. Speaking about the crisis, the report noted that the "greatest insufficiency in resources is in the area of corrections" and that "severe overcrowding of many state prison systems and the county jails in urban counties has caused great pressure on state judges against imposing appropriately lengthy sentences for violent and repeat offenders."[77]

CARCERAL CRISIS, STILL: THE ARMED CAREER CRIMINAL ACT AND THE FAILURE OF SPECTER'S NEW FEDERALISM

Federalizing the incarceration of "career criminals," however, was easier said than done. Although Specter and others stressed how the ACCA would respond to the problem of state prison overcrowding, they immediately came up against resistance from local prosecutors who saw the ACCA as threat to their jurisdiction over the control of violent criminals. "One of the issues which has been very troublesome and really the heart of the problem," Specter explained at a 1982 hearing, "turns on our ability to formulate a program which leaves local autonomy in the vast majority of cases." Although he insisted the ACCA sought to "supplement" local prosecution by creating a "category of assistance where resources are not sufficient or patterns of sentencing are insufficient," skepticism and hostility from local district attorneys put pressure on Specter and his allies to weaken the bill's federal reach into crime control and instead promote its potential utility at the local prosecutorial level. [78]

In fact, although Specter and other legislators' wanted the ACCA to disrupt the process of plea bargaining—thus allowing the federal government to harshly punish individuals who might otherwise receive more lenient sentencing in crisis-riddled states—they ultimately avoided adding provisions that would prevent the ACCA from enhancing local plea bargaining arrangements.[79] In his remarks on the bill's introduction in 1982, Specter detailed how a core benefit of the ACCA was merely the threat of federal prosecution of a 15-year mandatory sentence, which would discourage defendants from "manipulating the State court system through judge shopping."[80] Republican Congressman Harold Sawyer (R-MI) pointed out this discrepancy when he noted that other federal laws are "used for plea bargaining purposes," and that he assumes the ACCA would do the same. When Sawyer suggested putting in some "teeth" to the legislation to ensure it "cannot be used for plea

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bargaining," which he said "defeats the intent of the law," the bill's primary sponsor in the House, Ron Wyden (D-OR) suggested that eliminating District Attorney's ability to use the federal law as leverage in plea bargaining would kill the bill. Wyden admitted that his reluctance to restrict plea bargaining stemmed from the sponsors' desire to maintain the support of local officials, who were primarily attracted to its plea-bargaining possibilities despite the ACCA's original intention to reduce them. "Local law enforcement officials around the country are coming out for this, and coming out strongly," he noted, "that is why I would like to keep this close to what we have got now and attack the plea bargaining issue in a separate legislative initiative."[81]

In September 1982, the Senate passed S. 1688 with only one "no" vote and six abstentions. Specter secured verbal approval for the bill from President Reagan, Attorney General William French Smith, Counselor to the President Edwin Meese and, after some persistence, from key bureaucrats in the Justice Department. But Reagan vetoed the crime bill on January 14, 1983.[82] Ironically, his veto stemmed from the main compromise Specter had made to get the bill passed through committees: local prosecutors would have veto power over US attorneys, a change that the National District Attorneys Association and their powerful legislative backers Sen. Strom Thurmond (R-SC) and Edward Kennedy (D-MA) had demanded.[83] Reagan considered that restraint on federal prosecutors unacceptable.

Specter reintroduced the ACCA, now S. 52, to the Senate just 12 days later.[84] Even in the face of considerable roadblocks encountered in securing the bill's passage, Specter maintained his belief that the ACCA was a "magical solution," as one staffer put it, and doubled down on his efforts in 1983.[85] As he urged his peers to "retake the ground lost in our fight against crime and recapture legislative momentum," the bill's potential to ease state and local carceral crises remained central to Specter's pitch.[86] In his reintroduction speech, Specter emphasized that "criminal justice systems are so severely overloaded as to be incapable of effectively deterring or punishing career criminals" because of court backlogs and prison overcrowding, both of which "encourage excessive plea bargaining and unduly short sentences." "Consequently," Specter added, "career criminals remain at liberty to continue their crime sprees." At a hearing held that April in Pennsylvania, attendees again contextualized S. 52 as a remedy to overcrowded prisons and jails, which they identified as the number one crisis confronting law enforcement in the state. Dauphin County District Attorney Richard Lewis found S. 52 "attractive" because it would impose a tough sentence that "would be served in a federal institution and not in an overcrowded state prisons."[87] Pennsylvania's Bureau

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of Corrections Commissioner, Ronald Marks, agreed, noting "the ability to have people committed to the Federal prison system versus the State system looks very appealing."[88]

At the same time, Specter's desire to keep local district attorneys supportive of the bill led him to increasingly frame the ACCA as beneficial to local criminal prosecution. Sometimes, Specter used this framing even alongside mention of the legislation's role in reducing state prison overcrowding, even though the former dynamic negated the latter. At the same 1983 hearing where Marks celebrated the ACCA's benefits for circumventing overcrowding, Dauphin County District Attorney Lewis stated that the ACCA would give his office "a great amount of leverage" in processing cases.[89] Based on his experience as district attorney, Specter estimated the legislation would send roughly five out of 500 career criminals to Federal prosecutors while the other 495 would stand trial or accept plea bargains. "They would not have gotten 15 years in our State system, but they might have gotten 5 or 10," he explained. Similarly, even as Congressman Al Gore (D-TN) state the ACCA "may be useful as a way of dealing with the state prison overcrowding problem" that "reduces the possibility that overload in the corrections system will diminish the severity of punishment," he also saw it as a "another weapon in their arsenal" in securing tough sentences at the state level. At the time, Tennessee's state prisons were operating at 122% of capacity.[90]

The persistent tensions within the ACCA came to a head when the powerful Chairman of the Senate Judiciary Committee and virulent states-rights champion Strom Thurmond presided over hearings on the ACCA. Thurmond used this forum to raise constitutional concerns that had bubbled up in the discussion of the bill from local prosecutors and the National District Attorneys Association. The crux of the issue was technical—to ensure that the bill did not offend the Justice Department's objections that local prosecutors would have veto power over US attorneys. To address those objections, Specter had put language into the bill about local district attorney needing to "request or concur in the action by the US attorney." At the May 1983 hearing Specter explained that his intention remained to "limit" the federal government's reach. Thurmond wasn't mollified. "I've studied the Constitution all my life," he said, "we should keep the Federal Government out of the State's business, and the State out of the Federal government's business… . We're making an exception here, and frankly, I am very dubious about the constitutionality of it."[91]

As the district attorneys and their congressional allies gained steam, Specter's goal of creating a new federal crime that would justify federal

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jurisdiction over local crime control quickly slipped away. Once the bill reached the Senate floor in February 1984, Senators Kennedy and Thurmond introduced an amendment that would have greatly limited the bill's scope by requiring that the prior burglary or robberies committed by an offender must have fallen within federal jurisdiction (i.e., the burglary or robbery must have been committed against federally insured banks or post offices). The amendment passed 77-12. Once the bill was before the House Judiciary Committee, Specter was able to reextend its scope by focusing on gun possession by a convicted felon, which was already a federal crime and thus did not violate federalism concerns. The House version then toughened the sentence for gun possession to mirror what had been included in the ACCA—requiring a sentence of a minimum 15 years to life—making it so that anyone who was convicted for possession of a gun who had also been previously convicted of three felony convictions for robberies or burglaries would be eligible for prosecution under the ACCA. In other words, the "triggering offense" was now gun possession, and not prior conviction of a robbery or burglary, which meant that it "permitted no federal prosecution of anyone who could not be prosecuted under existing federal law." This version of the bill, now called the Armed Career Criminal Act of 1984, was attached to the omnibus Comprehensive Crime Control Act, which Reagan signed into law on October 12, 1984.[92]

Although it restored some of the power that had been stripped by Kennedy and Thurmond, the change represented a "more restrictive" compromise that limited the bill's ability to remove criminal offenders from state criminal legal systems.[93] The complaints from local prosecutors and their allies ensured that the ACCA did not ultimately create a *new* federal crime but rather only extended the sentence of an already existing federal offense. In practice, the ACCA operated less as a means for transferring the prosecution and imprisonment of so-called violent criminals to the less burdened federal system and more as a leveraging tool for local district attorney's to procure tougher plea deals from criminal defendants.[94] As a result, the ACCA likely exacerbated state prison overcrowding crises by giving district attorneys' the upper hand in extracting harsher sentencing deals from defendants. Specter himself came to tout the leveraging aspects of the ACCA as the "most important aspects of the statute" for its ability to procure "guilty pleas and stiff sentences," perhaps because in a roundabout way this leverage fulfilled Specter's goal of securing tough prosecution no matter how crowded state prisons or clogged local courts might be.[95] Ultimately, the multilayered and diffuse points of decision making in the federalist system mixed with the

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unwillingness of politicians to reconsider the costs of their commitment to law and order governance produced a criminal legal system riddled with crises of carceral incapacity. Despite Specter's attempts to construct a federal solution to this crisis without either expending federal funds or worsening the calamity of state prison overcrowding, his ACCA ultimately stoked rather than ameliorated the problems of carceral crisis he hoped to help solve.

CONCLUSION

Specter's ACCA, and his broader vision of federalizing crime control on a budget, failed to meaningfully address state prison overcrowding disasters rapidly advancing across the country. By 1988, 34 state prison systems operated at 100% or more of their highest reported capacity, and by 1989, 35 states and the District of Columbia faced court orders or consent decrees due to prison overcrowding.[96] Eventually, even state legislators who had resisted allocating more funding for prison construction increased their spending on prison construction due to the unrelenting crises of overcrowding, prison conditions litigation, the popularity of law-and-order politics, and the emergence of what Ruth Wilson Gilmore calls the "prison fix" for rehabilitating rural economies ravaged by deindustrialization.[97] But it wasn't until the passage of President Bill Clinton's 1994 Crime Bill that substantial federal funding for state prisons became available.[98] Yet, even this new federal funding stream for prison construction had only a marginal influence on helping states increase their prison capacity.[99] A RAND evaluation of the Violent Offender Incarceration/Truth-In-Sentencing Incentive (VOI/TIS) Grant Program authorized by the 1994 Crime Bill reported that the program's accomplishments were "modest," with the "median number of beds completed or under construction … a small fraction of capacity." In over half of the states, prison capacity funded by the VOI/TIS program amounted to "less than 4%."[100]

At no point in the long history of state prison overcrowding crises did federal or state legislators see carceral incapacity as a reason to reconsider their pursuit of anti-Black, tough-on-crime policing and punitive sentencing policies. In line with the broader retributive shifts in sentencing and penological practice in late twentieth-century penal administration, the warehousing of primarily racially marginalized and poor people deemed irreparably criminal was very much the point.[101] But the problem of prison overcrowding that law-and-order politics produced was not so easily managed by legislators and correctional bureaucrats who wrestled with escalating and locally sustained correctional costs, federal court mandates to decarcerate and/or reform their

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overpopulated prisons, and prisoner unrest, all of which threw state and local correctional systems into disarray and placed the central infrastructure of the carceral state into question. Even as a bipartisan bloc of legislators, researchers, and bureaucrats embraced increasingly punitive forms of governance, the tenets of US federalism made the process of implementing this carceral future fraught and unstable. This "frenetic and confused" period of carceral state development, driven by the crisis of prison overcrowding and the dilemmas of funding and governance they provoked, suggest that the rise of mass criminalization and incarceration was less a tale of inexorable and unmitigated carceral expansion than is commonly understood.[102] Rather, the carceral state ascended through a more contingent and fractured process wherein federal policy makers, the judiciary, and state and county policy makers had to navigate the considerable *limitations* of decentralized crime control to construct the mass imprisonment behemoth that exists today.

This is neither to contest the reality of the late twentieth-century carceral leviathan nor to diminish the unprecedented racialized and gendered state violence that it normalized and unleashed. More state prisons and local jails were eventually built, even without extensive federal government support.[103] Moreover, as numerous scholars have detailed, many federal court consent decrees seeking to address prison overcrowding paradoxically fueled prison construction, thereby facilitating the growth of the carceral state.[104] In 1991, state expenditures on capital outlays for corrections peaked at $4.6 billion. Between 1990 and 1995, the number of state and federal correctional facilities in operation increased 17%.[105]

But the crisis of overcrowding had not been quashed. Despite the increase in prison capacity, 40 out of 50 state prison systems remained at capacity or overcrowded in 1996.[106] The federal government's response, however, was neither to incentivize decarceration and sentencing reform nor to drastically increase federal expenditures for prison construction. Rather, Congress sought to limit imprisoned people's power to bring forward federal suits challenging unconstitutional and overcrowded prison conditions. Passed by a Republican-controlled Congress and signed into law under Clinton, the 1996 Prison Litigation Reform Act made it extremely difficult for prisoners to bring lawsuits against prison systems and substantially limited the ability of federal courts to impose and uphold court orders to reduce overcrowding.[107] In other words, rather than assisting states in building their way out of the crisis of carceral incapacity with federal dollars, the federal government instead helped them reduce their liability for overcrowded and inhumane prison conditions. This approach was cost effective for the federal government, requiring no new

expenditures for state prison construction, while still helping state policy makers maintain carceral politics no matter the enormity of their prison overcrowding crises.[108] For federal policy makers, it seemed the best remedy for state prison overcrowding was simply normalizing its existence and, in turn, the political project of racialized mass imprisonment, by restricting prisoners' access to federal courts and raising the threshold for proving prison overcrowding's unconstitutionality.

The history of the federal nonresponse to state prison overcrowding and Specter's failed attempt at addressing it through the ACCA offer several insights for the history of the United States carceral state. First, historians have not yet grappled with how a mixture of American federalism's decentralization of criminal legal administration, the dissolution of the LEAA, and Reagan-era fiscal conservatism created a massive crisis of state prison overcrowding. Historians have thus overlooked how the state prison incapacity required federal and state policy makers to make often-contested decisions regarding the construction and administration of a tough-on-crime criminal legal system. To be sure, the federal government's power over crime control did substantially grow in the late twentieth century. But it did not do so evenly.[109] Although it is true that the racialized carceral state is in many ways the "culmination of" a "long mobilization … against crime," the construction of the actual administrative structures and capacity of the prison nation—literally, the prison beds in question—was a far more uneven and fraught process, forged in spite of near-total federal state absence.[110]

Although it ultimately contributed to state prison overcrowding rather than addressing it, Specter's ACCA must be understood as an attempt to respond to a broader crisis of carceral incapacity in the states by scrambling to preserve it through controversially federalizing crime control. Examining these political decisions against a broader context of carceral incapacity and crisis of state prison overcrowding helps clarify both the political contingencies of racialized mass incarceration's development and, perhaps more importantly, the political pathways ignored or closed off by legislators committed to law and order. The late twentieth-century crisis of prison overcrowding demonstrates that despite clear evidence of the carceral state's administrative unsustainability and production of mass racialized state violence, federal legislators were unable—or more accurately unwilling—to envision policy alternatives outside of the retributive politics of mass criminalization, or what Elizabeth Hinton and DeAnza Cook have termed America's enduring "anti-black punitive tradition."[111] The result was the continued growth of a United States anti-Black carceral regime. But this growth was not foretold by the

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ghosts of policies past. Instead, expanding the carceral state under the United States' diffuse system of federalism provoked ongoing crises of capacity that required active carceral reimagination by state and federal policy makers repeatedly confronted by mass imprisonment's political instability and strain on state resources, along with increasing and inconvenient evidence of mass incapacitation's ineffectiveness in decreasing crime.

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NOTES

1. The hearings also discussed S. 1689, which would have authorized the life imprisonment of "habitual criminals" in federal prisons, and S. 1690, which would have required states to ensure imprisoned people had a marketable job skill and basic literacy before they released them on parole. Although S. 1689 was "carried along for a while as a useful adjunct to the main bill," neither of these two bills went very far, and Specter himself appears to have seen S. 1688 as the primary legislation to pursue. As Richard Fenno reported, by the end of October 1981, Specter was expressing "privately" that "The only part of the package that has any chance of passing is the first part." See Richard Fenno, *Learning to Legislate: The Senate Education of Arlen Specter* (Washington, DC: Congressional Quarterly, 1991), 47.

2. *Career Criminal Life Sentencing Act of 1981, Hearings Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary of the United States Senate*, 97th Cong. 154–162 (1981) (testimony of Chuck Stone, columnist at the *Philadelphia Daily News*).

3. *Career Criminal Life Sentencing Act of 1981*, 154–162 (testimony of Chuck Stone, columnist at the *Philadelphia Daily News*).

4. See Tera Eva Agyepong, *The Criminalization of Black Children: Race, Gender, and Delinquency in Chicago's Juvenile Justice System, 1899–1945* (Chapel Hill: University of North Carolina Press, 2018); Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity* (Chapel Hill: University of North Carolina Press, 2016); Elizabeth Hinton, *From the War on Poverty to the War on Crime* (Cambridge, MA: Harvard University Press, 2016); James Forman, *Locking Up Our Own: Crime and Punishment in Black America* (New York: Farrar, Straus and Giroux, 2017); Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime and the Making of Modern Urban America* (Cambridge, MA: Harvard University Press, 2010); Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge: Cambridge University Press, 2012); Julilly Kohler-Hausmann, *Getting Tough: Welfare and Imprisonment in 1970s America* (Princeton, NJ: Princeton University Press, 2017); Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of Punishment* (Palo Alto, CA: Stanford University Press, 2009); Kelly Lytle-Hernandez, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771-1965* (Chapel Hill: University of North Carolina Press, 2017); Jennifer Manion, *Liberty's Prisoners: Carceral Culture in Early America* (Philadelphia: University of Pennsylvania Press, 2015); Rebecca McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (Cambridge: Cambridge University Press, 2008); Naomi Murakawa, *The First Civil Right: How Liberals*

Built Prison America (New York: Oxford University Press, 2014); David Oshinsky, *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996); Heather Schoenfeld, *Building the Prison State: Race and the Politics of Mass Incarceration* (Chicago: The University of Chicago Press, 2018); Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *Journal of American History* 97, no. 3 (2010): 703–34.

5. See Simon Balto, *Occupied Territory: Policing Black Chicago from Red Summer to Black Power* (Chapel Hill: University of North Carolina Press, 2019); Vanessa Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* (Oxford: Oxford University Press, 2009); Michael C. Campbell and Heather Schoenfeld, "The Transformation of America's Penal Order: A Historicized Political Sociology of Punishment," *American Journal of Sociology* 118, no. 5 (2013): 1375–1423; Robert T. Chase, We Are Not Slaves: State Violence, Coerced Labor, and Prisoners' *Rights in Postwar America* (Chapel Hill: University of North Carolina Press, 2020); Max Felker-Kantor, *Policing Los Angeles: Race, Resistance, and the Rise of the LAPD* (Chapel Hill: University of North Carolina Press, 2018); Amanda Hughett, "A 'Safe Outlet' for Prisoner Discontent: How Prison Grievance Procedures Helped Stymie Prison Organizing during the 1970s," *Law & Social Inquiry* 44, no. 4 (2019): 898–921; Toussaint Losier, "Prison House of Nations: Police Violence and Mass Incarceration in the Long Course of Black Insurgency in Illinois, 1953-1987" (PhD diss., The University of Chicago, 2014); Mona Lynch, "Mass Incarceration, Legal Change, and Locale," *Criminology & Public Policy* 10, no. 3 (2011): 673–98; Mona Lynch, *Sunbelt Justice*; Donna Murch, "Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth-Century War on Drugs," *Journal of American History* 102, no. 1 (2015): 162–73; Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* (New York: Picador/Henry Holt & Co, 2010); Melanie Newport, "Jail America: The Reformist Origins of the Carceral State" (PhD diss., Temple University, 2016); Heather Schoenfeld, *Building the Prison State*.

6. Joshua Guetzkow and Eric Schoon, "If You Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation," *Law & Society Review* 49, no. 2 (2015): 402.

7. For example, Jonathan Simon argues that beginning with Nixon, presidential administrations easily pursued wars on drugs because the "interstate and international commerce" element justified federal intervention. See Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2006), 30.

8. Campbell and Schoenfeld, "The Transformation of America's Penal Order, 1375–1423, 1377.

9. See Malcolm M. Feeley and Edward L. Rubin, *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1998); Margo Schlanger, "Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders," *New York University Law Review* 81, no. 2 (2006): 550–630.

10. Here I offer a play on Heather Schoenfeld's conceptualization of "carceral capacity." In her study of Florida's post-WWII crime and penal politics, Schoenfeld importantly contends that the story of mass incarceration needs to be told through the lens of a "state capacity to punish," or "carceral capacity," which moves beyond an analysis

of political rhetoric and instead interrogates the actual "bureaucratic structures, new frontline and administrative positions, new staff training, and new protocols across the institutions of the criminal justice system" that concretely expanded the state's ability to punish and incapacitate so many people. This article shows that just as significant are the moments of carceral *in*capacity, where the state struggled to create the capacity necessary to detain the masses of people being sent to prison by increasingly punitive policing practices and sentencing policies. See Heather Schoenfeld, *Building the Prison State*, 16.

11. Ashley T. Rubin, *The Deviant Prison: Philadelphia's Eastern State Penitentiary and the Origins of America's Modern Penal System, 1829-1913* (Cambridge: Cambridge University Press, 2021), 12–13, 16, 19, 22. Rubin also details how overcrowding frequently beset Pennsylvania's Eastern State Penitentiary, built in 1829, with a notable spike after the Civil War; see 303–18. For other discussions of pre-1960s prison overcrowding see Rebecca M. McLennan, *The Crisis of Imprisonment*; Dan Berger and Toussaint Losier, *Rethinking the American Prison Movement* (New York: Routledge, 2018); David J. Rothman, "Perfecting the Prison: United States, 1789-1865"; Edgardo Rotman, "The Failure of Reform: United States, 1865-1965," in Norval Morris and David J. Rothman, eds. *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995), 169–97. Charles Bright, *The Powers That Punish: Prison and Politics in the Era of the "Big House," 1920-1955*, (Ann Arbor: University of Michigan Press, 1996).

12. "Report on Penal Institutions, Probation, and Parole," in *U.S. Wickersham Commission Reports U.S. National Commission on Law Observance and Enforcement* (Washington, DC: US Government Printing Office, 1931), 231–34.

13. See Berger and Losier, *Rethinking the American Prison Movement* and Heather Ann Thompson, *Blood in the Water: The Attica Prison Uprising and Its Legacy* (New York: Vintage Books, 2016).

14. *Law Enforcement Assistance Amendments: Hearings Before the Subcommittee No. 5 of the Committee on the Judiciary on HR 14341, HR 15947, and Related Proposals to Amend the Omnibus Crime Control and Safe Streets Act of 1968*, 91st Cong. (1970); *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1977: Hearings Before a Subcommittee of the Committee on Appropriations on H.R. 14239*, 94th Cong. (1976); *The Problem of Prison Overcrowding and Its Impact on the Criminal Justice System, Hearing Before the Subcommittee on Penitentiaries and Corrections of the Committee on the Judiciary*, 95th Cong. (1977); *Restructuring the Law Enforcement Assistance Administration, Hearings before the Subcommittee on Crime of the Committee on the Judiciary*, 95th Cong. (1977).

15. *The Problem of Prison Overcrowding and Its Impact on the Criminal Justice System, Hearing Before the Subcommittee on Penitentiaries and Corrections of the Committee on the Judiciary*, 95th Cong. 2 (1977) (statement of Joe Biden, Chairman of the Subcommittee on Penitentiaries and Corrections of the Committee on the Judiciary in the US Senate).

16. Theodore Caplow and Jonathan Simon, "Understanding Prison Policy and Population Trends," *Crime and Justice* 26 (1999): 74; Guetzkow and Schoon, "If You Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation." Indeed, state prison populations actually *decreased* during the mid-1960s and into the early 1970s but spiraled upward beginning in 1973 and then quickly surpassed prior state prison population records in 1974. See Patrick A. Langan, John V. Fundis, Lawrence A. Greenfield, and

Victoria W. Schenider, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1935-1986* (Washington DC: US Department of Justice, Bureau of Justice Statistics, 1988).

17. Between 1925 (when the Bureau of Justice Statistics began gathering data on state and federal prison populations) and 1975 prison population rates generally trended upward, but significant drops in prisoner populations during World War II and the Vietnam War disrupted this unfettered growth such that in 1968 the prison population was at its lowest rate since the 1920s (188,000). Beginning in 1974, state and federal prisoner populations began skyrocketing dramatically, with nearly 300,000 prisoners added to the population and the highest ever recorded incarceration rate in US history by 1985. From 1973 to 2009, state and federal prison populations grew from 200,000 to 1.5 million people, not including an additional 700,000 people imprisoned in jails. Although prison and jail populations declined somewhat in the past decade—notably declining from 2.1 million in 2019 to 1.8 million by mid-2020 due to the pandemic—the United States is still the world's leader in incarceration, imprisoning nearly 25% of the world's prisoners despite containing only 5% of the world's population. See "Prisoners 1925-1985," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, October 1986), 2; Jacob Kang-Brown, Chase Montagnet, and Jasmine Heiss, *People in Jail and Prison in 2020* (New York: Vera Institute of Justice, 2021); Jeremy Travis, Bruce Western, and Steve Redburn, eds. *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: The National Academies Press, 2014).

18. "Prisoners in 1986," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, May 1987), 5. Beginning in 1983, the growing problem of prison overcrowding prompted the Bureau of Justice Statistics to ask jurisdictions to report capacity estimates. As the Bureau of Justice Statistics notes in their reports, the concept of prison capacity contains within it many potential definitions such that "capacity may reflect both available space to house inmates and the ability to staff and operate an institution. The Bureau of Justice Statistics asked states to provide them with three measures to determine prison capacity: rated ("number of beds or inmates assigned by a rating official to institutions within the state"), operational ("number of inmates that can be accommodated based on a facility's staff, existing programs, and services"), and design capacities ("the number of inmates that planners or architects intended for the facility"). Reporting jurisdictions, however, did not all provide each of these reports or reported imprecisely, choosing to submit only one capacity measure or gave the same figure for each capacity measure they reported. Given these data issues, the Bureau of Justice Statistics measured prison overcrowding by assessing a state's prison population compared with both their "highest capacity" and "lowest capacity," pulling from the high and low ends of capacity measures provided by the states. Moreover, even among corrections professionals, guidance and standards regarding correctional space varied. For example, in 1980 the American Correctional Association recommended that adult correctional institutions maintain "one inmate per room or cell … of at least 60 square feet" and the US Department of Justice recommended that "all cells and detention rooms rated for single occupancy house only one inmate," with these cells having "at minimum, 50 square feet of floor space." Capacity measures were generally determined by state correctional officials "using whatever criteria they believe to be most appropriate" and without meaningful federal oversight. See

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"Prisoners in 1983," *National Prisoner Statistics Bulletin* (Washington, DC: US Government Printing Office, April 1984); "Prisoners in 1986," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, May 1987); "Prisoners in 1987," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, April 1988); "Prisoners in 1988," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, April 1989); "Prisoners in 1989," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, May 1990); Joan Mullen and Bradford Smith, *American Prisons and Jails, Volume III: Conditions and Costs of Confinement* (Washington, DC: National Institute of Justice, 1980), 40–42.

19. "Prisoners in State and Federal Institutions," *National Prisoner Statistics Bulletin* (Washington, DC: US Government Printing Office, December 31, 1977), 1; US Department of Justice, "Prisoners in 1989," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, May 1990), 5.

20. Christopher J. Mumola and Allen J. Beck "Prisoners in 1996," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, June 1997), 6.

21. More specifically, following the Commission on Accreditation for Corrections and Department of Justice's standard of 60 square feet minimum for prisoners who spend less than 10 hours per day in their cells, the researchers determined all confinement units with less than 120 square feet of floor space to have capacity for just one prisoner, given that more than one person in those cells would result in each individual having less than 60 square feet of space. When they applied the 60 square feet uniform standard to the cell spaces reported by the states, researchers found "substantial discrepancy between state definitions of capacity and the study's uniform definition based on square footage," resulting in the "loss of one-quarter of the spaces reported." If cells with less than 60 square feet were removed from the calculation of usable cells, the reported capacity of federal, state, and local correctional facilities was sliced in half. See Joan Mullen and Bradford Smith, *American Prisons and Jails, Volume III: Conditions and Costs of Confinement*, 41–56.

22. Stephen D. Gottfredson and Ralph B. Taylor, *The Correctional Crisis: Prison Populations and Public Policy* (Washington, DC: National Institute of Justice, 1983); Carla Rivera, "Rapid Overcrowding of Prison Predicted," *The Los Angeles Times*, December 12, 1985.

23. "State Prisons around Nation Scramble for Relief as Overcrowding Mounts," *New York Times*, September 29, 1983.

24. Leslie Maitland Werner, "Overcrowding Spreads to Jails in US," *New York Times*, November 23, 1983.

25. "Holmesburg Prison Tour, Conditions Shock Specter, State Briefs Pennsylvania," *Associated Press*, August 23, 1984.

26. Robert E. Taylor, "More Riots are Feared as Overcrowding Fuels Tensions Behind Bars," *Wall Street Journal*, August 18, 1981.

27. Cynthia Gorney, "The Festering Storage Bin in New Mexico," *Washington Post*, February 10, 1980.

28. "Crowding in Prisons Worrying Officials," *The New York Times*, February 10, 1980.

29. Al Kamen and Ed Bruske, "Overcrowding in DC Jail Again an Issue," *Washington Post,* July 6, 1983.

30. *Federal Assistance to State and Local Law Enforcement—Prisons: Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary*, 98th Cong. 2 (1983) (testimony of Senator Al D'Amato).

31. Governor James Thompson to Senator Arlen Specter, November 14, 1983, folder 5: "Prison Overcrowding," 1983, box 146, Arlen Specter Senatorial Papers, Group 2. Legislative Files, 1965-2011, TJU.2010.01.02, Thomas Jefferson University (managed by the University of Pittsburgh Library System; hereafter cited as Spector Papers).

32. *Federal Assistance to State and Local Law Enforcement Systems, Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary*, 98th Cong. 40–44 (1983) (testimony of Pennsylvania Bureau of Corrections Commissioner, Ronald Marks).

33. *On The Status of Our Nation's Prisons with a Focus on the Appropriate Role of the Federal Government in Building and Supporting the Prisons*, *Hearing Before the Subcommittee on the Juvenile Justice of the Committee on the Judiciary*, 98 Cong. 19, 48 (1983) (statements of Robert Landon, Director of Corrections for the Commonwealth of Virginia and Anthony Travisono, Executive Director of the American Correctional Association).

34. Between 1969 and 1977, Congress appropriated a total of $5.9 billion to the agency. See Hinton, *From the War on Poverty to the War on Crime*; Murakawa, *The First Civil Right*; Stuart Schrader, *Badges without Borders: How Global Counterinsurgency Transformed American Policing* (Berkeley: University of California Press, 2019); *Overview of Activities Funded by the Law Enforcement Assistance Administration* (Washington DC: General Accounting Office, 1977).

35. Hinton, *From the War on Poverty to the War on Crime*, 161.

36. In 1969, 79% percent of Law Enforcement Assistance Administration (LEAA) block grants went toward funding state and local police, whereas only 13% went toward corrections. *Overview of Activities Funded by the Law Enforcement Assistance Administration*, 11.

37. *Overview of Activities Funded by the Law Enforcement Assistance Administration*, 11 16, 129. Initially, the LEAA's funding for state and local corrections came under Part C funds and was extremely minimal. In 1969, 79% percent of LEAA block grants went toward funding state and local police, whereas only 13% went toward corrections. However, a round of amendments to the Safe Streets Act passed by Congress in 1970 increased LEAA funding for state and local corrections. Specifically, the passage of a "Part E" amendment set aside funds for the acquisition, construction, and rehabilitation of correctional institutions, resulting in a significant increase in LEAA funding for state corrections. Part E offered to pay for 75% of corrections projects with federal funds and required states to segment 20% of discretionary and block funds for corrections. It also stipulated that the funds could not replace other corrections spending, ensuring that the funds would be directed toward developing new facilities and programs. The jump in federal spending on corrections triggered by the Part E amendment was dramatic; the amount of LEAA funds used for corrections increased by a whopping 12,400% between 1969 and 1972, from just 2 million to almost $250 million. Between 1970 and 1979, nearly $800 million LEAA funds went toward "corrections-related activities." Despite this seemingly robust investment in corrections, however, a slim portion ultimately ended up funding correctional construction, suggesting a striking deficit in federal funding for carceral capacity. See *Overview of Activities Funded by the Law Enforcement Assistance Administration, Safe Streets … the LEAA Program at*

Work (Washington, DC: US Government Publishing Office, 1971); Malcolm Feeley and Austin Sarat, *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration, 1968-1978* (Minneapolis: University of Minnesota Press, 1980), 59; Elizabeth Hinton, *From the War on Poverty to the War on Crime*, 170–77; Robert E. Merriman, *Safe Streets Reconsidered: The Block Grant Experience 1968-1975* (Washington, DC: Advisory Commission on Intergovernmental Relations, 1977); Charlotte Moore, *Prison Reform: The Federal Role* (Washington, DC: Congressional Research Service, 1981), 5; Vesla Weaver, "The Significance of Policy Failures in Political Development: The Law Enforcement Assistance Administration and the Growth of the Carceral State," in Jeffrey A. Jenkins and Eric Patashnik, eds. *Living Legislation: Durability, Change, and the Politics of American Lawmaking* (Chicago: University of Chicago Press, 2012), 238; Congressional Budget Office, *Federal Law Enforcement Assistance: Alternative Approaches* (Washington, DC: US Government Publishing Office, 1978); *Hearings Before a Subcommittee on Appropriations*, 92nd Cong. 344 (1970) (Part E—Grants for Correctional Institutions and Facilities); *Correctional Reform: Hearings Before the Subcommittee on National Penitentiaries of the Committee on the Judiciary*, 91st Cong. 14 (1970) (statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration); *Restructuring the Law Enforcement Assistance Administration*, *Hearings Before the Subcommittee on Crime of the Committee on the Judiciary*, 95th Cong. 54–55 (1977) (testimonies of Richard Wertz, Executive Director, Governor's Commission on Law Enforcement and the Administration of Justice and US Representative John Conyers).

38. Hinton, *From the War on Poverty to the War on Crime*; Vesla Weaver, "The Significance of Policy Failures in Political Development," 238.

39. In fiscal year 1977, federal government funding accounted for only $150 million of the $2.4 billion spent on adult correctional facilities across all levels of government. More specifically, the federal government's expenditure on capital outlays for the purposes of constructing adult correctional facilities was only $185 million, compared with $1.3 billion from states and $1.009 billion from local governments. Mullen and Smith, "American Prisons and Jails," 127, 137.

40. Franklin E. Zimring and Gordon Hawkins, *The Scale of Imprisonment* (Chicago: University of Chicago Press, 1991), 139–40.

41. See Hinton, *From the War on Poverty to the War on Crime*, 276–306; Feeley and Sarat, *The Policy Dilemma*; Ted Gest, *Crime & Politics: Big Government's Erratic Campaign for Law and Order* (Oxford: Oxford University Press, 2001), 17–47.

42. Gest, *Crime & Politics*; Guetzkow and Schoon, "If You Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation."

43. William F. Woldman, "Prison Conditions: Congressional Response," April 6, 1989, folder 25, box 449, Spector Papers.

44. Ted Gest, *Crime & Politics*, 44. On the Reagan administration and federal government's reticence to fund state and local prison construction despite knowledge of worsening problem of state prison overcrowding, see *Attorney General's Task Force on Violent Crime: Final Report* (Washington, DC: U.S. Department of Justice), xiii; Mullen and Smith, "American Prisons and Jails," 145.

45. "The Case for Federal Assistance to States for Prison Construction," January 1985, folder 8: "Prisons, 1985-6," box 619, Spector Papers.

46. Internal memos between Specter and staffers who looked into potential budget cuts Specter could offer in exchange for his prison construction amendment reveal the extent of Specter's pursuit, as well as the challenges of making a case for federal funding for prison and jail construction during the Reagan years. See Joe Kurylak to Senator Specter re: Budget Cuts that You Could Support, April 2, 1985; Eric L. Richard to Senator Specter re: Budget Cuts to Compensate for Prison Program, August 22, 1985, folder 8: "Prisons, 1985-6," box 619, Spector Papers.

47. Although the passage of the 1986 Anti-Drug Abuse Act offered additional federal assistance for state and local law enforcement, albeit with more targeted focus on drug control versus crime generally, it too did little to respond to the states' prison overcrowding crisis. The Act allocated a sparse $456,777 for prison capacity discretionary grants and provided funds to 14 state and local governments. Even so, the program primarily provided "technical assistance, training, and financial support to state legislatures, departments of corrections, and special policy commissions or task forces dealing with state prison capacities"—that is, not new construction or renovation. Despite having a line item for "prison capacity" in the Act's 1987 budget, no funds were allocated for prison construction. Corrections funding for state and local governments increased with the passage of the 1988 Anti-Drug Abuse Act, and $181 million was allocated between 1989 and 1994. However, auditors of the program noted that "it is rare for this [funding] to translate into support for new beds that are in demand due to increased conviction rates for drug offenders," in part because "the funding of beds is generally not done on a small programmatic basis." See Justice Assistance Act of 1983, to accompany H.R. 2175, 98th Cong. (1983); Arnold P. Jones, *Administration of Justice: Assistance to State/Local Governments for Fiscal Years 1986 and 1987* (Washington DC: United States General Accounting Office, 1988), 8, 63–65; Terence Dunworth, Peter Haynes, and Aaron Saiger, *National Assessment of the Byrne Formula Grant Program: A Policymakers Overview* (Washington DC: National Institute of Justice Research Report, 1996), 64; "Statement of Senator Arlen Specter, Emergency Prison Expansion Act, 1987," folder 11, box 222; "Specter Prison Initiatives," folder 8, box 619; William F. Woldman, "Prison Conditions: Congressional Response," April 6, 1989, 7, folder 25, box 449, Spector Papers.

48. "Crowding in Prisons Worrying Officials," *New York Times*, February 10, 1980; "Prison Bond Issue Appears Defeated in New York State," *Wall Street Journal*, November 11, 1981; Kevin Krajick, "The Growing Crisis in Prison Overcrowding," *The Boston Globe*, June 13, 1982; "State Prisons around Nation Scramble for Relief as Overcrowding Mounts," *New York Times*, September 29, 1983. On the Reagan-era economy and antitax populism, see Dean Baker, *The United States Since 1980* (Cambridge: Cambridge University Press, 2007); Isaac William Martin, *The Permanent Tax Revolt* (Palo Alto, CA: Stanford University Press, 2008).

49. Campbell and Schoenfeld, "The Transformation of America's Penal Order"; Feeley and Rubin, *Judicial Policy Making and the Modern State*; Guetzkow and Schoon, "If You Build It, They Will Fill It; Margo Schlanger, "Civil Rights Injunctions over Time"; Susan Sturm, "The Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review* 142, no. 2 (1993): 639–738.

50. John Herbers, "Lawsuits a Growing Burden for Prison Authorities," *New York Times*, June 1, 1980.

51. Assertions that crime was rising during the late twentieth-century period require critical examination. Numerous scholars have demonstrated that sensationalized and racialized claims about rising crime ignored the fact that crime rates were at their lowest during the interwar period and that crime rates actually worsened *after* the nation began to invest in carceral state building. Apparent escalations in crime rates during the post-1960s period also ignored advances in crime reporting that likely increased the number of crimes reported and the presence of a high population of young adults as the result of "baby boomers'" maturation from children to young adolescents, who tend to commit the majority of offenses. See Thompson, "Why Mass Incarceration Matters," 727; Hinton, *From the War on Poverty to the War on Crime*; Vesla Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development* 21 (2007): 230–65.

52. *Federal Assistance to State and Local Law Enforcement Systems, Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary*, 98th Cong. 40–44 (1983) (testimony of Pennsylvania Bureau of Corrections Commissioner, Ronald Marks).

53. As Richard Fenno reported, there was not a clear constituency calling for Specter's brand of sentencing reform captured by the ACCA—it was "one man's home-grown, pet policy initiative." See Richard Fenno, *Learning to Legislate: The Senate Education of Arlen Specter* (Washington, DC, Congressional Quarterly, 1991), 45.

54. See Arlen Specter, "District Attorney Report to the People of Philadelphia, 1970-1971," folder 13, box 2, Spector Papers; Municipal Court Study," 1977, *Philadelphia Commission for Effective Criminal Justice*, folder 163, box 17, Philadelphia Commission for Effective Criminal Justice Archives, Temple Special Collections Research Center, Temple University, Philadelphia, PA; Andrew Geller, "A Day in Court," *The Philadelphia Inquirer*, July 24, 1983; 98 Cong. Rec. S3090 (daily ed. February 23, 1984); "An Oral History of Arlen Specter," *The Philadelphia Magazine*, November 30, 2007, https://www.phillymag.com/news/2007/11/30/the-full-specter/.

55. "Rizzo Insists Cause of Riot Was Racial," July 7, 1970, *The Philadelphia Evening Bulletin*.

56. Jon Katz, "14 Months after Holmesburg Riot, Time Bomb Still Ticks," September 14, 1971; "No Deals with Cons—Specter," September 14, 1971, *Philadelphia Daily News*.

57. Com. ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971).

58. "D.A. Squad to Hunt 4500 Bail Jumpers," September 23, 1970, *The Philadelphia Inquirer*.

59. "Prison System Blasted," *Associated Press*, April 13, 1972; "Arlen Specter Files Suit against Pa," *Associated Press*, December 20, 1972.

60. To be sure, Specter was not alone in his desire to federalize crime control. As Ted Gest notes, the "creeping federalization of local crime control," had been underway since the 1970s. Often out of a political desire to appear tough on crime, federal legislators had been steadily adding more federal criminal offenses. But Specter's Armed Career Criminal Act marked him as a "leader in the federalization trend." See Gest, *Crime & Politics*, 63–68.

61. Arlen Specter and Paul Michel, "The Need for a New Federalism in Criminal Justice," *The ANNALS of the American Academy of Political and Social Science* 462, no. 1 (1982): 60–61.

62. Specter and Michel, "The Need for a New Federalism," 62.

63. "The Need for a New Federalism," 63.

64. "The Need for a New Federalism," 60. Specter's strategy of targeting "armed career criminals" was not an entirely novel idea. Concern for "repeat offenders" of violent crimes dates to President Gerald Ford, whose administration sought to equip court systems with the legislative power and administrative resources to quicken the trial process and harshen the sentences for defendants who had a history of repeated offenses. Compelled by "evidence" that a small group of individuals in primarily segregated Black urban neighborhoods committed the majority of crimes, Ford's administration used the LEAA's $150 million in discretionary funds to specifically fund "career criminal programs" in various cities. Once selected to be prosecuted through a city's Career Criminal program, defendants, who tended to be Black, single, and young men, faced an onslaught of prosecutorial efforts and resources to expedite the trial process. Government officials routinely named the program the LEAA's "most successful program," and by 1980, 145 cities across the country had career criminal units. However, the termination of LEAA funding meant that by the early 1980s local career criminal programs could rely only on scarce state and local funds. Because of the popularity of career criminal programs, states and localities did often scrape together enough for these programs to continue. But the loss of federal funding streams pushed many career criminal programs into an era of funding precarity, leading many to eventually phase out, downsize, or face ongoing threats of potential defunding. See Hinton, *From the War on Poverty to the War on Crime*, 258; *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, Session on S. 28 and S. 3216, 95th Cong. 8 (1978) (statement of Charles R. Work, Esquire, Peabody, Rivlin, Lambert, and Meyers; Dick Parsons to Jim Cannon, Subject: Crime, September 13, 1976, folder: "Presidential Handwriting, 9/18/1976," box C49, Gerald R. Ford Presidential Library, Grand Rapids, MI, https://www.fordlibrarymuseum.gov/library/document/0047/phw19760918-02.pdf; *Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, Oversight Hearings on Proposed Legislation Providing Federal Financial Assistance to State and Local Law Enforcement Agencies, and to Review the Effects of Budgetary Reductions for Criminal Justice Assistance Programs and on HR 4481*, 97th Cong. (1982).

65. Specter and Michel, "The Need for a New Federalism," 64.

66. "The Need for a New Federalism," 64–65. Specter developed his reasoning regarding federal prosecution of "felons" caught in possession of a firearm on a "little-noticed recommendation" of the 1981 report of the Attorney General's Task Force on Violent Crime, Recommendation 21. Recommendation 21 called for "increased federal prosecutions of convicted felons apprehended in possession of a firearm." The Recommendation noted that federal penalties for gun possession were often harsher than state penalties for the same offense. Perhaps highlighting the federal government's wariness about federal intervention into crime control, the report did caution that state and local authorities have "primary jurisdiction" over such offenses and that any federal prosecution needed to be pursued in close collaboration with state and local prosecutors. The federal government's role was not to constitute wholesale takeover of firearm possession cases but rather to insert its prosecutorial resources when "more severe penalties" for the "most serious offenders" are able to be obtained. See *Attorney General's Task Force on Violent Crime: Final Report* (Washington DC: US Department of Justice, 1981), 30.

67. Specter and Michel, "The Need for a New Federalism," 70.

68. "The Need for a New Federalism," 69–70.

69. Reagan's administration and congressional leaders on both sides of the aisle followed Specter's lead in working to expand the federal government's power to punish, most visibly through the expansion of the federal government's role in drug policing and prosecution and toughening of the federal criminal code. Years later, Specter noted that he was "glad to accept the responsibility" for "escalating the trend" of federalizing local crime control. Ted Gest, *Crime & Politics*, 49, 68. See also Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York: Oxford University Press, 1997); Hinton, *From the War on Poverty to the War on Crime*.

70. Specter and Michel, "The Need for a New Federalism," 70.

71. "The Need for a New Federalism," 64.

72. For example, Specter faced resistance from powerful archconservatives, like Senate Judiciary Chairman Strom Thurmond, on the basis that the ACCA flagrantly extended federal criminal legal jurisdiction and violated states' rights. See Fenno, *Learning to Legislate*, 120–22; Gest, *Crime and Politics*, 68; John East, "Debate and Discussion: Armed Career Criminals," *The Baltimore Sun*, March 19, 1983.

73. *Armed Career Criminal Act of 1982 Report to Accompany S. 1688*, Committee on the Judiciary, 97th Cong. 8 (1982).

74. Flanagan was also the president-elect of the National District Attorneys Association.

75. *Career Criminal Life Sentencing Act of 1981, Hearings Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary of the United States Senate*, 97th Cong. 141 (1981) (testimony from Suffolk County, Massachusetts District Attorney Newman Flanagan).

76. *Armed Robbery and Burglary Prevention Act, Hearing Before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives*, 97th Cong. 39–41 (1981) (testimony of Assistant Attorney General in the Criminal Division of the Department of Justice Roger Olsen).

77. *Armed Career Criminal Act of 1982 Report to Accompany S. 1688*, Committee on the Judiciary, 97th Cong. 20 (1982).

78. *Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, Oversight Hearings on Proposed Legislation Providing Federal Financial Assistance to State and Local Law Enforcement Agencies, and to Review the Effects of Budgetary Reductions for Criminal Justice Assistance Programs and on HR 4481*, 97th Cong. 101 (1982).

79. *Report to Accompany S. 1688: Armed Career Criminal Act of 1982*, 97th Cong. (1982). Regarding the ACCA's effects on plea bargaining, the report states that S. 1688 is expected to "discourage plea bargaining" because prosecutors would be incentivized *not* to reduce second offenses to misdemeanors, which would make it more difficult for an offender to be prosecuted under the ACCA if they were to reoffend (p. 41).

80. *Armed Robbery and Burglary Prevention Act, Hearing Before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives*, 97th Cong. 3–6 (testimony of Senator Arlen Specter).

81. *Armed Robbery and Burglary Prevention Act, Hearing Before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives*, 97th Cong. 16–17

(testimony of Hon. Ron Wyden, Representative from the State of Oregon). It's worth noting that local district attorneys were not consistently unified in their support of the ACCA, and so Wyden's concern about their support is understandable. Although the National District Attorneys' Association had initially supported the legislation "in principle" in 1981, they pulled back their support when they had not secured the "mutual consent" language that would protect, in their view, their local discretionary power over where criminal offenders got prosecuted. Their opposition helped push some other prominent senators who had once backed the bill against it, such as the powerful Senator Edward Kennedy. Only after the ACCA integrated the National District Attorneys Association's "mutual consent" stipulation did the bill pass in the Senate. The refusal to engage on the question regarding outlawing plea bargaining may have stemmed from similar concerns. Fenno, *Learning to Legislate*, 68, 100–2.

82. As Ted Gest argues, Reagan likely felt that vetoing the first major crime bill to come across his desk was safe given that it occurred after the 1982 congressional elections, giving his administration time to develop crime legislation that aligned more with their interests without sacrificing electoral votes. See "Specter Says President Reagan Supports His Career Criminal Bill"; Ronald Reagan, "Memorandum of Disapproval," in folder 15, box 65, Spector Papers; Fenno, *Learning to Legislate*; Gest, *Crime and Politics*, 49.

83. See Fenno, *Learning to Legislate*, 115.

84. The new Senate bill included language that assuaged both Reagan's Department of Justice officials and Senators with constituents worried about federal takeover. The bill limited federal intervention into career criminal cases to "situations where the local district attorney requests or concurs in the action by the US attorney" but also placed this language about concurrence in the bill's section on intent rather than the jurisdictional section, which assuaged Department of Justice officials worry about limiting federal power. See *Armed Career Criminal Act of 1983, Hearing Before the Committee on the Judiciary of the United States Senate*, 98th Cong. 120 (1983).

85. Fenno, *Learning to Legislate*, 120.

86. *United States Senate Congressional Record*, January 26, 1983, 599.

87. *Federal Assistance to State and Local Law Enforcement Systems, Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary of the United States Senate*, 98th Cong. 33 (1983) (testimony of District Attorney for Dauphin County Richard Lewis).

88. *Federal Assistance to State and Local Law Enforcement Systems, Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary of the United States Senate*, 98th Cong. 42 (1983) (testimony of Pennsylvania's Bureau of Corrections Commissioner Ronald J. Marks.

89. *Federal Assistance to State and Local Law Enforcement Systems, Hearing Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary of the United States Senate*, 98th Cong. 33 (1983) (testimony of Dauphin County District Attorney Richard Lewis).

90. *Armed Career Criminal Act, Hearing Before the Subcommittee on Crime of the Committee on the Judiciary in the House of Representatives*, 98th Cong. 40–46 (1984) (testimony of Hon. Albert Gore, Jr., Representative in Congress from Tennessee).

91. See *Armed Career Criminal Act of 1983, Hearing Before the Committee on the Judiciary in the United States Senate*, 98th Cong. 2, 13 (1983) (opening statement of Senator Arlen Specter and testimony of Hon. James Knapp, Assistant Attorney General, Criminal Division, US Department of Justice); Fenno, *Learning to Legislate*, 120–21.

92. 98 Cong. Rec. S3090–3099 (daily ed. February 23, 1984); Fenno, *Learning to Legislate*, 120–24.

93. Fenno, *Learning to Legislate*, 123.

94. The ACCA did result in some federal convictions of repeat offenders. Deputy Assistant Attorney General James Knapp reported at the 1986 Senate hearing on the expansion of the ACCA that there were just 14 people serving sentences in federal prison as armed career criminals as of May 8, 1986. Knapp does suggest that those estimates may be low due to lack of sufficient reporting mechanisms, and later in the hearing, Deputy Assistant Secretary for Enforcement in the US Department of Treasury David Dart Queen reported that Bureau of Alcohol, Tobacco, and Firearms, which was running task forces in select cities to procure ACCA convictions, reported that the ACCA had obtained 40 convictions since the law's passage. By 1991, the BATF reported convicting 471 people under the statute. When considered against the broader increase in state prison populations, however, the numbers appear strikingly meager. In 1991, state prison and jail population at the time was a staggering 751,806 people. Against this context, 471 ACCA convictions appears trivial, and certainly not a meaningful strategy for reducing state prison overcrowding. See *The Armed Career Criminal Act Amendments, Hearing Before the Subcommittee on Criminal Law of the Committee on the Judiciary United States Senate*, 99th Cong. (1986) (testimony of James Knapp, Deputy Assistant Attorney General), at 8–9, (testimony of David Dart Queen, Deputy Assistant Secretary for Enforcement in the US Department of Treasury), at 21; (testimony from Edward S. G. Dennis, Jr., US Attorney and Ronald D. Castille, District Attorney for Philadelphia, Pennsylvania); *Protecting America: The Effectiveness of the Federal Armed Career Criminal Statute* (Washington, DC: Bureau of Alcohol, Tobacco, and Firearms, 1991), 5; Tracy L. Snell and Danielle Morton, *Prisoners in 1991* (Washington DC, Bureau of Justice Statistics, 1992).

95. "Sen. Specter Introduces Legislation that would Broaden His Armed Career Criminal Act to Include Violent Felons and Serious Drug Criminals, As Well As Robbers & Burglars," Press Release from US Senator from Pennsylvania Arlen Specter in folder 15: "Armed Career Criminal Act, 1981-88," box 65, Spector Papers.

96. "Prisoners in 1988," *Bureau of Justice Statistics Bulletin* (Washington, DC: US Government Printing Office, June 29, 1989), 4; *Prison Overcrowding: Issues Facing the Nation's Prison Systems* (Briefing Report to Congressional Requesters, United States General Accounting Office, November 1989, 29).

97. See Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2008); Lynch, *Sunbelt Justice*; Guetzkow and Schoon, "If You Build It, They Will Fill It"; Schoenfeld, *Building the Prison State*.

98. Specifically, the 1994 Crime Bill included a "Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program," which authorized $12.5 billion in grants for expanding state prison capacity for states who had sufficiently "toughened" crime

control of so-called violent offenders and adopted "truth-in-sentencing" laws that reduced use of parole.

99. It is important to note that although a substantial amount of funds for prison construction to confine "serious and violent offenders" were authorized, actual appropriations were much less. See Susan Turner, Terry Fain, Peter W. Greenwood, Elsa Y. Chen, and James R. Chiesa, *National Evaluation of the Violent Offender Incarceration/Truth-in-Sentencing Incentive Grant Program* (Washington, DC: Rand, 2001); "Violent Offender Incarceration and Truth In Sentencing Incentive Grant Program: Interim Final Rule," Office of Justice Programs, Department of Justice, February 15, 1995.

100. See Turner et al., *National Evaluation of the Violent Offender Incarceration/Truth-in-Sentencing Incentive Grant Program*, 76.

101. Gilmore, *Golden Gulag*; Hinton, *From the War on Poverty to the War on Crime*; Kohler-Hausmann, *Getting Tough*; Murakawa, *The First Civil Right: How Liberals Built Prison America*; Thompson, "Why Mass Incarceration Matters; Loïc J. D. Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, NC: Duke University Press, 2009).

102. Campbell and Schoenfeld, "The Transformation of America's Penal Order," 1395.

103. Between 1982 and 1991, 20% of the total corrections costs for 32 states were expended on capital outlays for one year or more. See Tracey Kyckelhahn, *State Corrections Expenditures, FY1982-2010* (Washington DC: Bureau of Justice Statistics, 2014), 3.

104. Guetzkow and Schoon, "If You Build It, They Will Fill It"; Lynch, *Sunbelt Justice*; Schoenfeld, *Building the Prison State.*

105. Kyckelhahn, *State Corrections Expenditures, FY1982-2010*, 2; James J. Stephan, *Census of State and Federal Correctional Facilities, 1995* (Washington, DC: Bureau of Justice Statistics, 1997), iv.

106. Christopher J. Mumola and Allen J. Beck, "Prisoners in 1996," in *Bureau of Justice Statistics Bulletin*, (Washington DC: US Government Printing Office, June 1997), 7–8.

107. Schlanger, "Civil Rights Injunctions over Time"; Anne K. Heidel, "Due Process Rights and the Termination of Consent Decrees under the Prison Litigation Reform Act," *Journal of Constitutional Law* 4, no. 3 (2002): 561–85.

108. Schlanger, "Civil Rights Injunctions over Time."

109. Sara Mayeux and Karen Tani, "Federalism Anew," *American Journal of Legal History* 56, no. 1 (March 1, 2016): 128–38.

110. Hinton, *From the War on Poverty to the War on Crime*, 307.

111. Elizabeth Hinton and DeAnza Cook, "The Mass Criminalization of Black Americans: A Historical Overview," *Annual Review of Criminology* 4 (2021): 1–26.