

Substantive Due Process at Sentencing



The Complicity of Lawyers in the Criminal Injustice System

Alec Karakatsanis

Usual Cruelty

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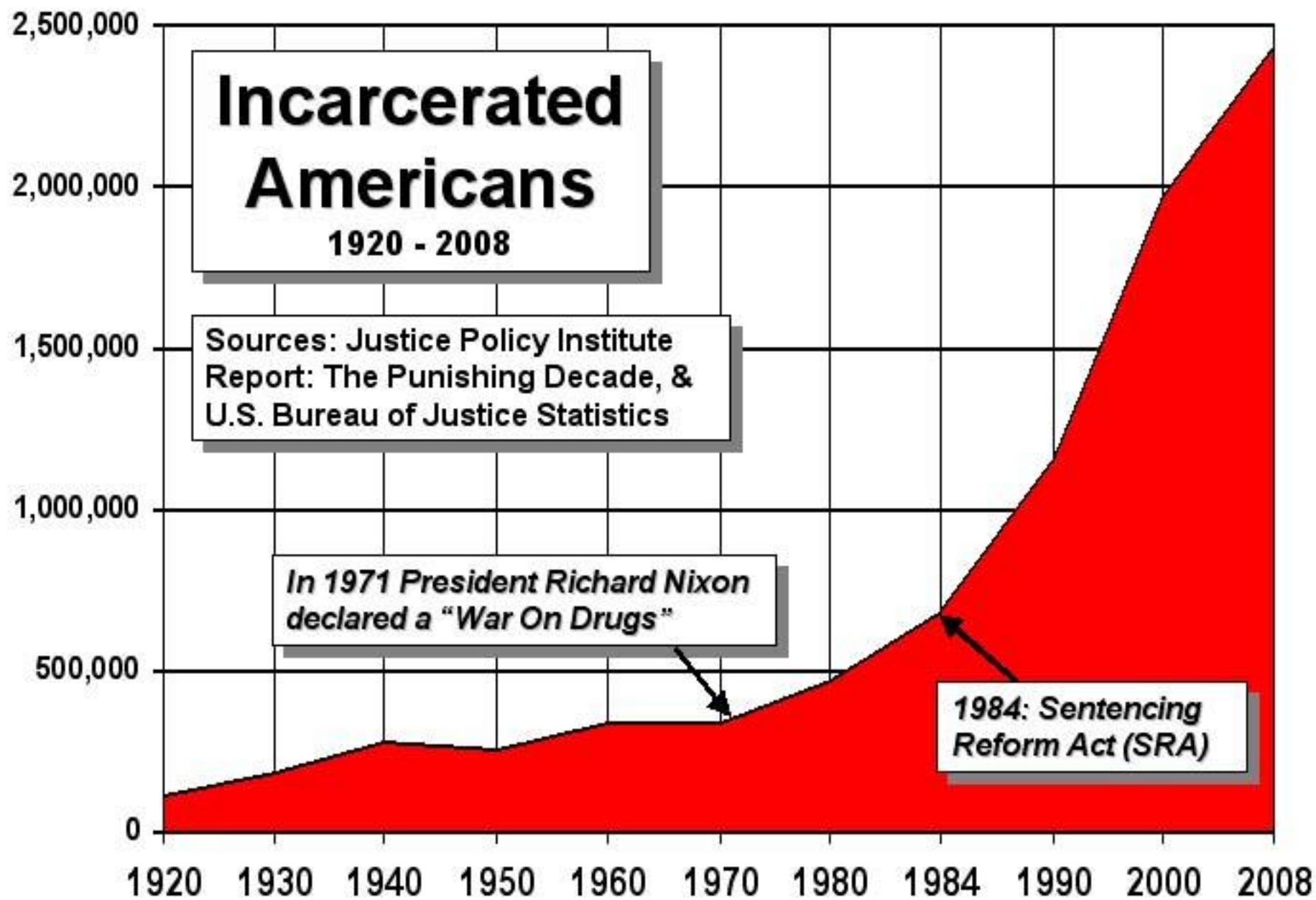
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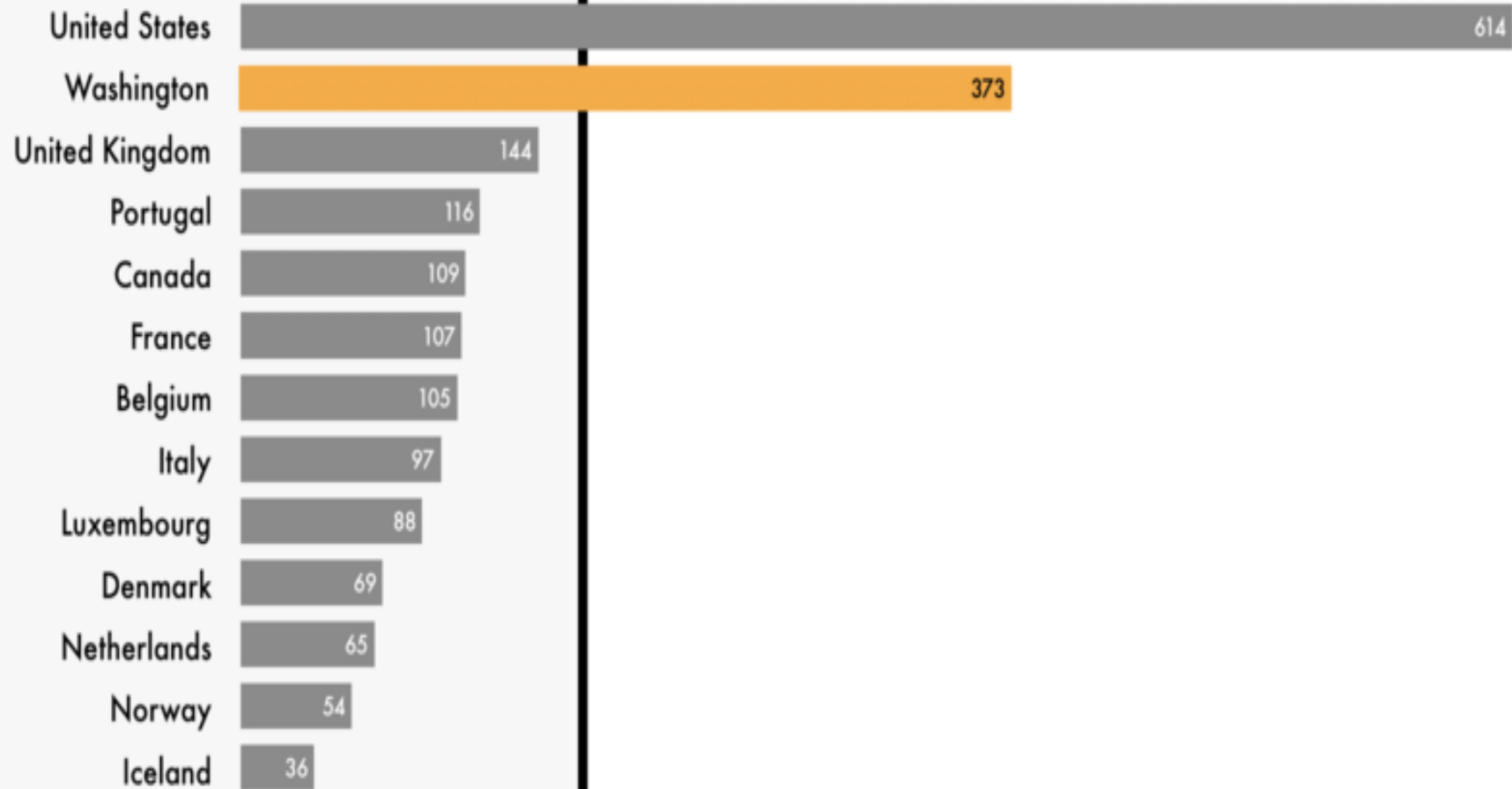


“There is little convincing evidence that mandatory minimum sentencing, truth-in-sentencing, or life without the possibility of parole laws had significant crime reduction effects. But there is substantial evidence that they shifted sentencing power from judges to prosecutors, . . . , exacerbated racial disparities in imprisonment; and made sentences much longer, prison populations much larger, and incarceration rates much higher.”

The Growth of Incarceration in the United States: Exploring Causes and Consequences, National Research Council, Ch. 3, pgs. 101-02, (2014)

INCARCERATION RATES

COMPARING WASHINGTON
AND FOUNDING NATO COUNTRIES



Incarceration rates per 100,000 population

*Race and
Retribution: An
Empirical Study of
Implicit Bias and
Punishment in
America,*
Levinson, Smith,
and Hioki, (2019)

- “. . . Moral panics, most of them racialized and driven by retributive discourse, contributed mightily to the punishment excesses of the past few decades. These moral panics saw pundits and professors alike warning at one time, for example, of a ‘new breed’ of merciless juvenile ‘superpredators’ and the horrors of ‘crack babies.’ Because of the tight connection between moral panics and criminal sentencing, hundreds of thousands of Americans are spending decades – or even their whole lives – in prison based on baseless legislative assumptions”

Felony Consequences and Prison Conditions



- Sexual Assault
- Physical Assault
- Torture/Solitary Confinement
- Reduced Life Span
- Inadequate Medical Care and Disease
- Inadequate Food
- Collateral Consequences

“No person shall be deprived of life, liberty,
or property, without due process of law.”

Article 1, Section 3 – Due Process

- Civil Commitment
- Pretrial Detention
- Punitive Damages

Deprivations of
Liberty or Property
Requiring
Heightened Scrutiny

Excuses for Not Applying Heightened Scrutiny to Criminal Sentences

- 8th Amendment as Exclusive Remedy
- Punishment as the Exclusive Province of the Legislature
- Criminal Trials Provide Substantive Due Process

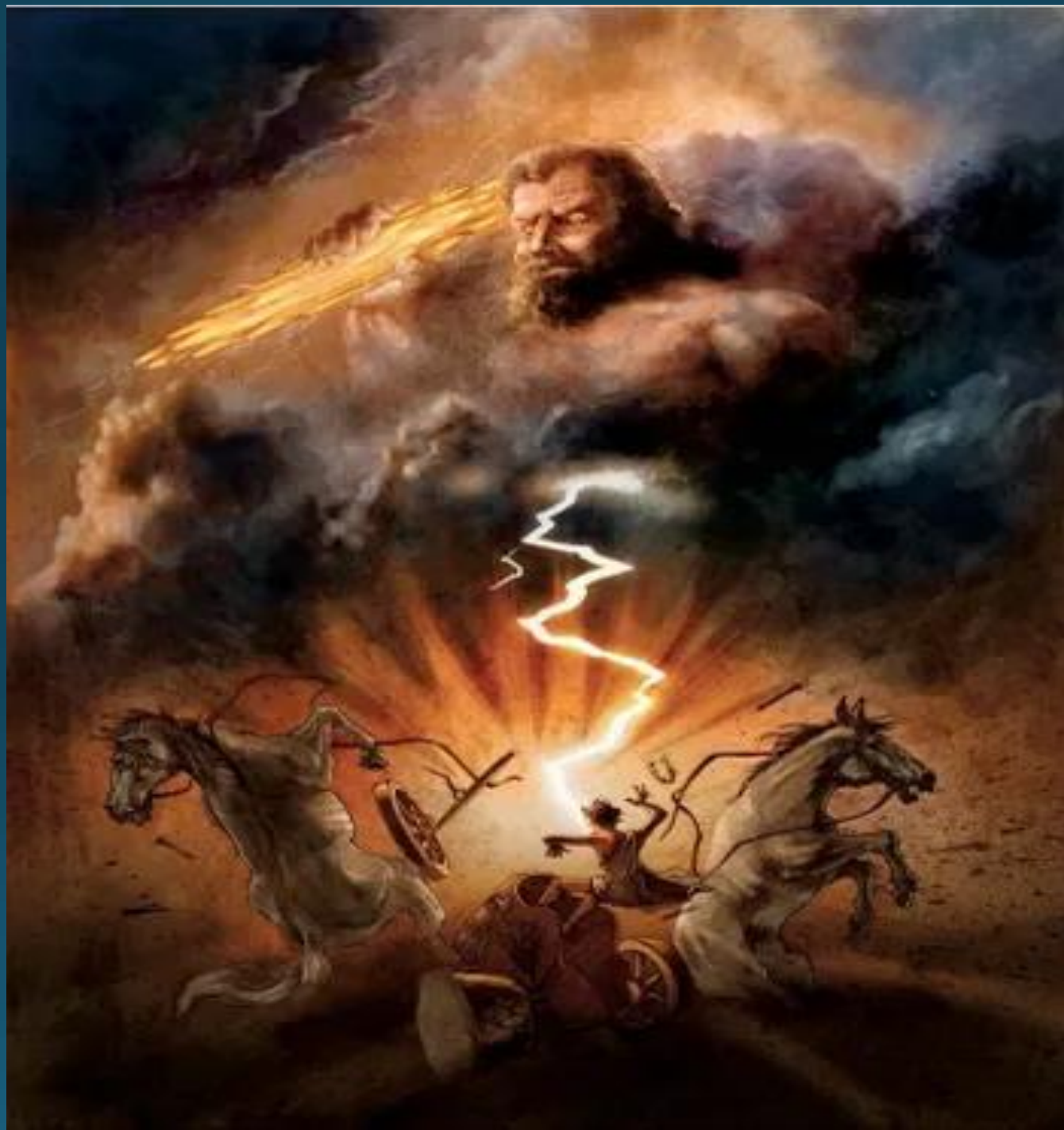
Purposes of Criminal Punishment

Deterrence – Individual and
General

Incapacitation

Rehabilitation

Retribution/Revenge



“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because longer sentences exist on the books largely for bargaining purposes.”

Missouri v. Frye, 566 U.S. 134, 143-44, 132 S. Ct. 1399 (2012)

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