McCleskey v. Kemp (1987)

**Case:** Warrren McCleskey appealed the Supreme Court to overturn his death sentence

**Argument:** Statistically there was racial bias in the administration of the death Penalty.
The Court acknowledged it feared that if it recognized racial discrimination was a problem in capital cases, it might also have to recognize the harm caused by discrimination in other types of criminal cases. In other words…. the Court was afraid of "too much justice."
The Sociological Perspective:

Examining Racial Bias in U.S. Criminal Justice System

Irene Petten & Adam Moskowitz
The **differences** in the way **social control** is exerted over different groups.
Sociologists argue that *differential justice* is a part of systemic racism embedded within larger societal forces and institutions:

- Segregation and job opportunities
- Education
- Gov. Policies
Racial segregation solidified in 20th century:

- Reinforced by housing policy
  - Post-WWII GI Bill
  - Restrictive covenants
  - Left African Americans with little option to buy
  - Affects wealth accumulation for generations
- Urban renewal
  - Highway building
  - Neighborhood disruption
Differential Justice: sociological context
Differential Justice: Sociological context
Changing Economy

• Post WWII manufacturing boom
• 1950s and 1960s incomes increase steadily
• 1970s, incomes stop increasing and manufacturing firms start closing down
• 1980s – 1990s closures increase
Differential Justice: Sociological context

The Changing Industrial Composition of the U.S. Economy, 1980–2010
Differential Justice: Sociological context

Deindustrialization

- Unions decline
- Computers and new tech replace low-skill workers
- Manufacturing moves overseas

African American population is hit hard

Manufacturing jobs offered benefits, stability & wage able to support a family

In Great Lakes area cities, ½ black males in manufacturing lost jobs (1979-1984)

New high skill jobs are located in suburbs

Coincides with rise of mass incarceration
Differential Justice: Sociological context

**Education**

- Funded by local property taxes
- Re-segregation occurring
- High school graduation rates are converging between racial groups
- Gap in bachelor’s and master’s degrees remains between whites and African Americans & Latinos
Differential Justice: Sociological context

Education

• Out of school suspensions and expulsions increase likelihood of drop-out and decrease legitimate opportunities
  • Create space for illegitimate opportunities

• Out-sourcing discipline to police
  • Students get criminal record for school infractions
Differential Justice: Scottsboro Boys

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel
- Plea Bargaining
- Sentencing

Corrections
- Mass Incarceration
- Over-representation of racial minorities
Differential Justice: Scottsboro Boys (1931)

Nine African American Males
Depression Era Train Hopping
Fought with White Boys
Convicted of Gang Raping White Girls
Differential Justice: Scottsboro Boys (1931)

Police
- Brutality, Intimidation, Force
- Racial Profiling
- Discrimination in Arrest

Court
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel
- Blatantly Racist Judges, Prosecutors, Juries

Corrections
- Sentencing
Differential Justice: Scottsboro Boys (1931)

Police
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Differential Justice: Scottsboro Boys (1931)

Police
- Brutality, Intimidation, Force
- Racial Profiling
- Discrimination in Arrest

Court
- Biased Decision to charge

Attorney General
Thomas Knight, Jr
Differential Justice: Scottsboro Boys (1931)

Police
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Scottsboro Boys (1931)

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- Brutality, Intimidation, Force
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- Discrimination in Arrest

Court
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel: Powell V Alabama

(1932)
Differential Justice:
Scottsboro Boys (1931)

Police
- Brutality, Intimidation, Force
- Racial Profiling
- Discrimination in Arrest

Court
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel (Powell v Alabama (1932))
- Blatantly Racist Judges, Prosecutors, Juries

After Powell v Alabama: International Labor Defense obtained a Jewish Defense Attorney from NYC for the Scottsboro Boys

The court transcripts note the prosecutor saying “you don’t need a Jew Lawyer telling us how to do things...”
Differential Justice: Scottsboro Boys (1931)

**Police**
- Brutality, Intimidation, Force
- Racial Profiling
- Discrimination in Arrest

**Court**
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel (Powell V Alabama (1932))

"I told it just like Victoria did because she said we might have to stay in jail if we did not frame up a story after crossing a state line with men." Bates continued, asserting that Price had said "she didn't care if all the Negroes in Alabama were put in jail."[76]
Differential Justice: Scottsboro Boys (1931)

Police
- Brutality, Intimidation, Force
- Racial Profiling
- Discrimination in Arrest

Court
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel (Powell V Alabama (1932))
- Blatantly Racist Judges, Prosecutors, Juries

Doctors testified that the medical evidence did not support the case
Differential Justice: Scottsboro Boys (1931)

Police
- Brutality, Intimidation, Force
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Court
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel (Powell V Alabama (1932))
- Blatantly Racist Judges, Prosecutors, Juries

Witness saw the moving train going by:

“Scottsboro boys were throwing girls into the back of the train car…”

Q: How did you know it wasn’t the fight with boys?
A: The girls were wearing dresses

…The girls were wearing overalls
Differential Justice: Scottsboro Boys (1931)

Police
- Brutality, Intimidation, Force
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- Discrimination in Arrest

Court
- Biased Decision to charge
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- Blatantly Racist Judges, Prosecutors, Juries

*In his instructions to the jury, Judge Callahan told them that they should presume that no white woman in Alabama would consent to sex with a black.*
Differential Justice: Scottsboro Boys (1931)

Police
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- Blatantly Racist Judges, Prosecutors, Juries

 Corrections
- Sentencing

By 1936, Five were tried. All convicted. Sentenced to 50+ years
4 Paroled by 1945
Served 14 years total

Haywood Patterson escaped in 1948 to Michigan
Michigan refused to extradite him
“The overt bias and racism has diminished…

…but the quality of justice is lacking”
Police: Brutality

Trayvon Martin
Rekia Boyd
Michael Brown
Sandra Bland
Eric Garner
Tamir Rice
Eric Harris
Jonathan Ferrell
Tanisha Anderson
Samuel DuBose
Freddie Gray
Yvette Smith
Laquan McDonald
## Police: Brutality

### Citizens Shot & Killed in Memphis

<table>
<thead>
<tr>
<th></th>
<th>1969-1974</th>
<th>1985-1989*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whites</td>
<td>24%</td>
<td>27%</td>
</tr>
<tr>
<td>Af. Americans</td>
<td>76%</td>
<td>63%</td>
</tr>
<tr>
<td></td>
<td>3x more likely</td>
<td>2x more likely</td>
</tr>
</tbody>
</table>

Can’t shoot a fleeing suspect in the back

No mandatory federal reporting of police killings
Police: Racial Profiling

Blue: Likelihood a black driver’s car is searched compared to whites
Red: Likelihood search of black driver’s car has contraband compared to whites

Black drivers **1.5 to 5.2 times** as likely to be stopped than white drivers

Equal odds as whites
Police: Discrimination in Arrest

Arrested by Age 30 in CA
Af. American Males 66%
White Males 30%

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest
Debate on Donald Black’s Research

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Community Relations / Poor Treatment

Demeanor

Negative Consequences of Arrest Record: “New Jim” Crow
- Sentencing in a subsequent offense
- Employment
- Housing
Courts: Biased Decision to Charge

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge

<table>
<thead>
<tr>
<th>Identity</th>
<th>Fully Prosecuted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Af. American Male</td>
<td>39%</td>
</tr>
<tr>
<td>Hispanic Male</td>
<td>42%</td>
</tr>
<tr>
<td>Af. American Female</td>
<td>30%</td>
</tr>
<tr>
<td>Hispanic Female</td>
<td>31%</td>
</tr>
<tr>
<td>White Male</td>
<td>26%</td>
</tr>
<tr>
<td>White Female</td>
<td>19%</td>
</tr>
</tbody>
</table>

Adjusted means for four independent variables: age, prior record, seriousness of charge, weapon was use

Spohn, Gruel & Welch (1987)
Courts: Biased Decision to Charge

View of Prosecutor
Race of Victim
War on Drugs

<table>
<thead>
<tr>
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<th>FullyProsecuted</th>
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</thead>
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<td>19%</td>
</tr>
</tbody>
</table>

Adjusted means for four independent variables: age, prior record, seriousness of charge, weapon was use
Spohn, Gruel & Welch (1987)
### Who gets Pretrial Detainment?

<table>
<thead>
<tr>
<th></th>
<th>Males</th>
<th>Detained prior to trial</th>
<th>Released prior to trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>33%</td>
<td>63%</td>
<td>16%</td>
</tr>
<tr>
<td>African American</td>
<td>44%</td>
<td>72%</td>
<td>23%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>51%</td>
<td>73%</td>
<td>16%</td>
</tr>
</tbody>
</table>

Demuth and Steffensmeier 2004

### Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

### Courts
- Biased Decision to charge
- Pretrial Detainment
Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel

<table>
<thead>
<tr>
<th>percent hired a private Attorney</th>
<th>Chicago</th>
<th>Miami</th>
<th>Kansas City</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>22.5</td>
<td>34.5</td>
<td>37.8</td>
</tr>
<tr>
<td>Af American</td>
<td>5.6</td>
<td>23.4</td>
<td>24.8</td>
</tr>
<tr>
<td>Hispanic</td>
<td>21.2</td>
<td>27.3</td>
<td>NA</td>
</tr>
</tbody>
</table>

Does NOT seriously effect odds of incarceration

*Plea Bargaining v. Incarceration

(Spahn, Delone)
Courts: Plea Bargaining

Far fewer trials
The rates at which civil and criminal cases go to trial, on the decline for decades, have slipped to historic lows. The percentage of civil and criminal cases that were disposed of with trials in common pleas courts:

<table>
<thead>
<tr>
<th>CIVIL CASES</th>
<th>2008</th>
<th>2010</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>NUMBER</td>
<td>PCT.</td>
<td>NUMBER</td>
<td>PCT.</td>
</tr>
<tr>
<td>TOTAL DISPOSITIONS</td>
<td>Franklin County</td>
<td>19,237</td>
<td>—</td>
</tr>
<tr>
<td>Statewide</td>
<td>192,102</td>
<td>—</td>
<td>182,520</td>
</tr>
<tr>
<td>TRIALS</td>
<td>Franklin County</td>
<td>116</td>
<td>0.6%</td>
</tr>
<tr>
<td>Statewide</td>
<td>2,810</td>
<td>1.5%</td>
<td>2,399</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CRIMINAL CASES</th>
<th>2008</th>
<th>2010</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>NUMBER</td>
<td>PCT.</td>
<td>NUMBER</td>
<td>PCT.</td>
</tr>
<tr>
<td>TOTAL DISPOSITIONS</td>
<td>Franklin County</td>
<td>9,287</td>
<td>—</td>
</tr>
<tr>
<td>Statewide</td>
<td>82,200</td>
<td>—</td>
<td>70,779</td>
</tr>
<tr>
<td>TRIALS</td>
<td>Franklin County</td>
<td>178</td>
<td>1.9%</td>
</tr>
<tr>
<td>Statewide</td>
<td>2,870</td>
<td>3.5%</td>
<td>2,124</td>
</tr>
</tbody>
</table>

Source: Ohio Supreme Court

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel
- Plea Bargaining
### US Sentencing Commission
Controlling for seriousness of offense, prior record, weapon used
Federal Cases

Af. Americans and Hispanics less likely to receive a “substantial assistance” departure than whites

When they did, Whites received larger sentence reductions

### Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

### Courts
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel
- Plea Bargaining
Courts: Sentencing

<table>
<thead>
<tr>
<th>Sexual Assault of a Stranger</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Offender</strong></td>
</tr>
<tr>
<td>Af. American</td>
</tr>
<tr>
<td>White</td>
</tr>
</tbody>
</table>

Controlling for seriousness of offense, prior record, weapon used

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel
- Plea Bargaining
- Sentencing
Corrections: mass incarceration

International Rates of Imprisonment per 100,000

- United States: 698
- Rwanda: 492
- Russia: 446
- Brazil: 301
- Australia: 151
- Spain: 139
- China: 119
- Canada: 106
- France: 100
- Austria: 96
- Germany: 78
- Denmark: 61
- Sweden: 60
- India: 30


Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel
- Plea Bargaining
- Sentencing

Corrections
- Mass Incarceration
Corrections: mass incarceration

Increase is largely due to growth in non-violent offenders

Mass incarceration ≠ safer streets
Crime rate decreases before incarceration rate increases

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge
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- Sentencing

Corrections
- Mass Incarceration

Corrections: mass incarceration

PRISON INDUSTRIAL COMPLEX
States followed federal economic incentives to guide policies

1994 Violent Crime Control & Law Enforcement Act

- Provides states with billions in funding for new prisons
- only if they adopt tough “truth in sentencing” laws
  - reduces eligibility for parole
  - eliminates funding for higher education while incarcerated

Police
- Brutality
- Racial Profiling
- Discrimination in Arrest

Courts
- Biased Decision to charge
- Pretrial Detainment
- Inadequate Counsel
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- Sentencing

Corrections
- Mass Incarceration
Since 1999, the size of the private prison population grew 90%.

The use of private prisons was at a maximum in 2012, when almost 9% of the total U.S. prison population were housed in private facilities.
Corrections: over-representation of minorities

Police
- Brutality
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Corrections
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Corrections: over-representation of minorities

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**Corrections**
- Mass Incarceration
- Over-representation of racial minorities

4/5 Scottsboro boys served 10 years
**Corrections: over-representation of minorities**

**Impact on family with incarcerated member**
- Psychological impact
- Stigma & shaming
- Time/energy: fill in to do things incarcerated member used to do
- Financial strain: may need to move, struggle to replace income

**Relationships**
- Difficult to maintain

**Children**
- 2.3 million children have parent/s in prison
- Causes trauma and disadvantage
- Foster home or parental time limitation

**Police**
- Brutality
- Racial Profiling
- Discrimination in Arrest

**Courts**
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**Corrections**
- Mass Incarceration
- Over-representation of racial minorities
Differential Justice: Research on Contemporary Issues

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Corrections
- Mass Incarceration
- Over-representation of racial minorities

Poverty
- Housing
- Education
- Jobs
Differential justice: maintained

Discriminatory intent v. effect

How can these disparities exist in a system that outlaws discrimination?
Differential justice: maintained

McCleskey v. Kemp (1987)

- McCleskey claimed racially discriminatory administration of death penalty

5-4 decision (maj. lead by Justice Powell)

- Death penalty upheld: Thurgood Marshall joined dissenting opinion

- No racial discrimination proven in individual case although statistics clearly demonstrate discriminatory administration

- Discriminatory effect is not sufficient evidence of discrimination in any individual case

- To challenge on racial bias, must demonstrate discriminatory intent or deliberate bias
Differential justice: maintained


- Private parties cannot sue for discriminatory impact

- Discriminatory impact insufficient to sue federally funded agencies for race, color or national origin discrimination

- Must prove discriminatory intent
Systemic racism (including government policy) promotes differential justice

African Americans:
- Have lower job opportunities
- Unequal educational opportunities
- Disrupted communities
- Less wealth accumulation
- Negatively impacted by criminal Justice System

Contributes to stereotyped perception that Blacks are more prone to criminality → used as fodder for inaction
Recommendations from Sociologists:

Address racism in society
- Attitudinal and behavioral changes
- Diversify & Train Criminal Justice workers
- Better access to education, jobs and housing for racial minorities

Policy Changes
- Community Corrections
- Community Policing
- Financial incentives to eradicate discriminatory effect
- War on Drugs
- Financial incentives to reduce mass incarceration
- Sentencing Guidelines