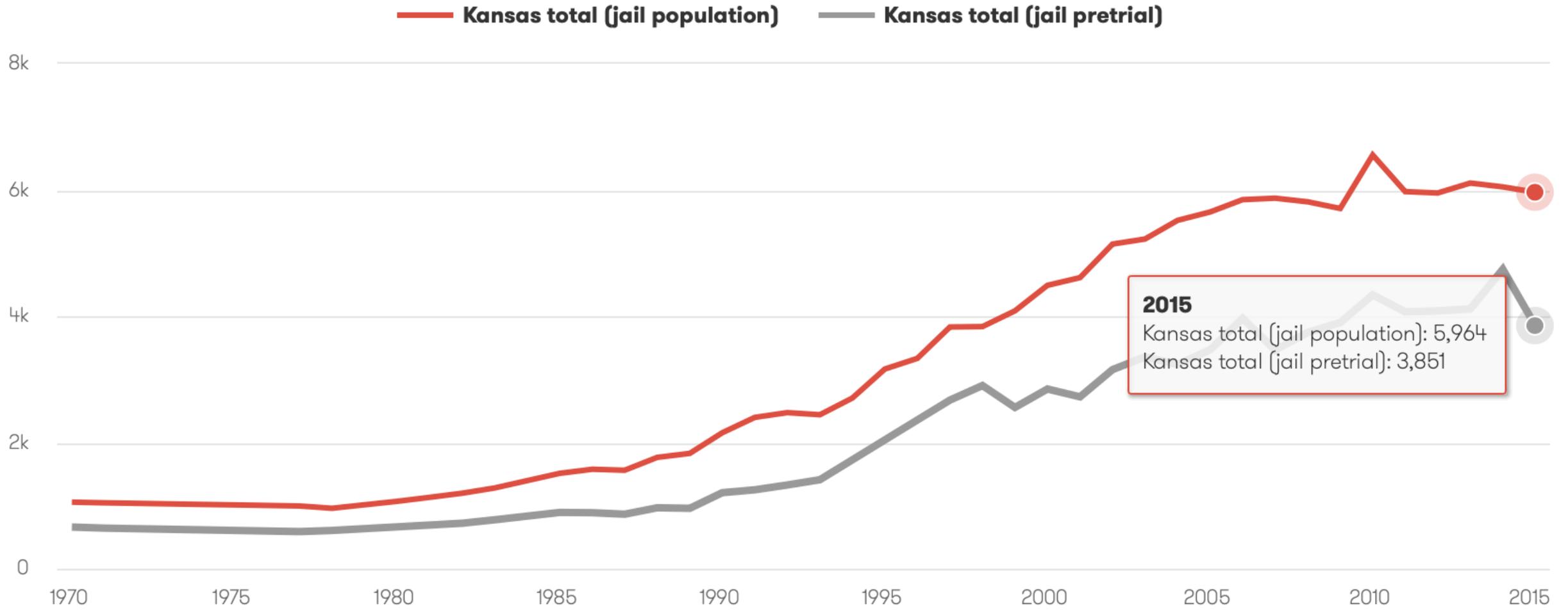


# Challenging Pre-Trial Risk Assessment Tools

March 8, 2019

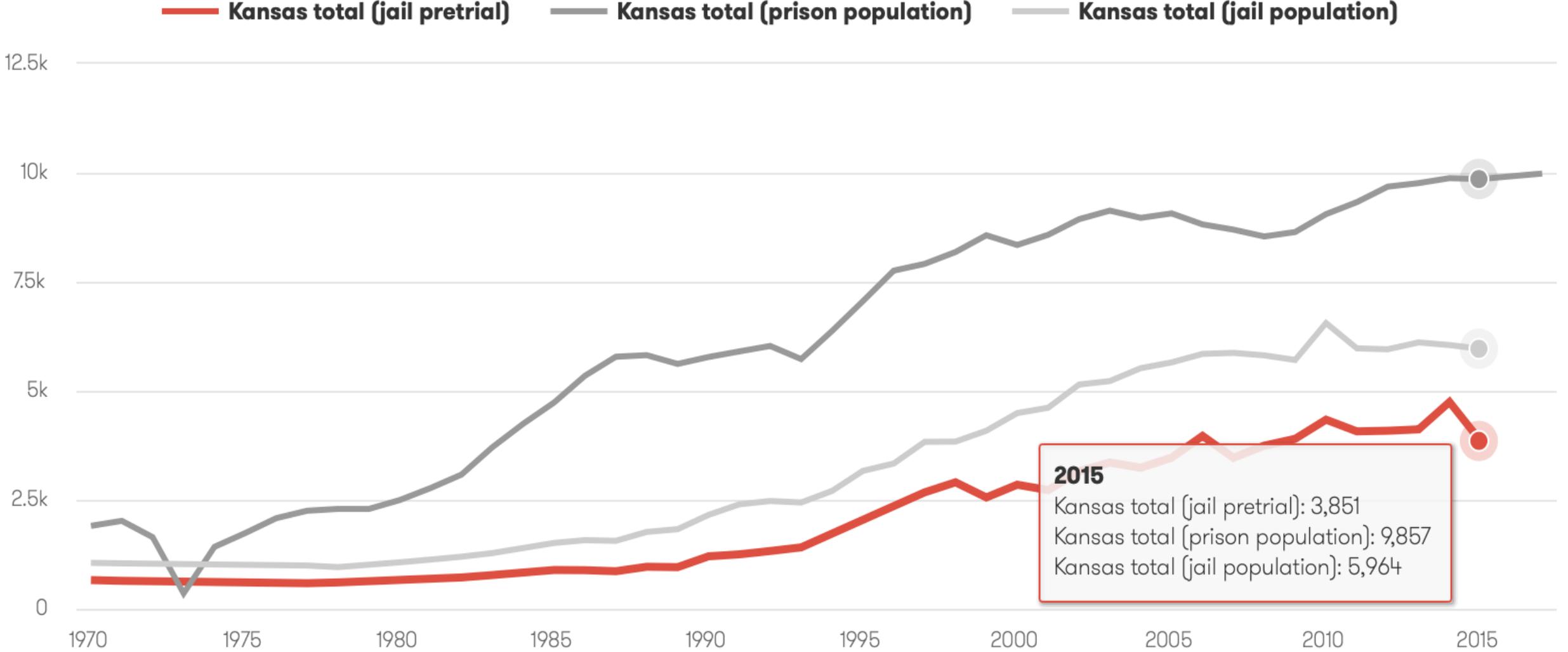
**ACLU**  
Kansas

# Jail population, Jail pretrial



**2015**  
Kansas total (jail population): 5,964  
Kansas total (jail pretrial): 3,851

# Jail pretrial, Prison population, Jail population

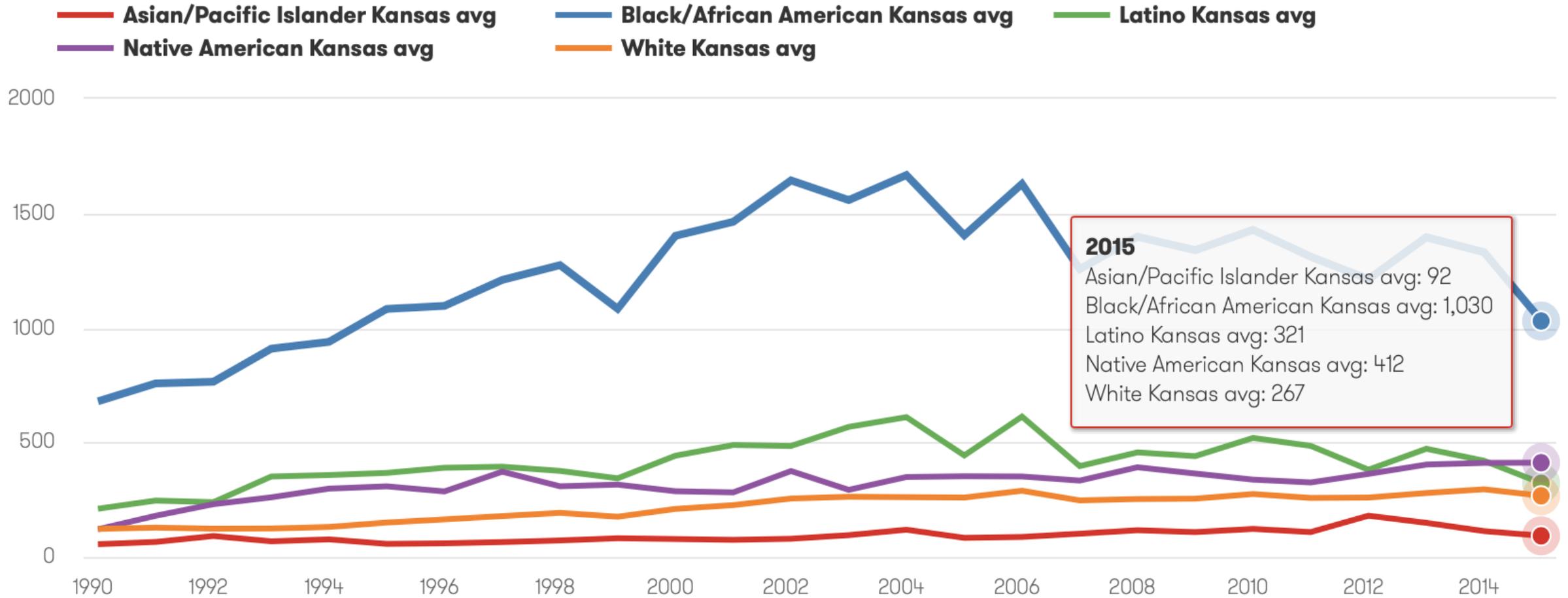


From the Vera Institute of Justice, "Incarceration Trends" Website

# Jail population



Per 100,000 residents age 15-64



**2015**  
Asian/Pacific Islander Kansas avg: 92  
Black/African American Kansas avg: 1,030  
Latino Kansas avg: 321  
Native American Kansas avg: 412  
White Kansas avg: 267

The use of risk assessment tools  
in making pretrial decisions  
**poses threats to civil liberties and  
will not reduce the jail population  
or improve pre-trial accuracy.**



# Overview

- Legal Guidance and Relevant Literature
- Risk Assessment Data, Proxy Variables, Racial Bias
- Implementation Best Practices
- Alternative Pre-trial Release Strategies

# Risk Assessment Tools Critiqued by DOJ

- 2014 Letter to U.S. Sentencing Commission<sup>1</sup>
- “Promise and Danger of Data Analytics”
- Mistaken Reliance on Static, Historical Factors
- Bias Against Underserved Communities
- Constitutional Infirmities
- Further Study Required

<sup>1</sup> <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf>

# Academic Critiques of Risk Assessment

- Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 Emory L.J. 59 (2017).
- Jessica Corey, *Risky Business: Critiquing Pennsylvania's Actuarial Risk Assessment in Sentencing*, 7 Colum. J. Race & L. 150 (2016).
- Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 Berkeley J. Crim. L. 75 (2015).
- Cecilia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 Notre Dame L. Rev. 537 (2015);
- Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. Rev. 671 (2015).
- Jessica Pishko, *Punished for Being Poor: The Problem with Using Big Data in the Justice System*, Pac. Standard Mag. (Aug. 18, 2014).
- Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, Federal Sentencing Reporter, Vol. 26, No. 3, p. 171 (Feb. 2014).
- Jay P. Singh and Seena Fazel, *Forensic Risk Assessment: a Metareview*, Criminal Justice and Behavior, Vol. 37, No. 9, p. 978 (Sept. 2010).
- Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, paper presented at University at Albany Symposium on Sentencing, pp. 14-17 (Sept. 2010).
- Paula M. Casey et al., National Center for State Courts (NCSC), *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group* (2011).
- Bernard E. Harcourt, *Risk as a Proxy for Race 1* (U. Chi. L. Sch., John M. Olin Law & Economics Working Paper No. 535, Public Law and Legal Theory Working Paper No. 323)

# Constitutional Infringements

- Due Process Clause  
(Group-Based Liberty Deprivations)
- Equal Protection Clause  
(Suspect Class-Based Deprivations)

# Court-Recognized Safeguards

- Attorney Present at Risk Assessment Administration
- 5<sup>th</sup> Amendment Right Not to Answer Certain Questions
- Attorney Review of the Assessment Results
- Right to Raise Objections at Hearing.
- Robust Hearing With Other Information Considered
  
- Cases:
  - Malenchik v. State*, 928 N.E.2d 564 (Ind. 2010)
  - State v. Loomis*, 881 N.W.2d 749, 753 (Wis. 2016)
  - Commonwealth v. Redacted*, Case No. ESCR2015-00590,  
2016 Mass. Super. LEXIS 29, at \*9-\*10 (Mass. Sup. Ct. April 7, 2016)

# No Adequate Pre-Trial Safeguards

- No Counsel at Risk Assessment
- No Clear Right to Counsel at Initial Bail Hearing
- No Ability to Review Risk Assessment Prior to Hearing
- Less Robust Hearing Opportunity
- Cases:
  - *Blaurock v. State*, Case No. No. 108,591, 2015 Kan. App. Unpub. LEXIS 172, at \*7 (Kan. App. Mar. 6, 2015)

# **The Fairness Problem:**

**Risk Assessment Tools come with a host of built-in biases and potentially violate civil liberties while failing to promote human dignity.**

# Why are we here today?

“What algorithmic risk assessment has done is **reveal the inequality inherent in all prediction**, forcing us to confront a much larger problem than the challenges of a new technology. Algorithms shed new light on an old problem.”

Mayson, Sandra Gabriel, Bias In, Bias Out (September 28, 2018). 128 Yale Law Journal \_\_ (2019 Forthcoming); University of Georgia School of Law Legal Studies Research Paper No. 2018-35. Available at SSRN: <https://ssrn.com/abstract=3257004>

# What is the problem?

**Algorithms shed light on racial bias in the criminal justice system.**

“That order of operations can be problematic given the range of data that fuels the forecast. Data scientists often refer to this type of problem as **'garbage in, garbage out.'** In a historically biased criminal justice system, the 'garbage in' can have grave consequences.”

*Vincent Southerland - Executive Director, Center on Race, Inequality, and the Law, NYU Law.*

The Devil is in the Data, APRIL 9, 2018, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data>

# The data that feeds the algorithms that run the RAI are often proxies race and poor people.

- Defendant age
- Substance use
- Criminal history, including violence and failure to appear
- Active community supervision
- Pending/current charge(s)
- Employment stability
- Education
- Housing/residential stability
- Family/peer relationships
- Community ties

# The tools are validated, so what?

“Even a well-validated risk assessment tool **will not produce accurate estimates** of risk for failure to appear and/or rearrest if it is not used correctly.”

PRETRIAL RISK ASSESSMENT TOOLS: A Primer for Judges, Prosecutors, and Defense Attorneys, Sarah L. Desmarais and Evan M. Lowder, February 2019, available at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf>

# The data in Kansas shows racial biases

- **Policing**

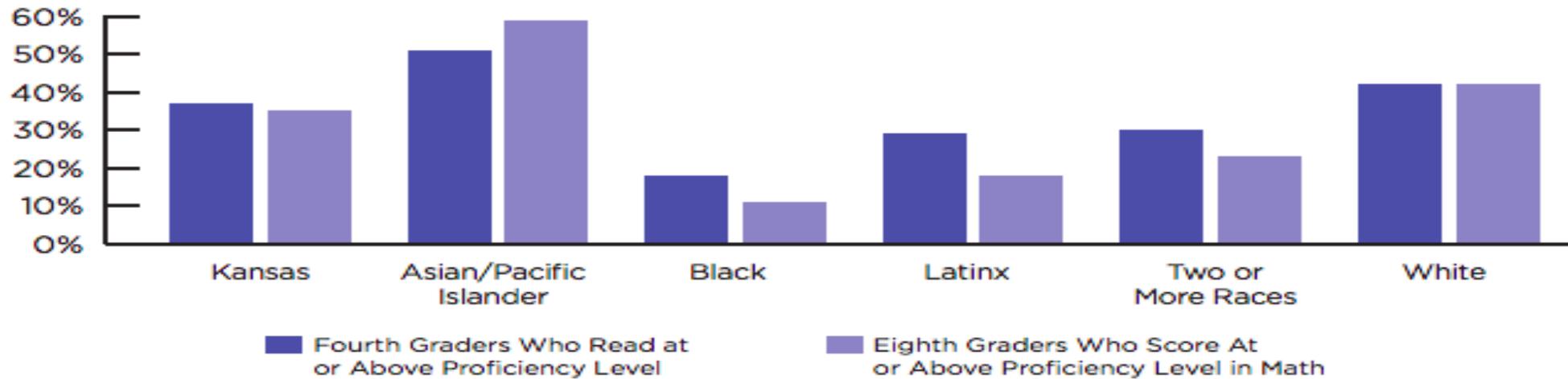
- The Wichita Police Department study of 37,454 traffic and pedestrian stops in 2001 found: Blacks are twice as likely to be stopped by WPD. Blacks were 3 times more likely to be searched, arrested or have officers use excessive force. Black and Hispanic drivers were more likely to be stopped at night than White drivers.
- Between 2010 and 2014 the RCPD intensified its enforcement of state marijuana prohibition law. In 2014 black persons in Riley County were 6.8 times more likely than white persons to be arrested for marijuana possession.” <https://mapj.org/2017/02/23/cej-leaflet-on-rcpd-drug-law-enforcement-2010-2014/>
- Marijuana arrests: Black residents make up 11.5 percent of Wichita’s population but account for 35 to 40 percent of the first-time cases, municipal court records showed.” <https://www.kansas.com/news/politics-government/election/article16705595.html>
- disproportionate minority contact in Douglas County’s criminal justice. <http://www2.ljworld.com/news/city-government/2018/dec/18/city-to-join-study-to-determine-racial-breakdown-of-police-stops-and-searches/>

- **Jails and Prisons** - Black people represent 6% of the population, but 30% of the state's prisoners
- **Prosecutors** – On average, about one quarter of youth of color receive diversions, compared to about 45% of white youth.  
[https://www.kuyj.org/uploads/2/1/9/2/21929892/racial\\_disparities\\_in\\_the\\_kansas\\_juvenile\\_justice\\_system\\_2019.pdf](https://www.kuyj.org/uploads/2/1/9/2/21929892/racial_disparities_in_the_kansas_juvenile_justice_system_2019.pdf)

# Healthcare, Education, Employment, and Housing Data in Kansas

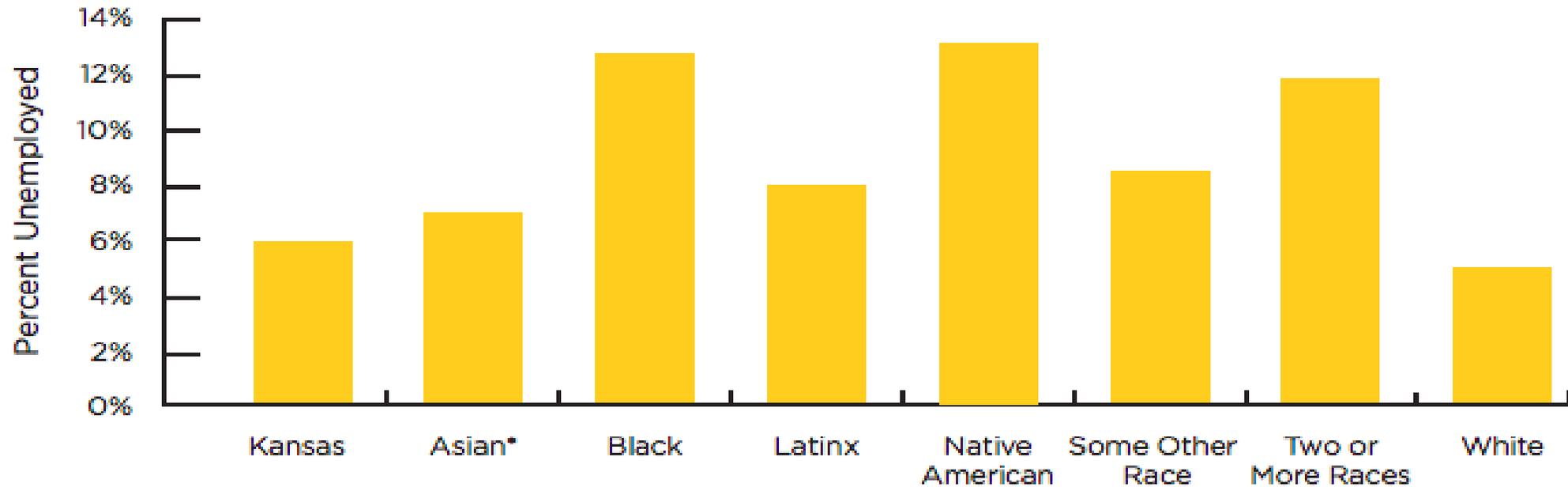
- Black students are 5 times as likely to be suspended as White students. <https://projects.propublica.org/miseducation/state/KS>

## Less than 4 in 10 Kansas Students are Proficient in Reading and Math



Source: U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (NAEP).

## Black Kansans More than Twice as Likely to be Unemployed as their White Counterparts



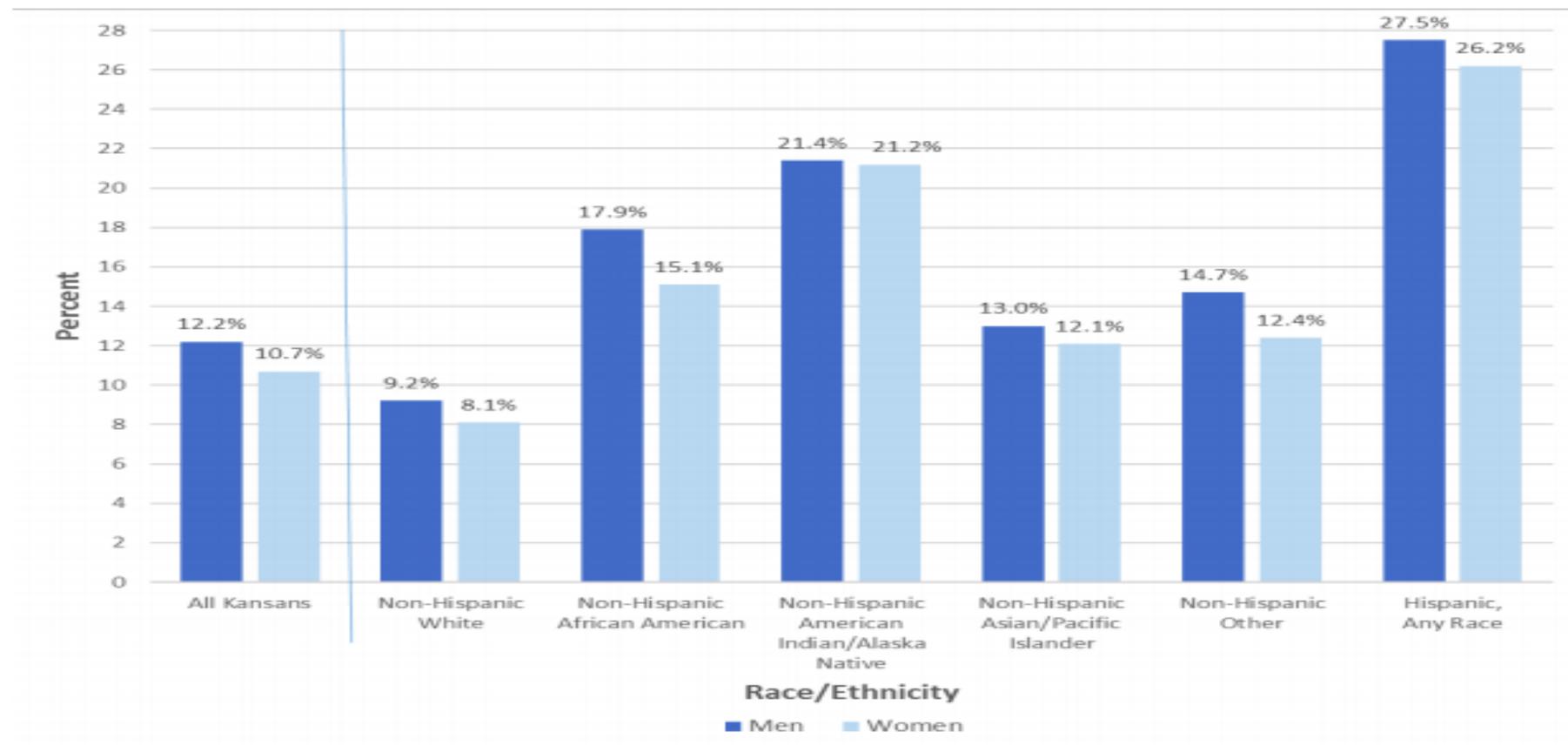
Source: KHI analysis of data from the U.S. Census Bureau's American Community Survey (ACS) 2010 (2006-2010) 5-Year Estimates and the U.S. Census Bureau's ACS 2015 (2011-2015) 5-Year Estimates.

\*Asian Kansans' data for median household income does not include Pacific Islanders.

Source: 2018 Kansas Health & Prosperity Index (HAPI) Tackling the Legacies of Unfairness Facing Kansans of Color: Enhancing Opportunity for Every Kansan [https://realprosperityks.com/wp-content/uploads/2018/12/2018\\_HAPI\\_report.pdf](https://realprosperityks.com/wp-content/uploads/2018/12/2018_HAPI_report.pdf)

**Black Kansans are roughly twice as likely as white and Asian/ Pacific Islander Kansans to report missing health care due to cost.**

Figure 19b. Percent of Population without Health Insurance by Race/Ethnicity and Gender in Kansas, 2015



Source: 2018 Kansas Health & Prosperity Index (HAPI) Tackling the Legacies of Unfairness Facing Kansans of Color: Enhancing Opportunity for Every Kansan [https://realprosperityks.com/wp-content/uploads/2018/12/2018\\_HAPI\\_report.pdf](https://realprosperityks.com/wp-content/uploads/2018/12/2018_HAPI_report.pdf)

- One-quarter of Black (25.4 percent) and Latinx (25.3 percent) Kansans live in poverty, compared with white Kansans (10.6 percent).
- For children in Kansas, the percentage of children of color living in poverty is even more pronounced. Compared with white children in Kansas (10 percent), Black children are four times as likely (40 percent) and Latinx children are twice as likely (22 percent) to live in poverty.

Source: 2018 Kansas Health & Prosperity Index (HAPI) Tackling the Legacies of Unfairness Facing Kansans of Color: Enhancing Opportunity for Every Kansan [https://realprosperityks.com/wp-content/uploads/2018/12/2018\\_HAPI\\_report.pdf](https://realprosperityks.com/wp-content/uploads/2018/12/2018_HAPI_report.pdf)

# **Risk Assessment tools are not the solution to alleviating overcrowding and racial disparities in Kansas.**

“Any system that relies on criminal justice data must contend with the vestiges of slavery, de jure and de facto segregation, racial discrimination, biased policing, and explicit and implicit bias, which are part and parcel of the criminal justice system. Otherwise, these automated tools will simply exacerbate, reproduce, and calcify the biases they are meant to correct.”

*Vincent Southerland* - Executive Director, Center on Race, Inequality, and the Law, NYU Law.

APRIL 9, 2018 , <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data>

# Across the country, experts are speaking to legislatures and task forces just like this one.

## Washington

Released report in February 2019; the report does not make a recommendation regarding the use of these tools but recommends courts using them to consider practices to measure performance and ensure transparency and equality. <http://wsac.org/pretrial-reform-task-force/>

## Ohio

Formed 2018; ongoing

## Massachusetts

Passed law to implement task force recommendations; heard from experts from MIT and Harvard - An Open Letter to the Members of the Massachusetts Legislature Regarding the Adoption of Actuarial Risk Assessment Tools

## New York

Released report in March 2018; says further study is warranted before implementation. <http://www.nyjusticetaskforce.com/pdfs/ReportBailReform2019.pdf>

## Idaho

House approves H0118, which requires: - all data + records used to build or validate a risk assessment to "be open to public inspection, auditing, and testing" - no claims of trade secrecy

# **Risk Assessment tools are not right for Kansas.**

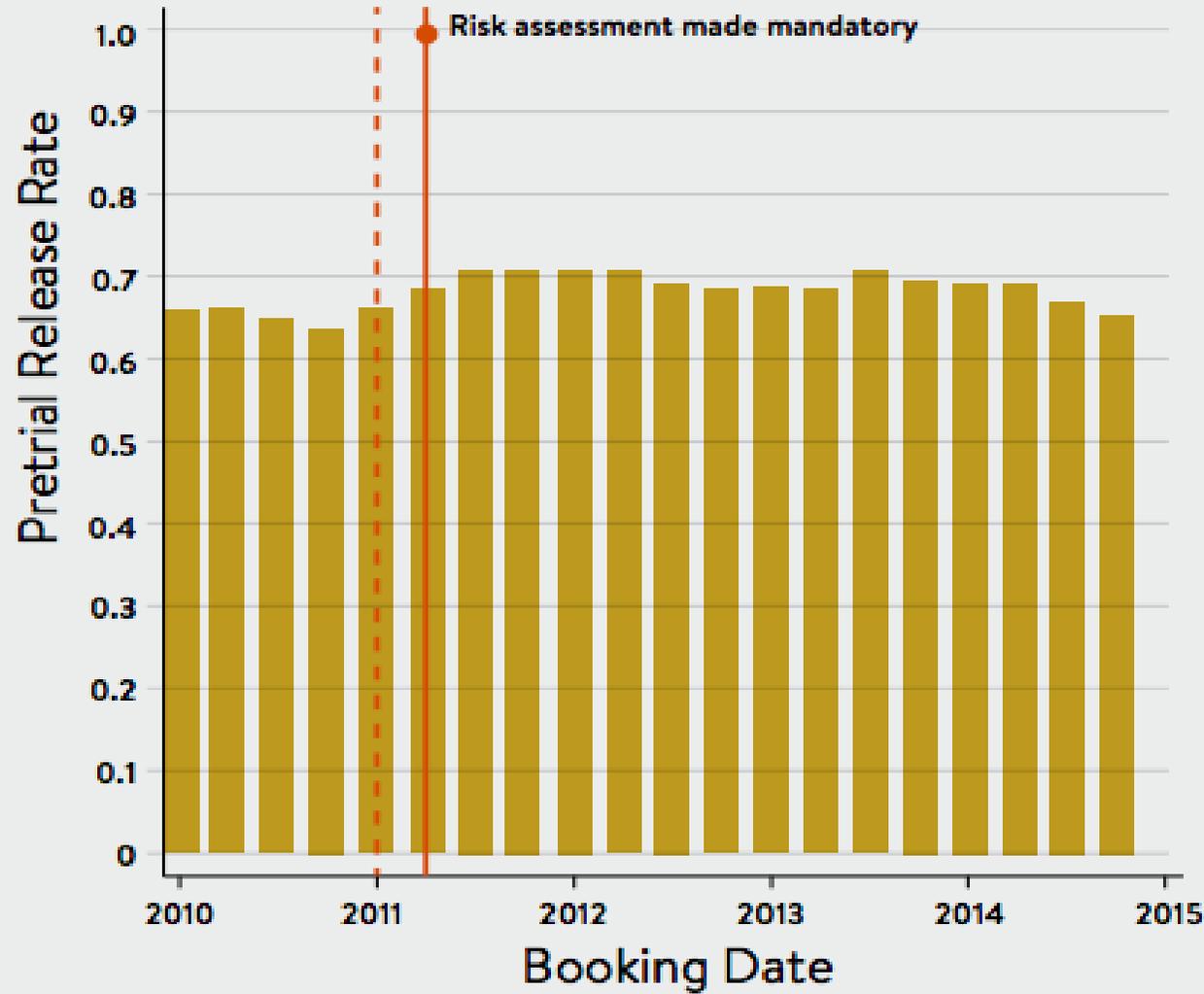
- Criminal justice systems vary county by county in how offenders are treated.
- Correctional resources vary at the county level and can have an impact on outcomes.
- Important to consider economic growth and development, pre-reform versus post reform conditions; they can change across time and lead to different results for various reasons.
- Need to have the infrastructure and financial resources to collect the data necessary to locally validate the tool.

**The use of risk assessment tools in making pretrial decisions poses threats to civil liberties and may not result in the reduction of the prison population.**

# Kentucky – HB 463 mandated risk assessment tools

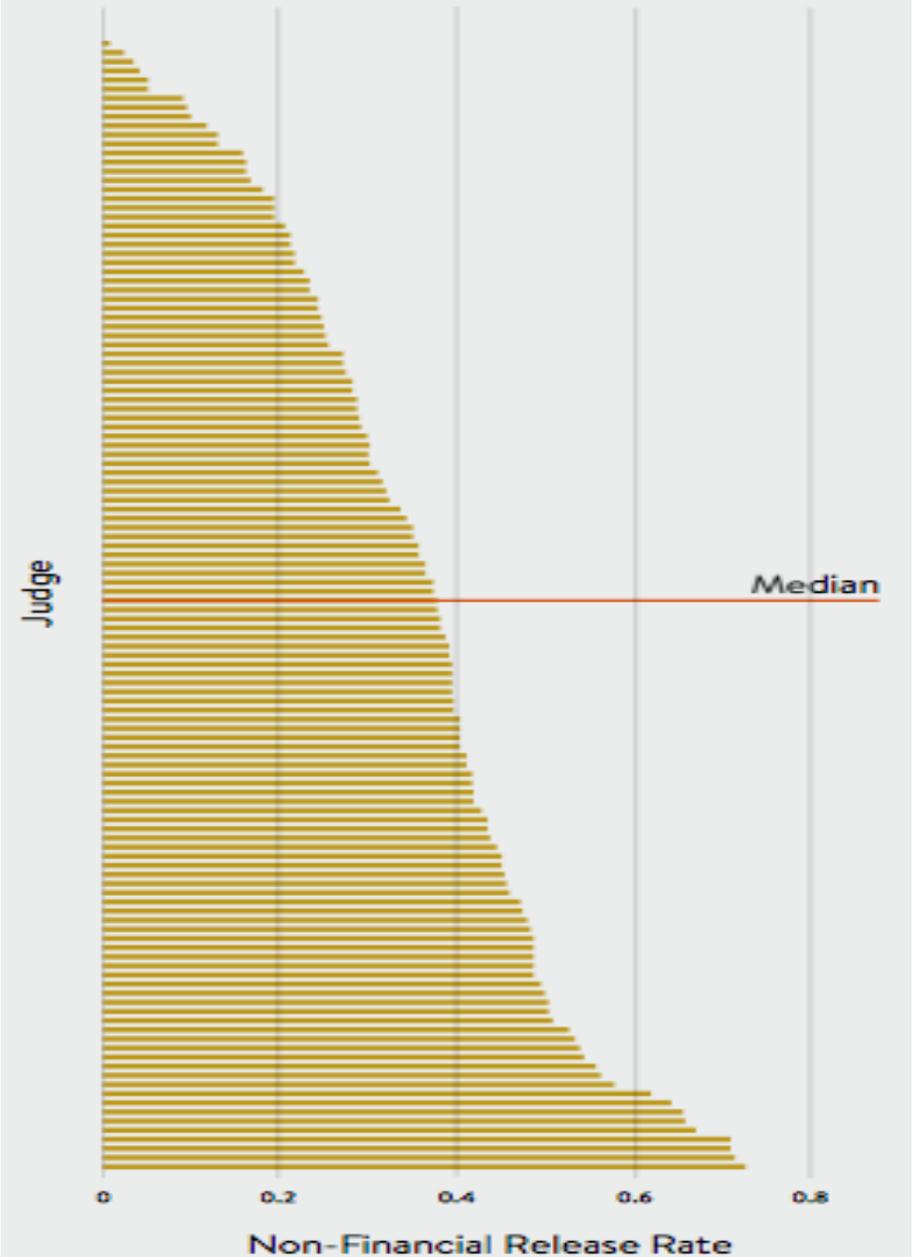
- Relative to black defendants, white defendants are more likely to be granted non-financial release.
- The racial gap jumped from about 2 percentage point to 10 percentage point after HB 463 was implemented and remained relatively constant through January of 2016.
- despite the increase in the likelihood of being granted non-financial release, HB 463 did not lead to a visually discernible increase in the likelihood of being released within 3 days for black defendants.
- once county effects and varying time trends at the circuit level have been accounted for, the racial gap in the likelihood of being released is pretty constant over time at about 5 percentage point

**Figure 1. Kentucky's Pretrial Release Rate Before and After Reform**

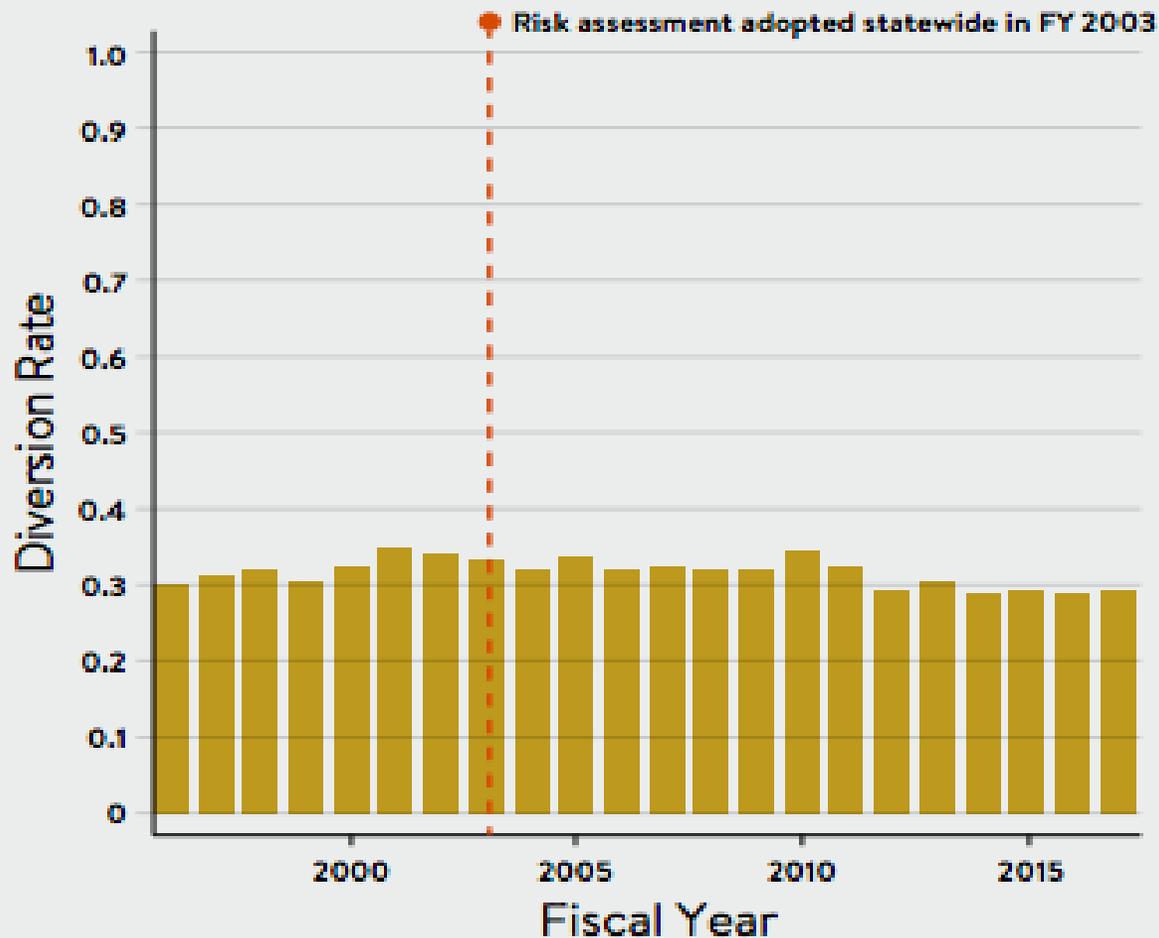


Source: The Roadblock to Reform, by Megan Stevenson and Jennifer Doleac, November 2018, <https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf>

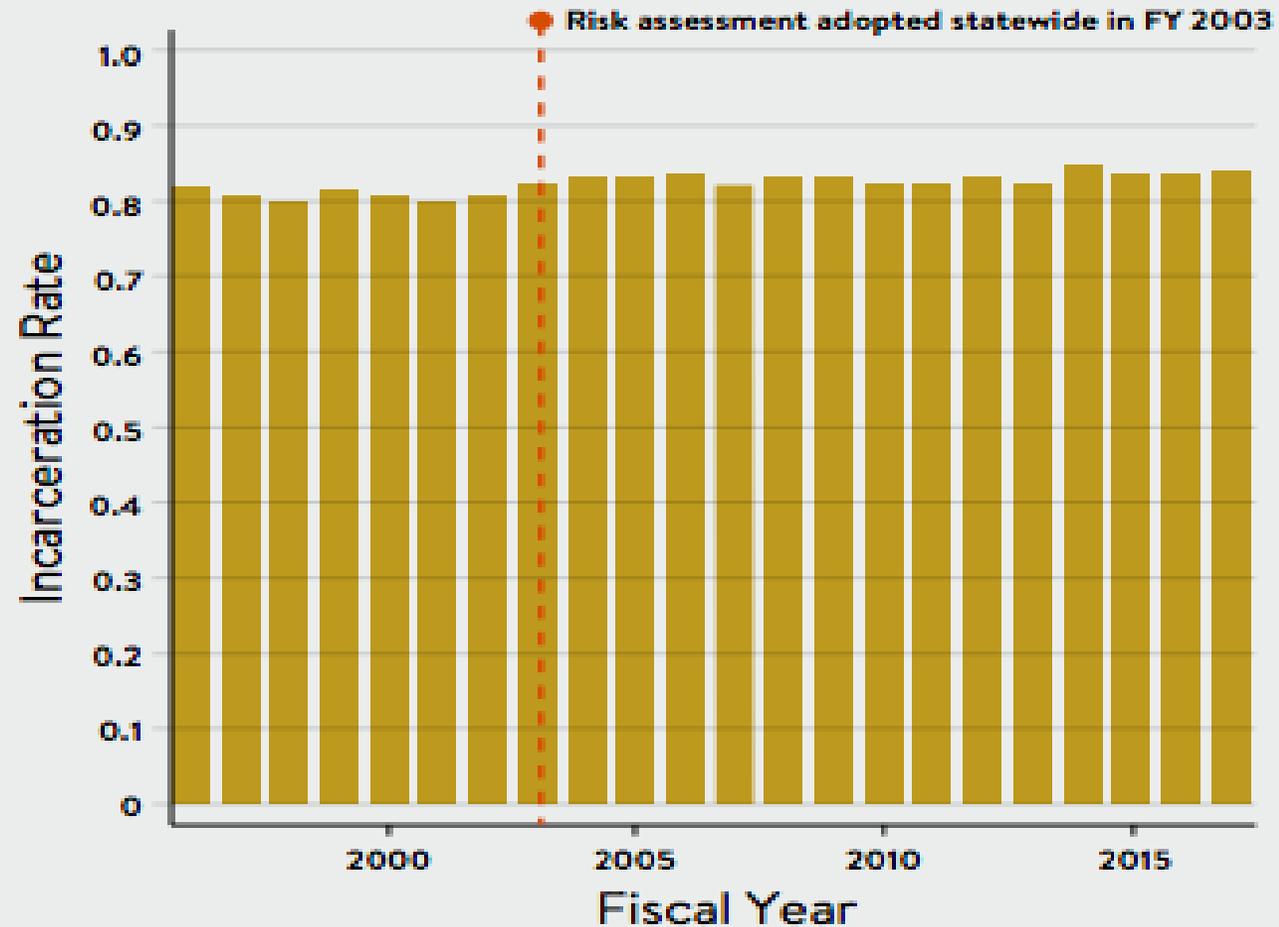
**Figure 2: Wide Variance Across Kentucky Judges in the Fraction of Low/Moderate Risk Defendants who are Granted Non-Financial Release**



**Figure 3: No Change in the Diversion Rate for Virginia's Risk-Assessment Eligible Offenders as a Result of Risk Assessment**



**Figure 4. No Change in the Incarceration Rate Among Risk-Assessment-Eligible Cases After Risk Assessment is Adopted Statewide**



Source: The Roadblock to Reform, by Megan Stevenson and Jennifer Doleac, November 2018, <https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf>

# THE USE OF PRETRIAL "RISK ASSESSMENT" INSTRUMENTS:

A SHARED STATEMENT OF  
CIVIL RIGHTS CONCERNS

We believe that jurisdictions should not use risk assessment instruments in pretrial decisionmaking, and instead move to end secured money bail and decarcerate most accused people pretrial. Thus, the principles that follow should not be construed as an endorsement of risk assessment instruments in pretrial decisionmaking, but rather tools to mitigate harm in places where they are already in use.

# Alternatives to Risk Assessment Tools

- Pre-Court Messages
  - Consequence Messages
  - Plan Making Messages
  - Combination Messages
- Re-Design of Summons Forms

- Policing changes, such as issuing citations in lieu of arrest
- investments in non-police responses to public safety problems
- Automatic release of broad categories of defendants

# Concerns About Risk Assessments

- Julia Angwin, et al., Bias in Criminal Risk Scores Mathematically Inevitable, Researchers Say, (ProPublica) (Dec. 30, 2016), available at <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematicallyinevitable-researchers-say>.
- Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing, 131 Harv. L. Rev. 1125 (Feb. 9, 2018), available at: <https://harvardlawreview.org/2018/02/bailreform-and-risk-assessment-the-cautionary-tale-of-federal-sentencing/>
- Sandra G. Mayson, Dangerous Defendants, 127 Yale L. J. 490 (Jan. 2018), available at <https://www.yalelawjournal.org/article/dangerous-defendants>
- Chelsea Barabas, et al., An Open Letter to the Members of the Massachusetts Legislature Regarding the Adoption of Actuarial Risk Assessment Tools in the Criminal Justice System (Nov. 9, 2017), available at <https://medium.com/berkman-klein-center/thefollowing-letter-signed-by-harvard-and-mit-based-faculty-staff-and-researchers-chelsea7a0cf3e925e9>
- NYU Law/ACLU reporting out of a convening on pretrial risk assessment, “fairness,” and race: <http://www.law.nyu.edu/sites/default/files/Final%20Report--ACLU-NYU%20CRIL%20Convening%20on%20Race%20Risk%20Assessment%20%20Fairness.pdf>

# Concerns about Risk Assessments

- Chelsea Barabas, et al., Interventions over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment (2018), available at <http://proceedings.mlr.press/v81/barabas18a/barabas18a.pdf>
- Sonja B. Starr, Evidence-Based Sentencing and the Scientific Rationalization of Discrimination, 66 Stan. L. Rev. 803 (April 2014), available at <https://www.stanfordlawreview.org/print/article/evidence-based-sentencing-and-the-scientific-rationalization-of-discrimination/>
- Bernard E. Harcourt, Risk as a Proxy for Race, Univ. of Chicago Law & Econ. Olin Working Paper No. 535 (Sept. 2010), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1677654](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654).
- Mayson, Sandra Gabriel, Bias In, Bias Out (September 28, 2018). 128 Yale Law Journal \_\_\_\_ (2019 Forthcoming); University of Georgia School of Law Legal Studies Research Paper No. 2018-35. Available at SSRN: <https://ssrn.com/abstract=3257004>
- Stevenson, Megan, Assessing Risk Assessment in Action (2018). 103 Minnesota Law Review 303 . Available at SSRN: <https://ssrn.com/abstract=3016088>

# Concerns About Risk Assessments

- Shared Statement of Civil Rights Concerns on The Use of Pretrial Risk Assessment Instruments, Leadership Conference on Civil and Human Rights (July 30, 2018), available at: <https://leadershipconferenceedfund.org/pretrial-risk-assessment/>
- Six Things to Know about Algorithm-Based Decision-Making Tools, Leadership Conference on Civil and Human Rights (July 30, 2018), available at: <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-6Things.pdf>
- Statement from Nicholas Turner on Leadership Conference's Risk Assessment Principles (July 30, 2018), available at <https://www.vera.org/newsroom/press-releases/statementfrom-nicholas-turner-on-leadership-conferences-risk-assessment-principles>
- John Logan Koepke and David G. Robinson, Danger Ahead: Risk Assessment and the Future of Bail Reform, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3041622](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041622)
- Julia Angwin, et al., Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And it's Biased Against Blacks, ProPublica, (May 23, 2016), available at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminalsentencing>
- PRETRIAL RISK ASSESSMENT TOOLS: A Primer for Judges, Prosecutors, and Defense Attorneys, Sarah L. Desmarais and Evan M. Lowder, February 2019, available at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf>