

The background features a hand reaching out from the bottom center towards a digital interface. The interface is composed of glowing blue lines and nodes, with several glowing padlock icons scattered throughout. The overall color scheme is dark blue and black, with bright blue highlights from the digital elements.

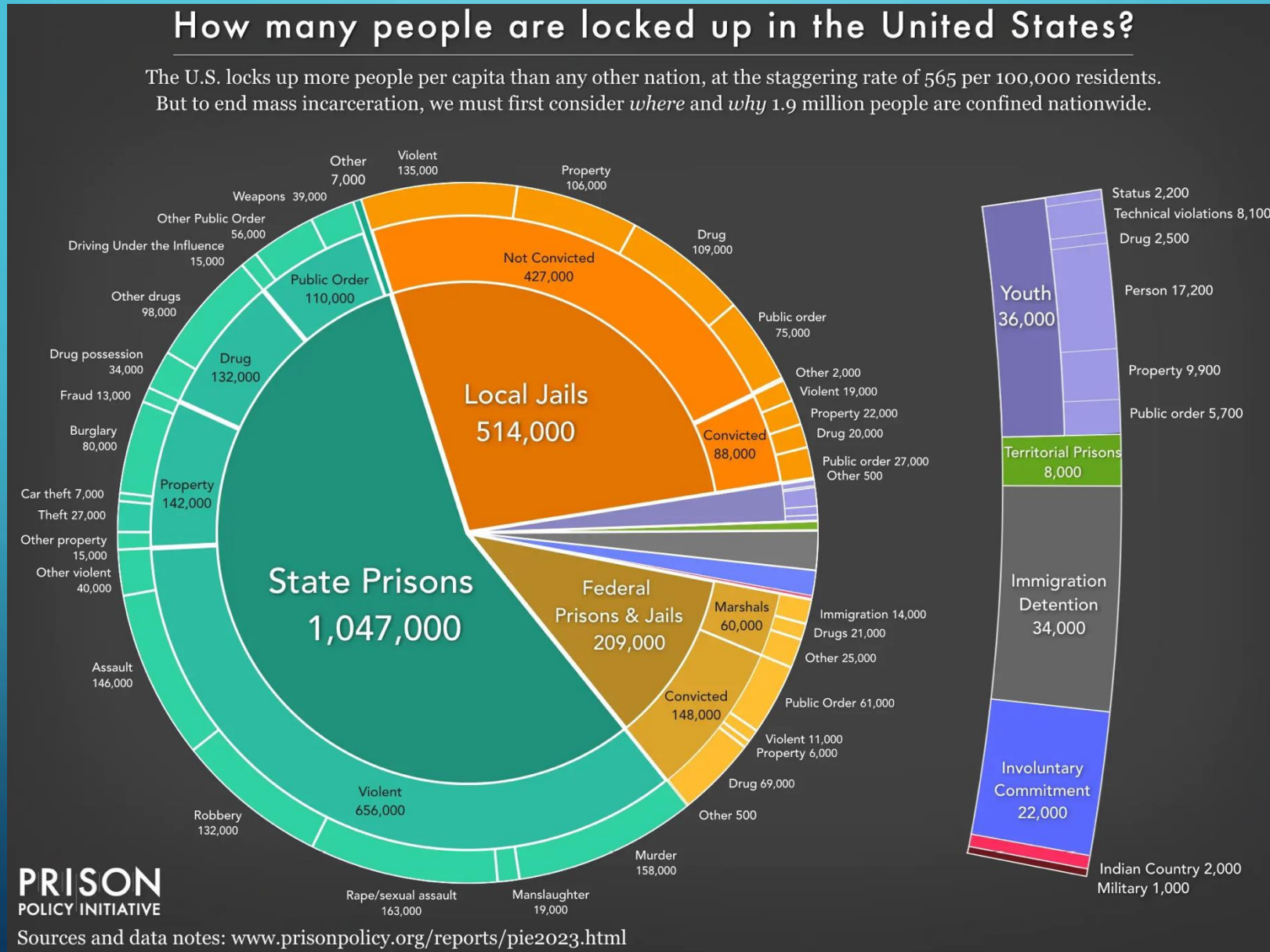
LITIGATING AI IN THE U.S. CRIMINAL LEGAL SYSTEM

OPPORTUNITIES AND CHALLENGES

THE UNITED STATES HAS A MASS INCARCERATION PROBLEM

How many people are locked up in the United States?

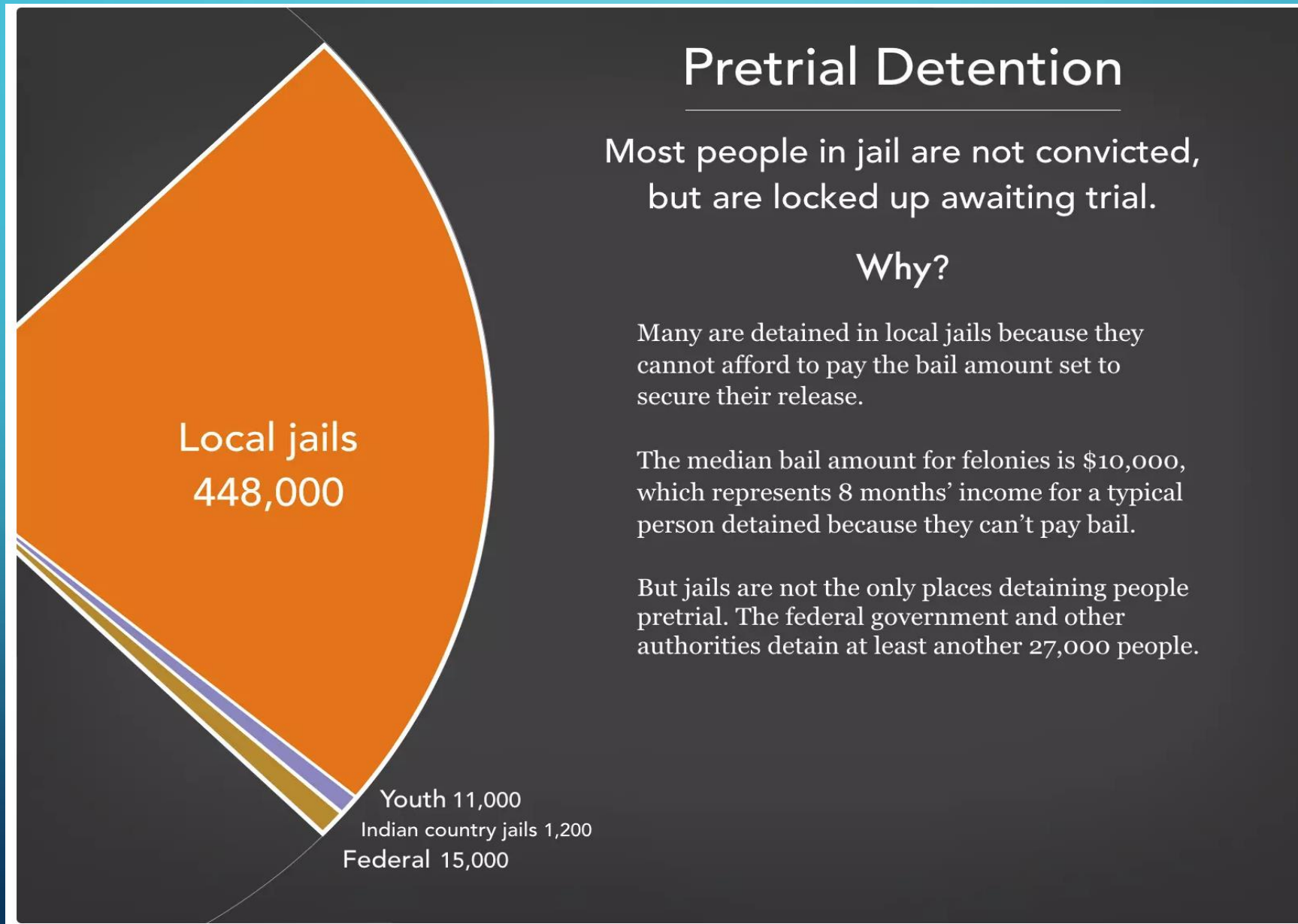
The U.S. locks up more people per capita than any other nation, at the staggering rate of 565 per 100,000 residents. But to end mass incarceration, we must first consider *where* and *why* 1.9 million people are confined nationwide.



PRISON
POLICY INITIATIVE

Sources and data notes: www.prisonpolicy.org/reports/pie2023.html

FEEDING THE TRIAL PENALTY



Pretrial Detention

Most people in jail are not convicted, but are locked up awaiting trial.

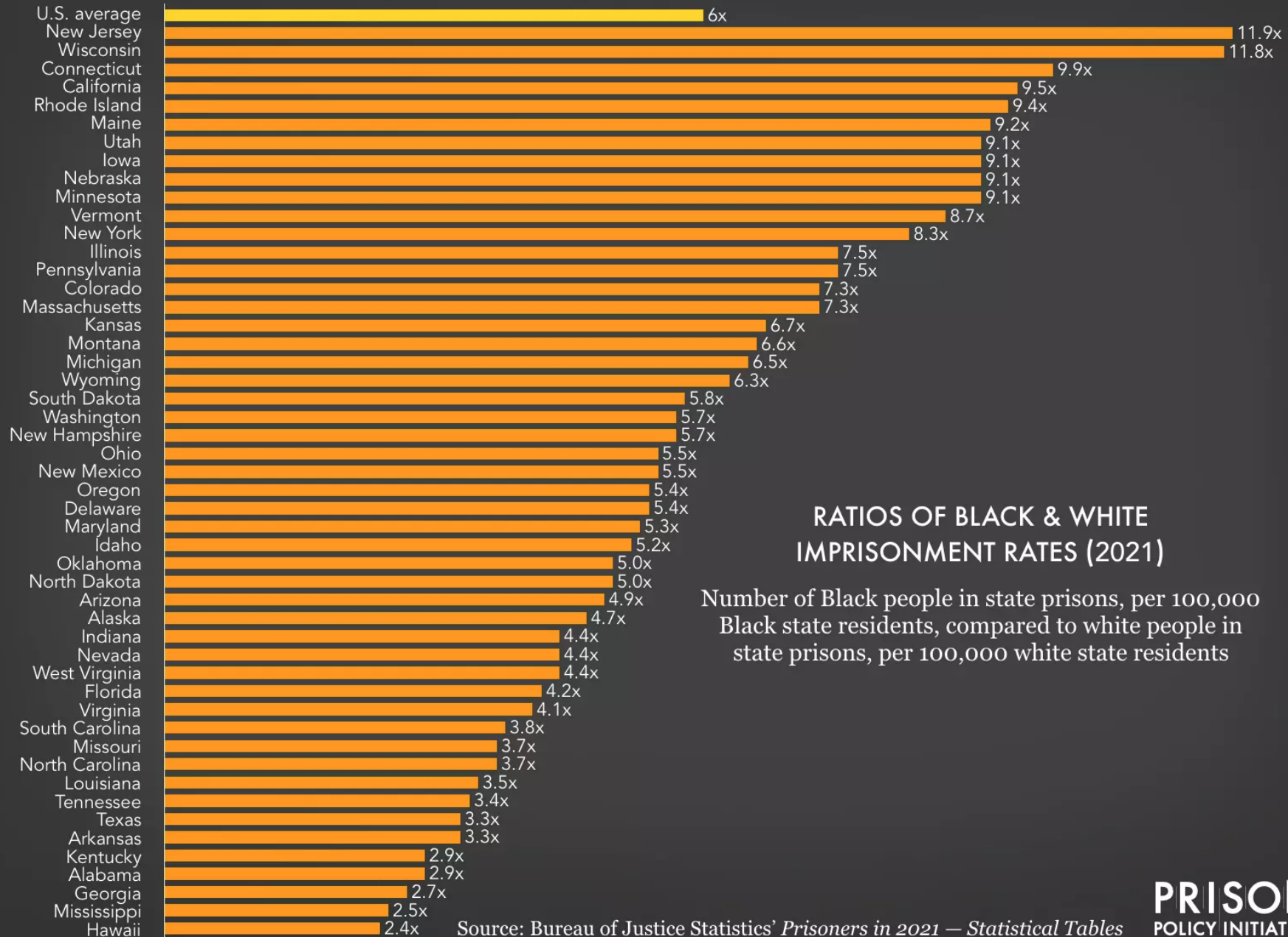
Why?

Many are detained in local jails because they cannot afford to pay the bail amount set to secure their release.

The median bail amount for felonies is \$10,000, which represents 8 months' income for a typical person detained because they can't pay bail.

But jails are not the only places detaining people pretrial. The federal government and other authorities detain at least another 27,000 people.

How much higher are Black incarceration rates than white?



RATIOS OF BLACK & WHITE IMPRISONMENT RATES (2021)

Number of Black people in state prisons, per 100,000 Black state residents, compared to white people in state prisons, per 100,000 white state residents

Source: Bureau of Justice Statistics' *Prisoners in 2021 — Statistical Tables*

PRISON
POLICY INITIATIVE

THE US CARCERAL SYSTEM HAS A RACE PROBLEM

Racial and ethnic disparities in correctional facilities

White people are underrepresented in prisons and jails while Black and American Indian or Alaska Native people are overrepresented.



Source: U.S. Census Bureau, American Community Survey 2022 1-Year Estimates, Table S2603
For category definition and selection details, see www.prisonpolicy.org/reports/pie2024.html#methodology

PRISON
POLICY INITIATIVE

The CSI Effect

- The idea that the exaggerated portrayal of forensic science influences public perceptions



JUNK SCIENCE

- Bite mark evidence
- Burn pattern evidence
- Shaken baby syndrome
- “Hair microscopy” (hair comparison)
- Forearm forensics (bullet matching)

THRESHOLD CHALLENGE





Defenders not only need to learn but often teach:

- Judges
- Juries
- Prosecutors!!

DISCOVERY / BRADY

Due process requires the State provide defendants with all evidence in its possession that is material to “either guilt or punishment, irrespective of the good faith or bad faith of the prosecution”.

Brady v. Maryland, 373 U.S. at 87.

WHERE IS THE INFO?

- **The tech / system itself**
- How the agency uses the tech / system
- **How the tech / system was used in this case**
- Who used the tech / ran the search
- **Validation / verification of software**

JUSTIFYING REQUEST – WHAT AM I TRYING TO PROVE?

- The technology itself is unreliable
- Reliability is unknown or is not scientifically validated
- The technology was misused
- The tech was improperly applied
- The results were interpreted wrong
- The analyst who used the tech lacked qualifications, misused it, misinterpreted the results, exhibited bias, exceeded the scope of their role, etc

ARTEAGA DISCOVERY REQUEST

- The **name and manufacturer** of the facial recognition software used
- The **source code** for the face recognition algorithm(s)
- The **error rates** for the facial recognition system used and whether they reflect **tests in operational conditions**
- The **performance of the algorithm(s)** used on applicable NIST Face Recognition Vendor Tests, if available

STATE OF NEW JERSEY V. FRANCISCO ARTEAGA

"The evidence sought here is directly tied to the defense's ability to test the reliability of the FRT. As such, it is vital to impeach the witnesses' identification, challenge the State's investigation, create reasonable doubt, and demonstrate third-party guilt."

DAUBERT / FRYE

Challenges:

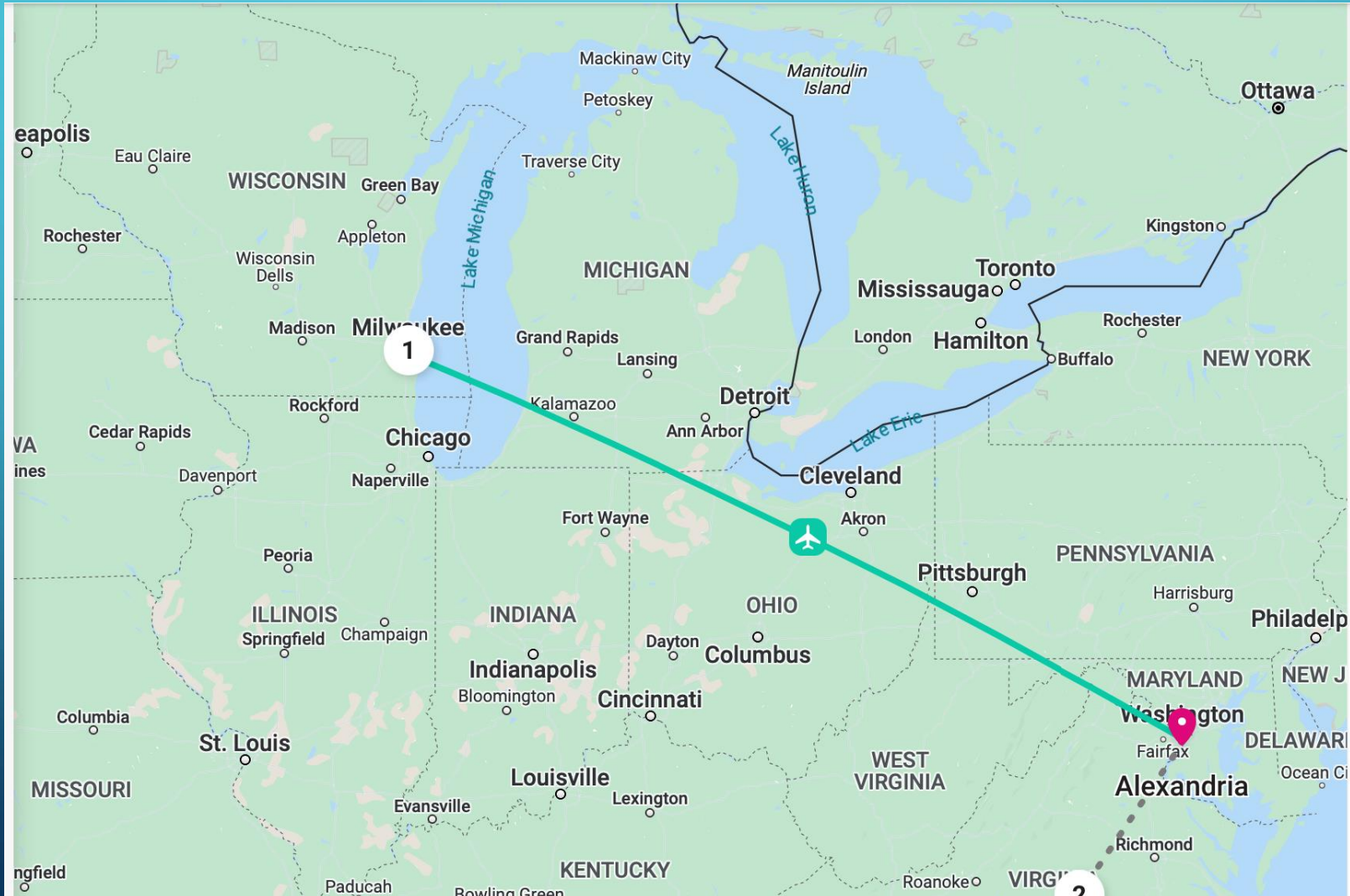
- Lack of Forensic Standards
- Lack of External Validation
- Lack of “Industry Standards”
- Lack of Testing in Real World Circumstances

PUBLIC RECORDS REQUESTS

Recent 4AC ALPR case – law enforcement using Rekor Scout. Found:

- Approximately 1.6 billion records
- "Convoy analysis"
- "Interdiction analysis"
- Hot lists
- Who and how many people were accessing records

WHEN YOU SUBPOENA THE COMPANY





WHEN TRADE SECRETS ARE INVOKED





APPENDIX

- NACDL “Garbage In, Gospel Out: How Data-Driven Policing Technologies Entrench Historic Racism and 'Tech-Wash' Bias in the Criminal Legal System” Wendy Lee, Jumana Musa and Michael Pinard
<https://www.nacdl.org/Document/GarbageInGospelOutDataDrivenPolicingTechnologies>
- New Jersey v. Arteaga NACDL, EFF and EPIC Amicus brief: <https://www.nacdl.org/getattachment/d1d22974-8548-4c16-baca-80072d4fd255/new-jersey-v-arteaga-brief.pdf>
- “The Undue Influence of Surveillance Technology Companies on Policing” Elizabeth Joh, UC Davis School of Law
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924620
- “Ethical AI in American Policing” Elizabeth Joh, UC Davis School of Law
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4096953
- “Thousands of Criminal Cases in New York Relied on Disputed DNA Testing Techniques” <https://www.propublica.org/article/thousands-of-criminal-cases-in-new-york-relied-on-disputed-dna-testing-techniques>
- “Life, Liberty and Trade Secrets” Rebecca Wexler https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920883
- “A Forensic Without a Science” Clare Garvie <https://www.law.georgetown.edu/privacy-technology-center/publications/a-forensic-without-the-science-face-recognition-in-u-s-criminal-investigations/>
- [How Machines Reveal the Gaps in Evidence Law](#) Andrea Roth. Vand. L. Rev. (2023)
- [What Machines Can Teach Us About “Confrontation”](#) Andrea Roth *Duq. L. Rev.* 210 (2022)

CASES

- [US v. Budziak](#), 697 F.3d 1105, 1111 (9th Cir. 2012) (finding that a district court had erroneously denied defense access to investigatory software, EP2P, used in a CP investigation)
- [US v. Gonzales](#), No. CR-17-01311 (D. Arizona 2019) following [Budziak](#) and ordering discovery of Torrential Downpour software (source code itself wasn't requested)
- [US v. Schwier](#), No. 3:17-cr-00095 (D. Alaska) finding that the reliability of Torrential Downpour software is material to the defense; and then finding that defense counsel was entitled to independently test an executable version of the software under protective order (source code itself wasn't requested)
- [United States v. Crowe](#), No. 11 CR 1690 MV, 2013 WL 12335320, at *7 (D.N.M. Apr. 3, 2013) (requiring the government to allow the defense expert to examine and use a copy of the government's confidential Shareaza software at a secure government facility)
- [State v. Arteaga](#), 476 N.J. Super. 36, 61 (App. Div. 2023) (ordering access to records concerning the NYPD's use of facial recognition, including source code, to identify the defendant because "the reliability of the technology bears direct relevance to the quality and thoroughness of the broader criminal investigation")
- [State v. Pickett](#), 466 N.J. Super. 270, 277-78 (App. Div. 2021) (finding TrueAllele's method of DNA probabilistic genotyping a trade secret but granting disclosure to source code under a protective order)
- [State v. Peters](#), 362 Mont. 389 (2011) (source code for an "intoxilyzer" disclosed under protective order)