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2022 CLE Weeks

Managing Risks for Implementing AI Solutions

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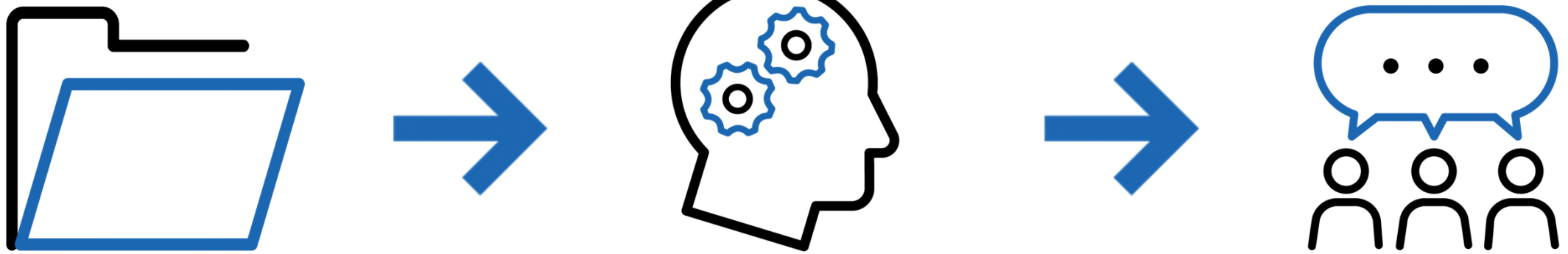
Overview

- The State of AI Today
- Deploying AI Comes With Challenges
  - Data Privacy and Biometrics
  - Contracting for AI Software Development
- How to Get it Right When Implementing New AI Solutions
- Questions?

What is AI?

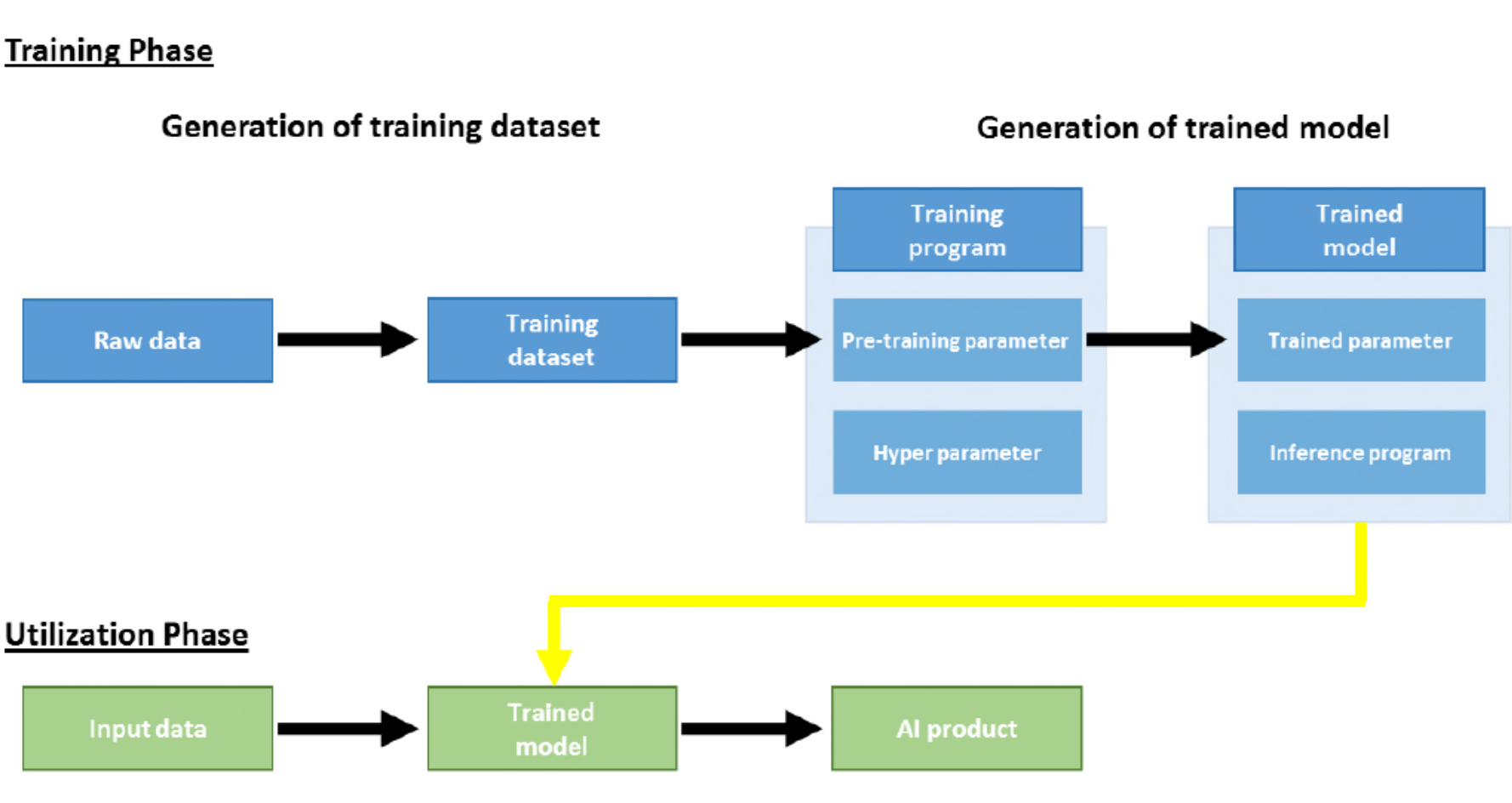


Inputs

AI / ML Model

Outputs

Two Phases to AI-Based Deployment and Use



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The State of AI Today

Is the AI Revolution Finally Here?

1994 – Internet

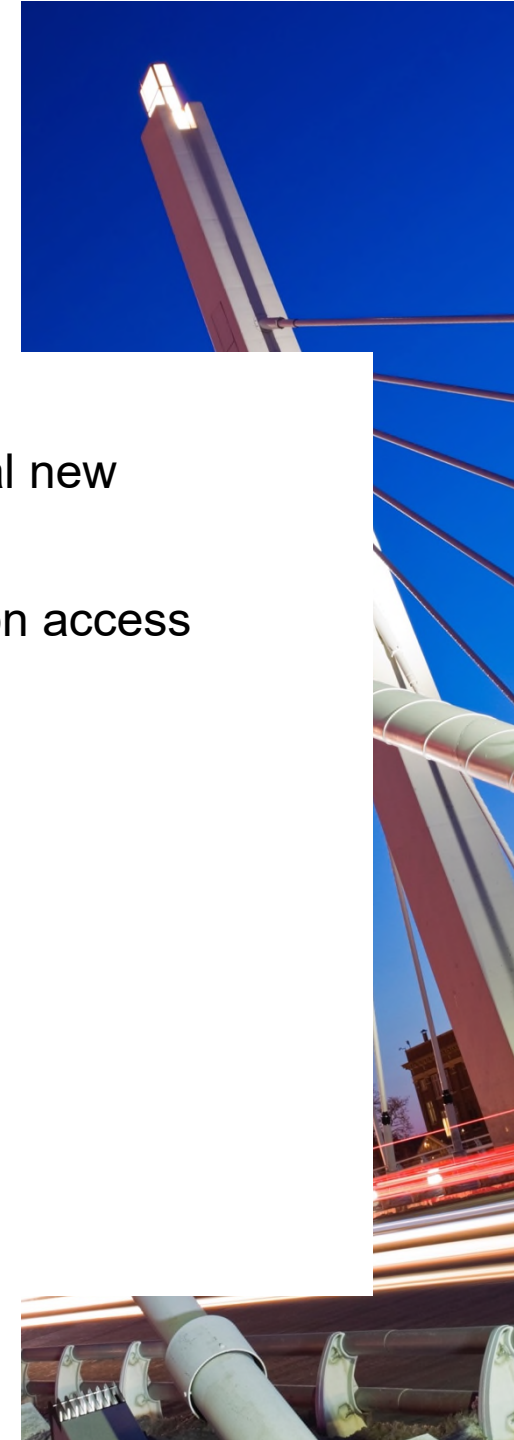
2008 – Smartphone

2022 – Artificial Intelligence

Applications of AI

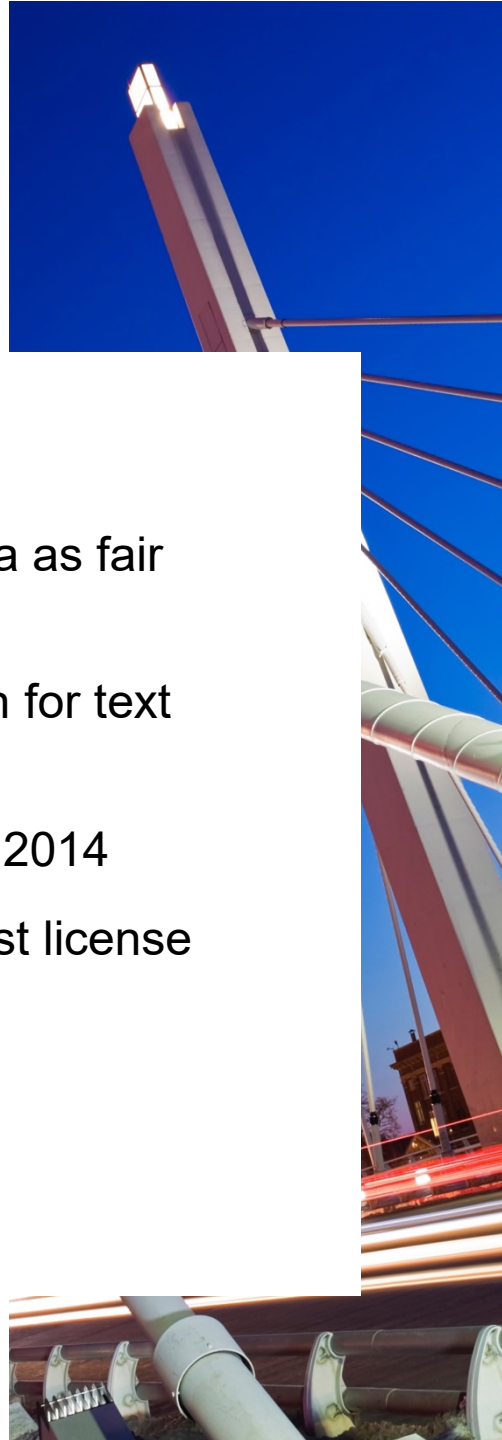
- Manufacturing robots
- Self-driving cars
- Smart assistants
- Healthcare (Diagnostics, workflow assistants, drug discovery)
- Automated financial investing
- Content Generation

What is Generative AI?



- **Generative AI** is a category of machine learning where computers can generate original new content in response to prompts from the user.
- **Generative AI models** are reinventing communication, content creation, and information access
- Some use cases for Generative AI include:
  - Movie restoration
  - Image improvement
  - Healthcare diagnostics
  - Design
  - Software development

Legal Risks with Generative AI



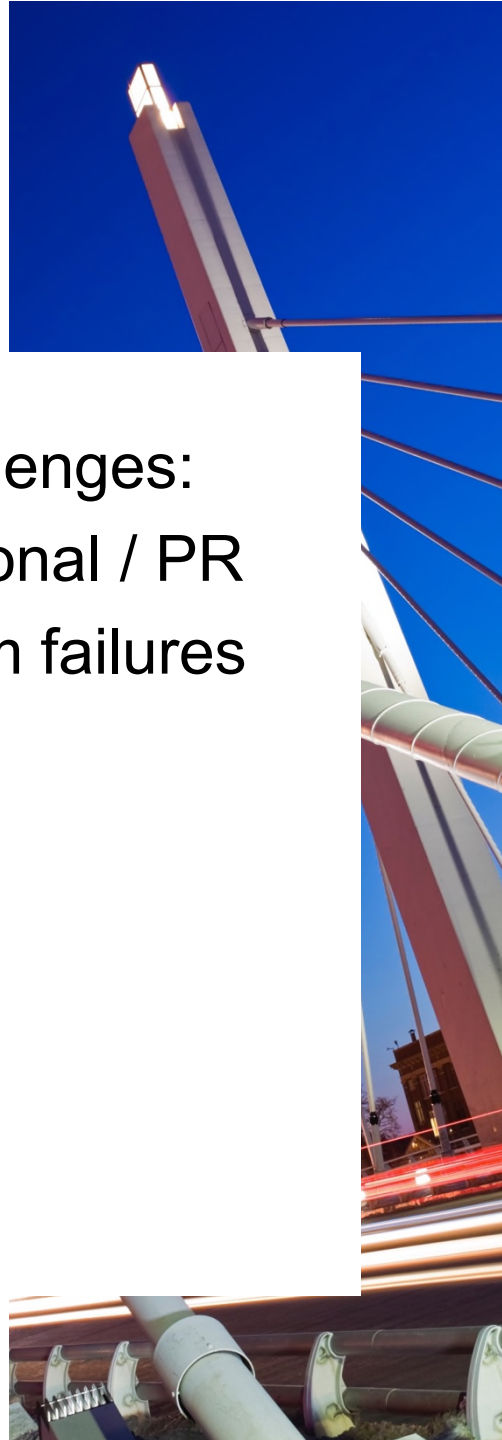
- **Can you use copyrighted data to train a machine learning model?**
  - There is no direct legal precedent in the US that upholds publicly available training data as fair use
  - EU has passed the Digital Single Market Directive in 2019 which contains an exception for text and data mining "for all purposes as long as the author has not reserved their right."
  - UK has had a text and data mining exception to copyright for research purposes since 2014
  - Data mining and training operations may move to Europe, and US companies could just license the trained models
- **Can AI generated works be protected under copyright law?**
- **Bottom line:** Use Generative AI solution with caution

Deploying AI Comes with Challenges

- Use and collection of biometric data
  - Online retailer faces two biometric data privacy claims over voice biometrics
- Data vulnerabilities
  - General merchandise retailer paid $18.5M to states, $39.4M to banks and credit unions, and more to consumers in connection with a data breach – estimated total costs in excess of $300M
- Selection of AI vendors

Other challenges:

- Reputational / PR
- AI system failures
- IP risks



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Challenge 1: Data Privacy and Biometrics

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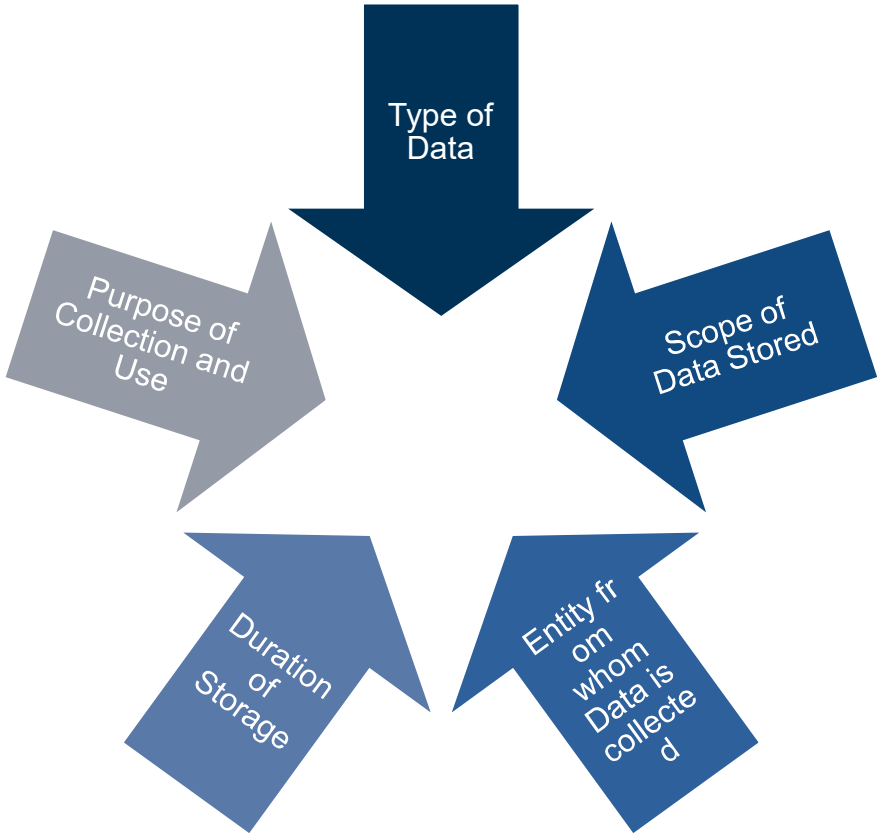
Evaluating Data Privacy Risks

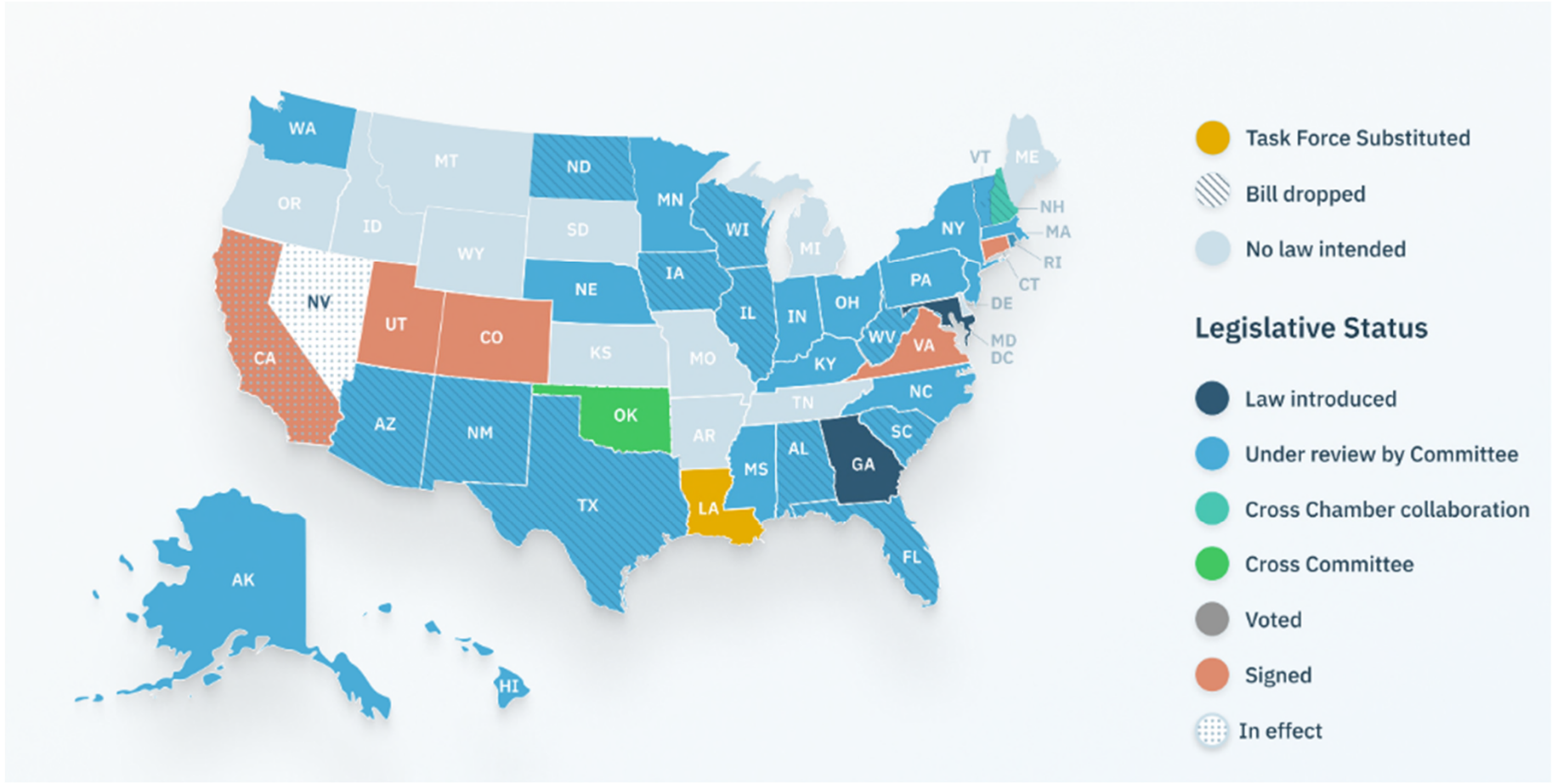


Maintain a Data Governance Model

- Data ownership
- Regulatory compliance
- Data breach mitigation
- Data removal request policies

Challenge 1: Data Privacy and Biometrics

Data Privacy Laws, Generally

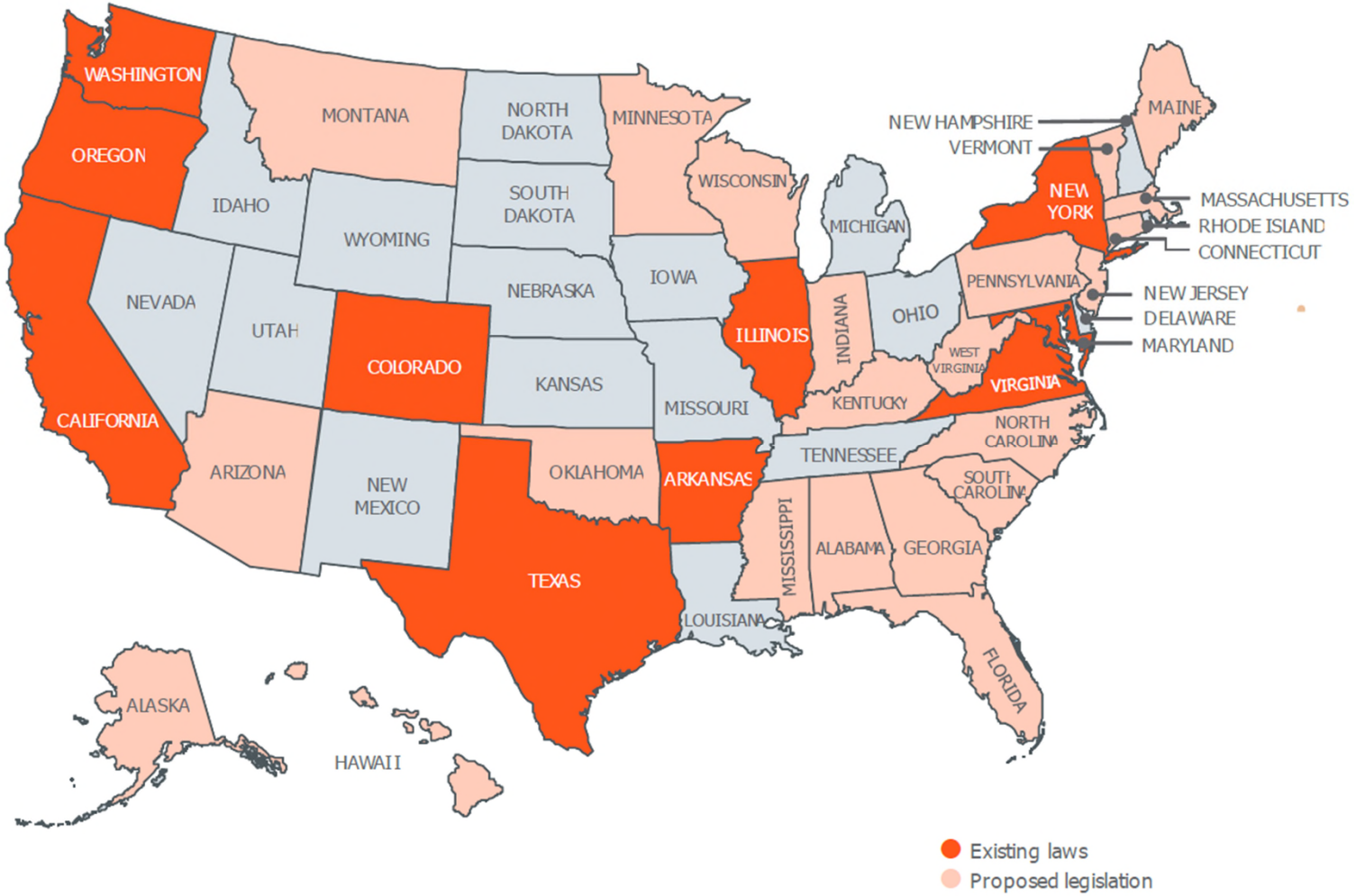


Challenge 1: Data Privacy and Biometrics
Biometric Data Concerns

- Data management processes
- Biases / profiling
- Public relations
- Regulatory and compliance

Challenge 1: Data Privacy and Biometrics

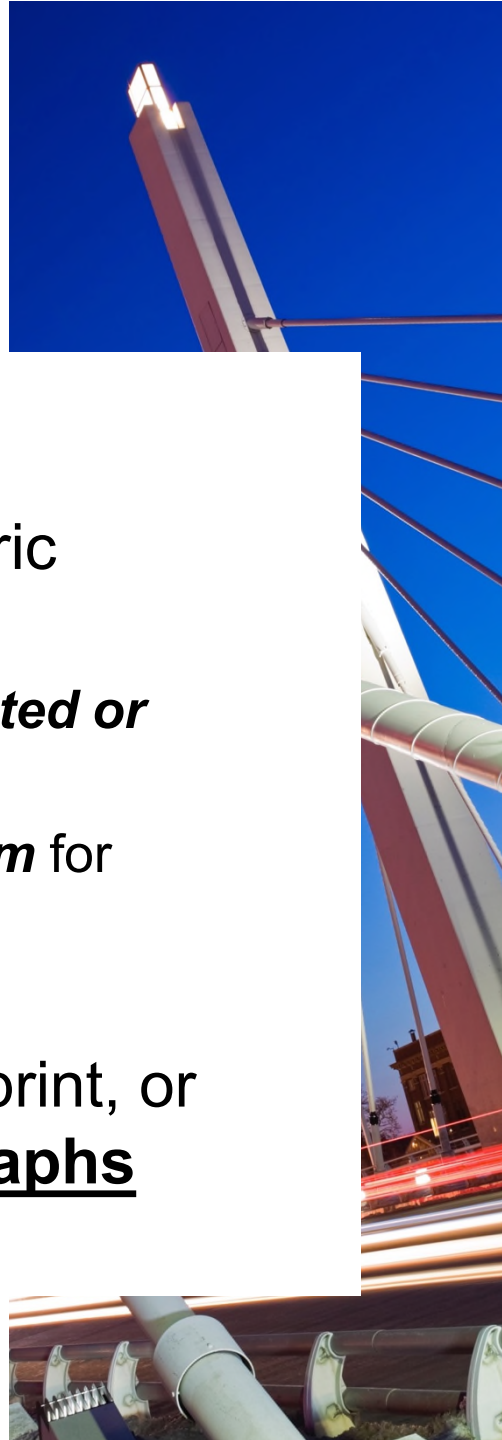
Biometric Privacy Laws



Challenge 1: Data Privacy and Biometrics
Biometric Privacy Laws

- Illinois Biometric Privacy Law
- New York City Biometric Identifier Information Ordinance
- AB27 NY State Biometric Privacy Act
- Texas Capture or Use of Biometric Identifier Act (CUBI)
- Washington Biometric Identifiers Law (H.B. 1493)
- Maryland enacted H.B. 1202, which restricts employers from using specific kinds of facial recognition technology in interviews without the applicant's written consent

Challenge 1: Data Privacy and Biometrics
Tracking Customers / Employees in Retail Space



Illinois Biometric Privacy Law

- No private entity may … obtain a person's or a customer's biometric identifier ... unless it first:
  - ***informs the subject*** … in writing that a biometric identifier … is being ***collected or stored***
  - ***informs the subject*** … in writing of the ***specific purpose and length of term*** for which a biometric identifier … is being ***collected, stored, and used***; and
  - ***receives a written release executed by the subject***….
- "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or ***scan of hand or face geometry*** — **it does not include photographs**

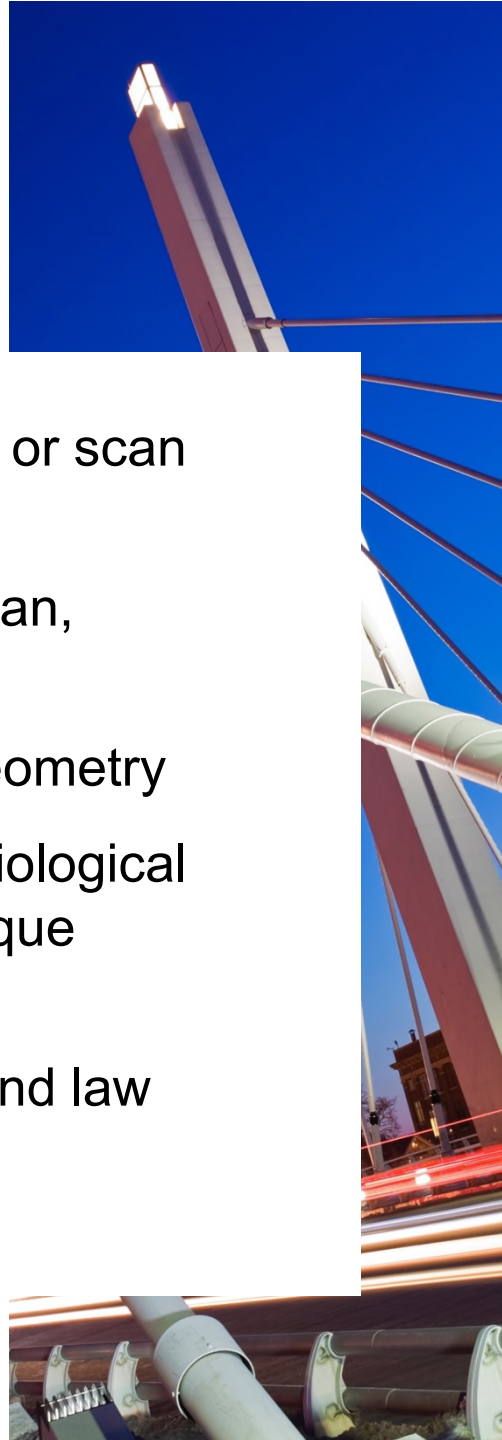
Challenge 1: Data Privacy and Biometrics
BIPA Challenges in Illinois

Proposed Changes to BIPA

- Eliminate BIPA's application to the employment context
- Exclude timekeeping systems from BIPA's purview
- Eliminate a plaintiff's private right of action
- Remove healthcare employers from BIPA's purview
- Repeal BIPA in its entirety

Illinois has also introduced its own Consumer Protection Act, which would effect biometric data privacy as well.

Challenge 1: Data Privacy and Biometrics
Varying Definitions of Biometrics



- **Illinois** – more than photo / video, *i.e.*, retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry
- **New York** – examples of biometric data similar to Illinois, *e.g.*, a retina or iris scan, fingerprint or voiceprint, or scan of hand or face geometry
- **Texas** – a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry
- **Washington** – data generated by automatic measurements of an individual's biological characteristics, such as a fingerprint, voiceprint, eye retinas, irises, or other unique biological patterns or characteristics used to identify a specific individual
- **Certain states** have passed facial recognition laws applicable to government and law enforcement agencies but not private enterprises

Challenge 1: Data Privacy and Biometrics

Best Practices for Biometric Data

1

Assess collection and storage of any and all biometric identifiers

2

Establish clear written policies regarding biometric data (including timeframes, duration, etc.)

3

Communicate with all individuals — employees or otherwise — about biometric data policies

4

Obtain written consent

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Challenge 2: Contracting for AI Development

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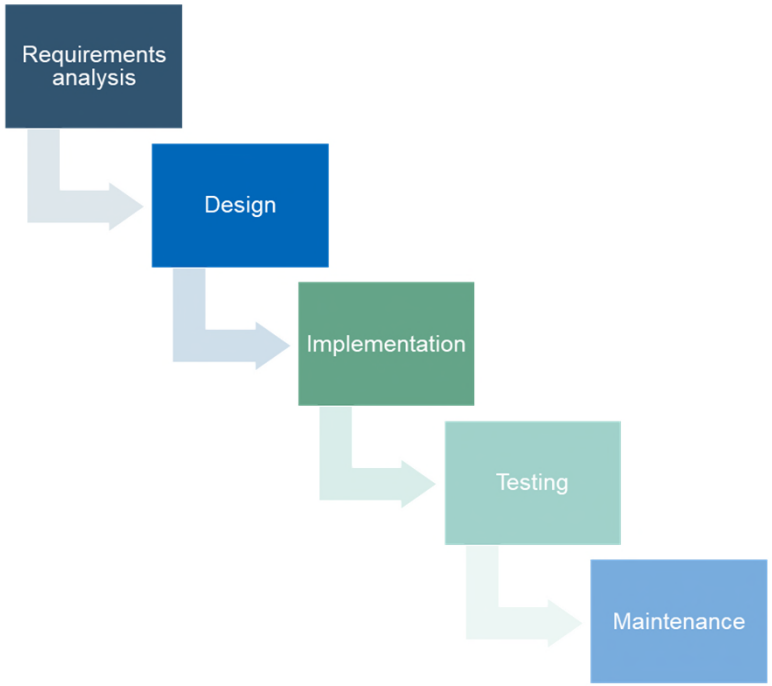
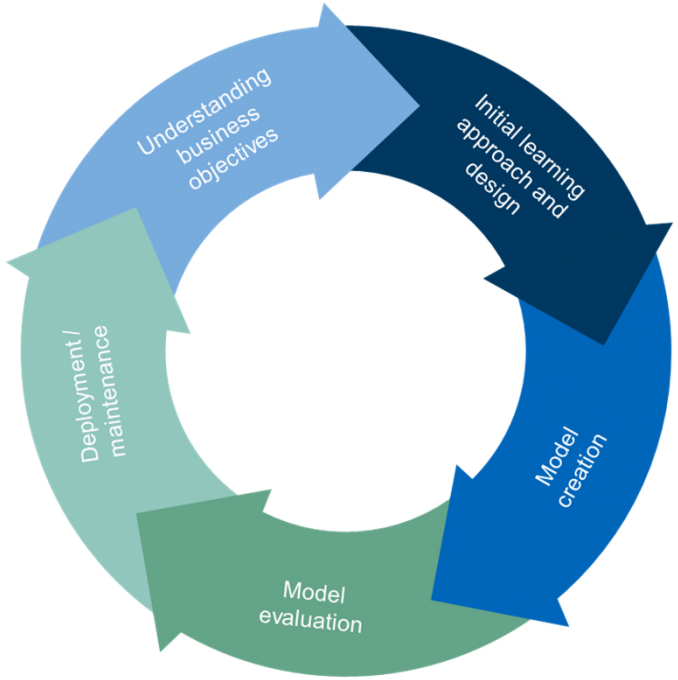
Development Process

Conventional Software Development Process



AI Technology Development Process



Challenge 2: Contracting for AI Development
Differences in Development Process

- Contents and performance of trained models are unclear when the contract is executed
- Conventional software – deductive. Describe the processing procedures for the inputs as a set of rules and write code to implement those procedures. Generally developed in advance.
- Trained models – infer rules in various unknown situations from only limited data (training data sets). Very difficult to predict all unknown events to be inferred when doing the training

Challenge 2: Contracting for AI Development
Challenges in AI Vendor Selection

- Evaluate credibility and processes of AI vendor
  - Data compliance
  - Reputational risk
  - Indemnification
- Evaluate competence and knowhow of AI vendor
  - Accuracy of AI models heavily dependent on knowhow

Challenge 2: Contracting for AI Development

Challenges in Contracting for Development

- Scrutinize agreements for:
  - Performance requirements
    - Use of milestone payments for hitting KPIs
  - Data ownership and control during relationship and after termination
  - Data retention and removal policies
  - Product Liability

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How to Get It Right When Implementing New AI Solutions

Considerations for Implementing New AI Technologies

- Stress test for potential points of failure
- Adverse event management policy
  - PR / reputational harm considerations
  - Expand insurance coverage to address AI
- Effective and comprehensive data governance framework
- IP considerations

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Questions?

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