



ETHICAL AND LEGAL CONSIDERATIONS FOR AI DEPLOYMENT AND USE

MARCH 14, 2024

Martha Buyer
Martha Buyer, PLLC
P.O. Box 305
East Aurora, NY 14052
716-652-4413
martha@marthabuyer.com

Let's start
with the
basics

- AI systems and products generate responses determined by complex algorithms applied to vast quantities of data.

Recognizing that AI processes and outcomes—by definition—have no inherent common sense

- **Inherent limitations**

- No common sense
- No consciousness
- No creativity*

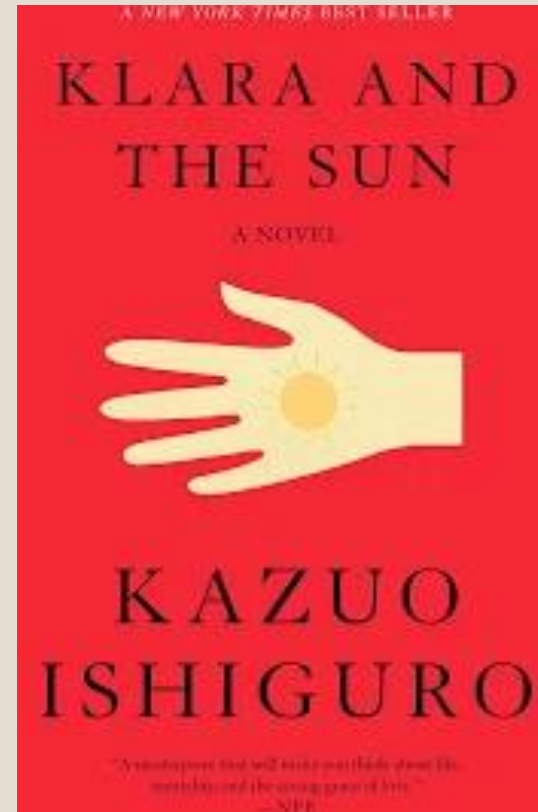
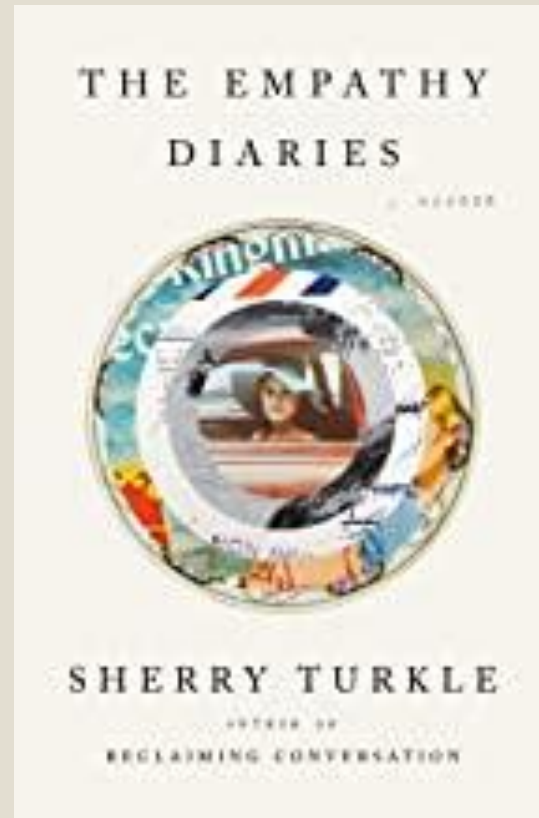
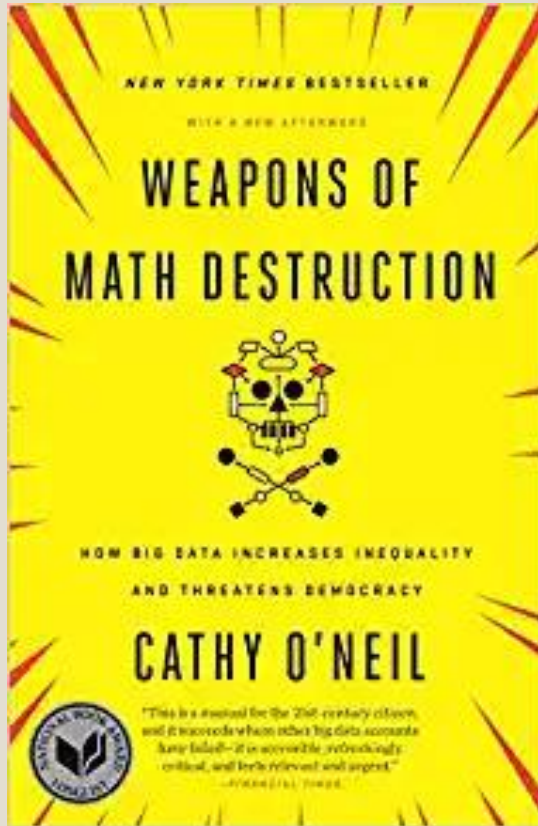
* we'll get back to this one

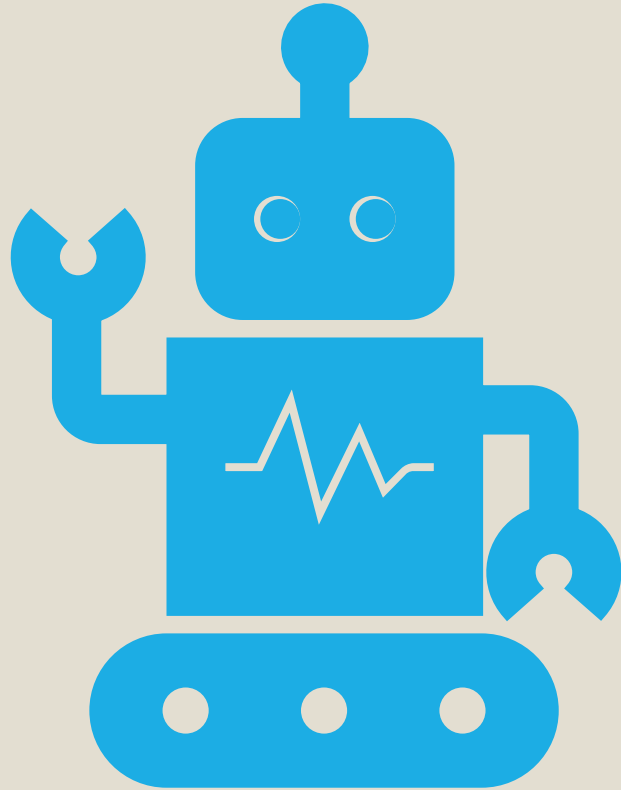




AI OUTCOMES ARE BASED HISTORICAL INFORMATION ONLY

Mark Hoit, NC State





What is the AI “solution” designed to accomplish?

- Strictly computational
- Are human judgments going to be made based on what the AI solution yields?

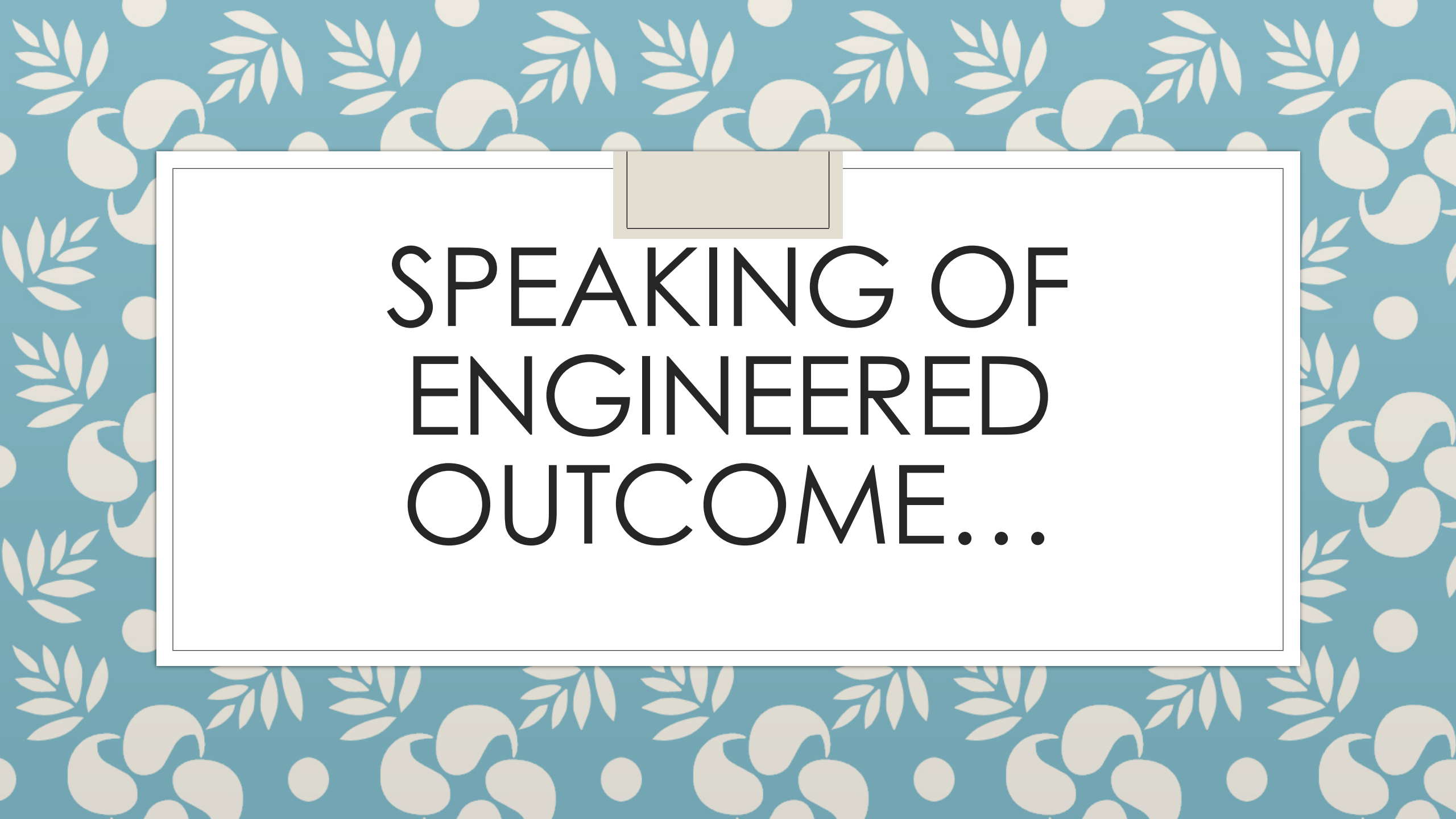


**WHAT'S ACTUALLY
BEING MEASURED?**

Vulnerabilities

- Garbage in, garbage out
- What is actually being measured?
- What is the goal of the process?
 - Engineered outcome?





SPEAKING OF
ENGINEERED
OUTCOME...

Who's Writing the Questions? How are they Phrased?

- What's the most important issue facing NYS?
 - Taxes
 - Cost of Living
 - Public Safety
 - Environment
 - Business Climate
 - Something Else

<https://www.nysenate.gov/questionnaires/patrick-m-gallivan/2023-legislative-questionnaire>





How
reliable is
the
underlying
data?

1378

Kindly, rate us as HIGHLY SATISFIED for
a FREE 10 PIECE NUGGET OR
SAUSAGE EGG MCMUFFIN
WITH ANY PURCHASE

Go to www.mcdvoice.com within 7 days
and tell us about your visit.

Validation Code: _____

Expires 30 days after receipt date.

HOW
“GOOD” IS
THE DATA
GENERATED
BY THIS?

WHAT IS
ACTUALLY
BEING
MEASURED?

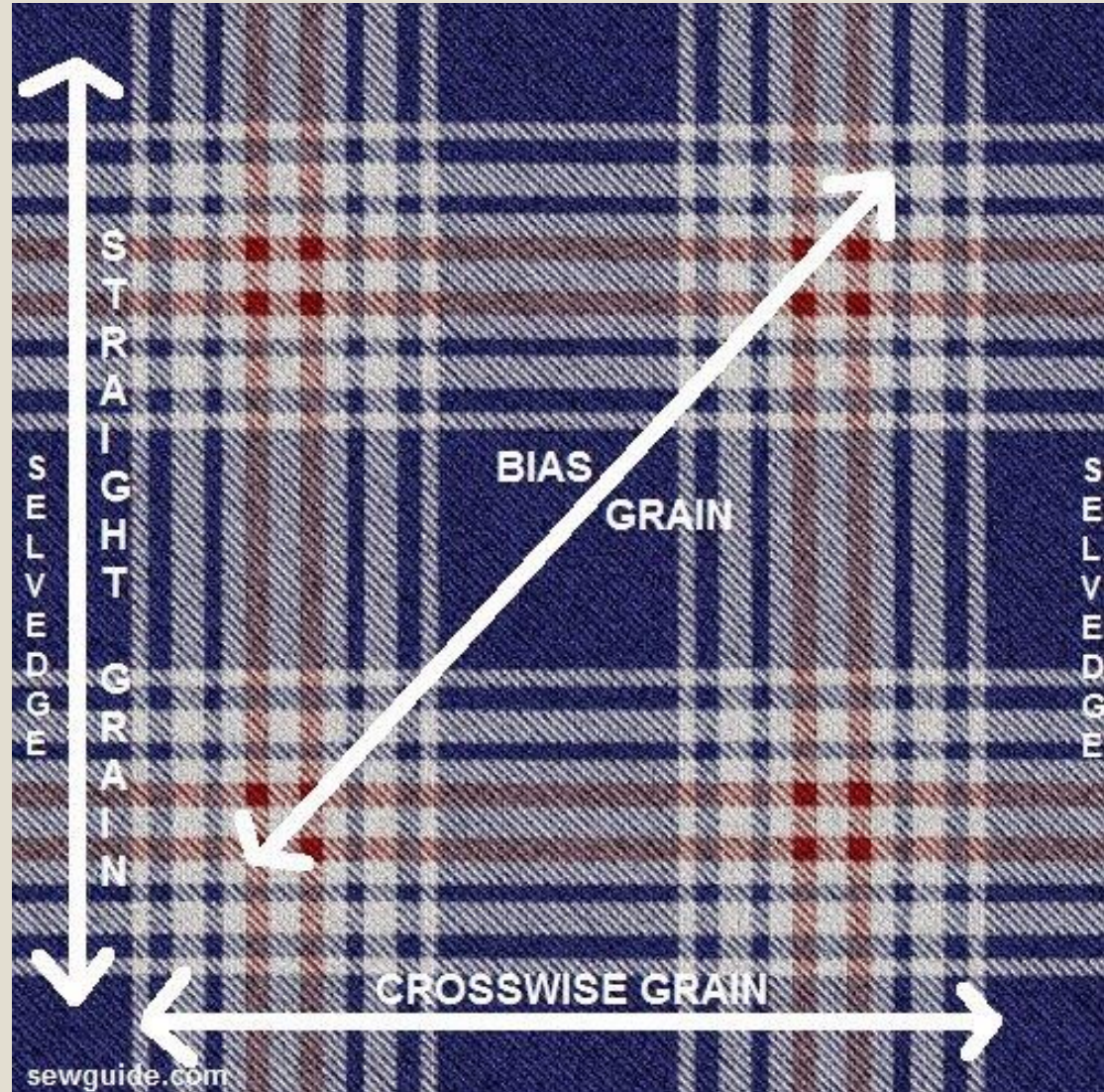
More on vulnerabilities

- What if the outcome leads to “bad” results?
 - Unintended consequences
 - Actionable consequences
 - Actionable decisions based on faulty logic
 - Actionable results based on faulty algorithms
 - Identifying who is at fault



Bias

- Claims that bias can be eliminated simply reflect a lack of understanding of what bias is
- Bias cannot be eliminated.
 - Recognized
 - Managed



Unintentional but Systemic Bias

- <https://www.jstor.org/stable/resrep29576?mag=what-happens-when-police-use-ai-to-predict-and-prevent-crime>
- YEUNG, D., KHAN, I., KALRA, N., & OSOBA, O. A. (2021). *Identifying Systemic Bias in the Acquisition of Machine Learning Decision Aids for Law Enforcement Applications*. RAND Corporation. <http://www.jstor.org/stable/resrep29576>



**A REAL LIFE
EXAMPLE**

Consider the source

- Who's doing the underlying work/coding to generate the output?
- Geographic biases
- Socio-economic biases
- Education level biases
- Cultural biases



What answers are the questions designed to identify?

- How will those answers be used to provide service?
 - Note that I didn't say "better service"
 - Note that I also didn't say "who defines what constitutes better service?"



What is the AI product service intended to accomplish?

How good is the underlying data?
When was it collected?

How was the data captured/obtained?
Those methods changed over time? If so, how can that impact results

What is the AI provider actually providing?

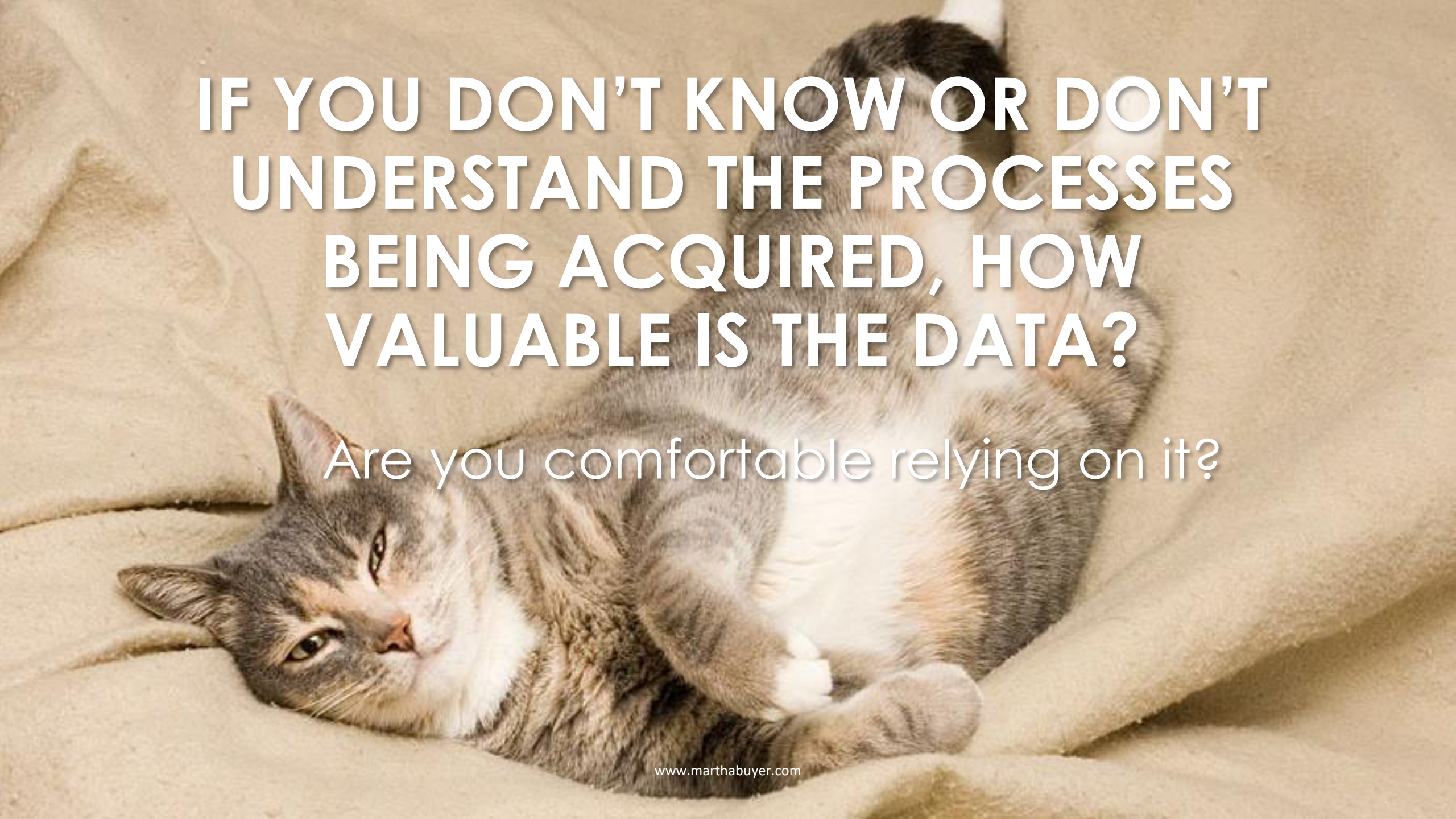
What is the secret sauce?

How will revisions to the [hidden] processes be communicated, managed and implemented?



HOW DOES THE AI PROVIDER BRING VALUE?

How are the elements of the algorithm identified and weighted?



**IF YOU DON'T KNOW OR DON'T
UNDERSTAND THE PROCESSES
BEING ACQUIRED, HOW
VALUABLE IS THE DATA?**

Are you comfortable relying on it?



COMMON SENSE

REMINDER:

AI HAS NO
COMMON
SENSE

Nope.
No way.
Not me.

**WHERE
DOES
RESPON-
SIBILITY
FALL?**

Taglines that nightmares are made of...

oceg

How AI Makes Regulatory
Change Management
Easier, Faster, and More
Accurate

 surestep

2024

An OCEG Webinar



Lack of Accountability

- Who is responsible when things go south?
- Who can afford to defend?

Governmental Use of AI

- Criminal justice
- Biometrics
- Public school teacher evaluation
- Immigration and border control
- Determination of eligibility for government benefits
 - Temporary Assistance for Needy Family (TANF)
 - Unemployment
 - Housing
 - Medical care
 - Medication
 - Rehab
 - Ongoing treatment/support

Reliance on AI outcomes has a cost

“...When challenged, many state governments have disclaimed any knowledge or ability to understand, explain or remedy problems created by AI systems that they have procured from third parties. The general position has been ‘we cannot be responsible for something we don’t understand.’ This means that algorithmic systems are contributing to the process of government decision-making without any mechanisms of accountability or liability.”

“AI Systems as State Actors”

Columbia Law Review, Volume 119, No. 7

Sentencing

- Purpose of sentence
 - Punishment
 - Deterrence
 - Public Safety



- Considerations
 - “Badness” of the committed crime
 - Was the crime premeditated?
 - Does the defendant show genuine remorse?
 - How can the judge tell if the remorse genuine
 - Likelihood of recidivism
 - Social deprivation
 - Mental illness

COMPAS

- Correctional Offender Management Profiling for Alternative Sanctions
 - Criminal risk assessment tool
 - Relies up on a large set of factors to assess risk of recidivism
- The problem?
 - According to ProPublica, COMPAS was twice as likely to mischaracterize non-whites as at a higher risk of committing other crimes than white people.



AI in the Enterprise

- This may be more than 5 years old, but...
- Amazon ditched AI recruiting tool that favored men for technical jobs
- Specialists had been building computer programs since 2014 to review résumés in an effort to automate the search process
- Let's just say that it didn't go well.

<https://www.theguardian.com/technology/2018/oct/10/amazon-hiring-ai-gender-bias-recruiting-engine>



LACK OF TRANSPAREN CY



Before the AI “product” is deployed

How are system designs and implementation plans, including both training and ongoing testing, done to ensure reasonable, if not fair, outcomes?

And, by the way, who decides what's fair and what isn't?



In cases of accountability when AI is used to support government decision-making...

1. Lack of clear public accountability and oversight processes; and
2. Objections from vendors that any real insights into their technology would reveal trade secrets or other confidential information.



Columbia Law Review



A LITTLE ADVICE

Legal Considerations

Contract

Allocation of risk

Privacy/Confidentiality
Considerations

Products liability

Antitrust

International

Intellectual property

Communications
technology

More Legal Considerations

- Definitions Matter
- It's not enough to read the contract to determine what's included
- What's **not included** is as important as what is...



Subtleties

- Service Expectations
 - What is the yield intended to be?
 - How will the information be compiled?
- How will the user be protected when underlying AI technologies are refined and taken to the next level?
 - Building technology evolution into the agreement, particularly if the agreement covers more than a one-time event.



Who bears the risk?

- Number of variables
- Complexity of the operations being performed?
- Insurance
- Indemnity





A LITTLE MORE ADVICE

A chessboard with several pieces, including a king, a queen, a rook, a knight, and a pawn, set against a light blue background. The pieces are arranged on a checkered board, with the king and queen in the center, a rook to the left, a knight to the right, and a pawn in the foreground. The background is a soft, light blue gradient.

CLEAR TERMINATION STRATEGY

Exit Strategy

- Actual number crunching is mysterious, so a clear exit strategy, with measurable goals, must be in place.
- Auto-renewal provisions, which are not legal in many states, including New York, must be recognized before any agreement should be signed.



Contractual flexibility

- Changing terms based on:
 - Technology
 - System evolution
 - Regulatory action



Lawyers Using ChatGPT get caught

- Roberto Mata v. Avianca Airlines

Mata v. Avianca, Inc., No. 1:2022cv01461 - Document 54 (S.D.N.Y. 2023); <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2022cv01461/575368/54/0.pdf?ts=1687525481>

- Michael Cohen

- Submitted non-existent judicial opinions with fake quotes and citations

Avianca



Defamation

- Mark Walters v. Open AI, LLC
 - Journalist asked ChatGPT for a summary of an unrelated pending case
 - The Second Amendment Foundation v. Robert Ferguson
 - <https://www.saf.org/wp-content/uploads/2023/05/Dkt-1-Complaint.pdf>
 - Based on this summary, Mark Walters was falsely accused of embezzlement and fraud, neither of which occurred
 - <https://www.courthousenews.com/wp-content/uploads/2023/06/walters-openai-complaint-gwinnett-county.pdf>

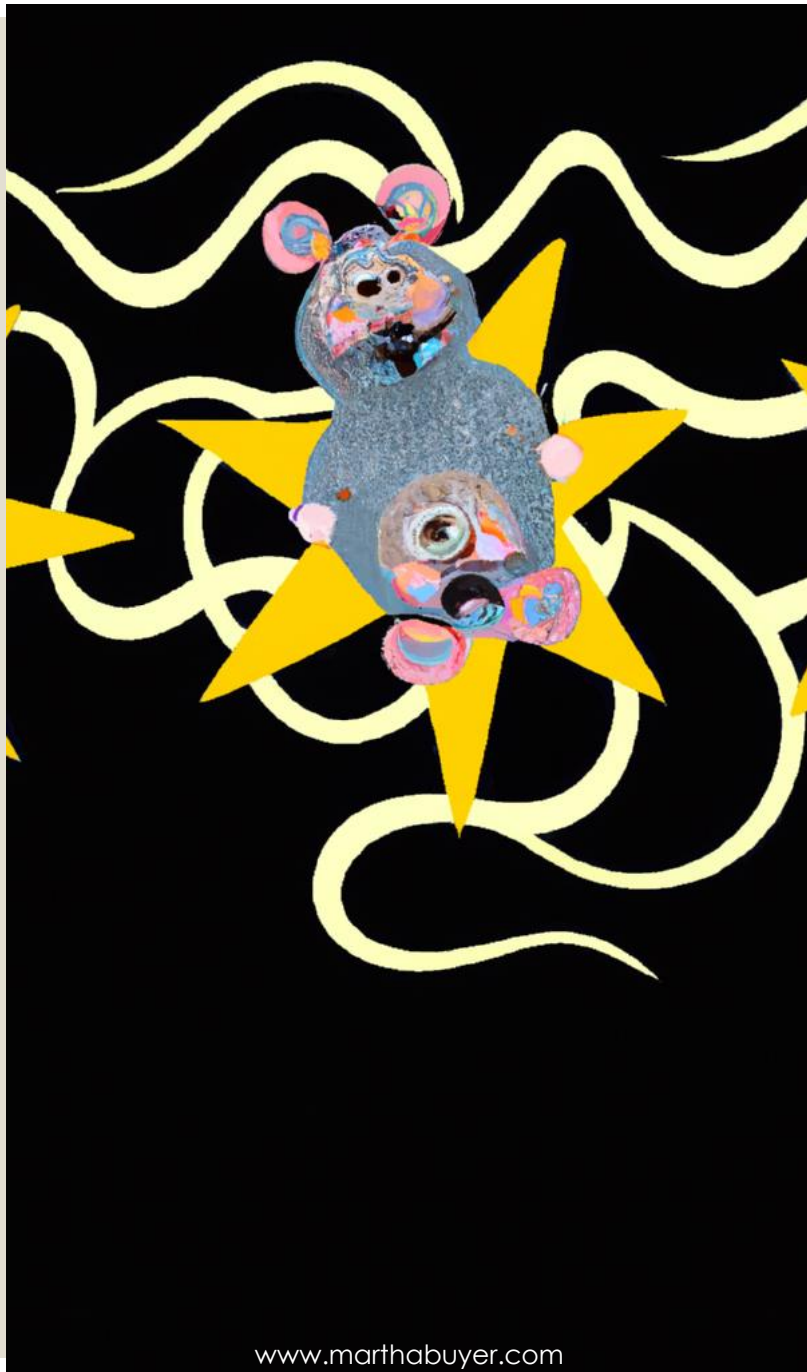
AI and Copyright

- Only works of art created by human authors can be copyrighted
 - “human authorship is a ‘bedrock requirement of copyright’ based on ‘centuries of settled understanding.’”
- Judge Beryl Howell in Thaler v. Perlmutter, 8/18/2023
 - <https://www.scribd.com/document/665871482/Thaler-v-Perlmutter#>



And along comes DALL-E...

E...



www.marthabuyer.com





Clickthrough clauses like these disclaimers:

- “May occasionally generate incorrect information”
- “May occasionally produce harmful instructions or biased content”

NEW YORK TIMES, 8/29/2023



A.I. Revolution Is Coming. Just When Is Hard to Say.

By STEVE LOHR

Lori Beer, the global chief information officer of JPMorgan Chase, talks about the latest artificial intelligence with the enthusiasm of a convert. She refers to A.I. chatbots like ChatGPT, with its ability to produce everything from poetry to computer programs, as "transformative" and a "paradigm shift."

But it's not coming soon to the nation's largest bank. JPMorgan has blocked access to ChatGPT from its computers and told its 300,000 workers not to put any bank information into the chatbot or other generative A.I. tools.

For now, Ms. Beer said, there are too many risks of leaking confidential data, questions about how the data is used and about the accuracy of the A.I.-generated answers. The bank has created a walled-off, private network to allow a few hundred data scientists

and engineers to experiment with the technology. They are exploring uses like automating and improving tech support and software development.

Across corporate America, the perspective is much the same. Generative A.I., the software en-

**Expect a lag between
the invention and
widespread adoption.**

gine behind ChatGPT, is seen as an exciting new wave of technology. But companies in every industry are mainly trying out the technology and thinking through the economics. Widespread use of it at many companies could be years away.

Generative A.I., according to

CONTINUED ON PAGE B3

Kenned Has a Z

By ELIZABETH

Skyhorse Publish
company, but it h
utation for takin
others avoid. It
ures on the left,
outside the mar
er, like Alex Jon
broadcaster v
examines "the
national consp
manity and a

What has
cantly less a
which the
Tony Lyons,
litical ambit
thors: Rob
whose cam
been rife w
cluding fa
ronavirus
chairman
ing Mr. K
tion, SK
\$150,000

Should I panic? No.

Should I consider these issues now? Absolutely!

Technology improvements



Results of litigation



Deployment and Implementation



Learning from others' missteps and mistakes



It isn't all about indemnity, but that's a big part

- Read the contract and understand its provisions
- How will processes be updated?
- How will you know when such changes occur?
- Who has indemnified who?

Sources

- *Amazon Ditched AI Recruiting Tool that Favored Men for Technical Jobs*, The Guardian, October 10, 2018, <https://www.theguardian.com/technology/2018/oct/10/amazon-hiring-ai-gender-bias-recruiting-engine>
- https://www.americanbar.org/groups/judicial/publications/judges_journal/2021/winter/artificial-intelligence-benefits-and-unknown-risks/.
- Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 Colum. L. Rev. 1941 (2019).
- Judge Herbert B. Dixon Jr., *Artificial Intelligence: Benefits and Unknown Risks*, The Judges' J., January 15, 2021,
- Julie Lopez, *AI in the Criminal Justice System*, Harvard Tech. Rev., March 26, 2023, <https://harvardtechnologyreview.com/2023/03/26/ai-and-bias-perceptions-and-impact-on-society-voting-governance-and-ai/>.
- Christopher Rigano, *Using Artificial Intelligence to Address Criminal Justice Needs*, 280 NIJ J. 1 (January 2019).
- <https://www.jstor.org/stable/resrep29576?mag=what-happens-when-police-use-ai-to-predict-and-prevent-crime>.
-

Sources (con't)

- Christopher Rigano, *Using Artificial Intelligence to Address Criminal Justice Needs*, 280 NIJ J. 1 (January 2019).
- <https://www.jstor.org/stable/resrep29576?mag=what-happens-when-police-use-ai-to-predict-and-prevent-crime>.
- Isaac Taylor, *Justice by Algorithm: The Limits of AI in Criminal Sentencing*, 42 *Crim. Just. Ethics*, 193-213 (2023).
- Yeung, Douglas, et al., RAND Corp., *Identifying Systemic Bias in the Acquisition of Machine Learning Decision Aids for Law Enforcement Applications* (2021).
<http://www.jstor.org/stable/resrep29576>. Accessed 5 Mar. 2024.
-



Thank you!

Martha Buyer

Law Offices of Martha Buyer,
PLLC

www.marthabuyer.com

716-652-4413