

# Contestability: What the Law Tells Us

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# Contestability: It's Necessary

- Being able to challenge a government decision seems like an obviously good idea
- In fact, it's often legally required, by the Constitution and/or statute
  - (Statutes can create new rights but they can't abridge constitutional rights.)
- Brand new guidance from the White House: “Where practicable and consistent with applicable law and governmentwide guidance, agencies must provide timely human consideration and potential remedy, if appropriate, to the use of the AI via a fallback and escalation system in the event that an impacted individual would like to appeal or contest the AI’s negative impacts on them.” <https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf>

# Historical Background

- In the 1960s, lawyers and Congress became aware of the dangers (and benefits) of large computerized databases of personal information
- In 1972, the Department of Health, Education, and Welfare convened an advisory committee on the topic
- The committee produced a report (*Records, Computers, and the Rights of Citizens*) that has been the foundation for all subsequent privacy legislation
- Among the principles advocated in the report: the importance of accuracy and the right to correct inaccurate entries
- In other words, the committee understood the dangers of data errors in computer processing

# Goldberg v. Kelly, 397 U.S. 254 (1970)

- John Kelly's welfare payments were terminated by New York City, without a full hearing. He and other sued. The Supreme Court upheld their complaint.
  - “The fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385 (1914)
  - “The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”
  - “One of these [principles] is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.” *Greene v. McElroy*, 360 U.S. 474 (1959)

***Let's pick this apart...***

# Due Process

“The fundamental requisite of **due process** of law is the opportunity to be heard.”

- The Fourteenth Amendment: “nor shall any State deprive any person of life, liberty, or property, without **due process** of law”
- People receiving welfare payments have a right to continue to receive them unless **due process** is followed to terminate such payments
- That in turn requires that people *must* have the right to challenge such decisions; without such a right, there is no **due process**

# What is “Due Process”?

- The phrase is used twice in the Constitution, but the concept goes back to the Magna Carta (June 1215)
- The government itself must follow the laws
- “Before depriving a citizen of life, liberty or property, the government must follow fair procedures”
  - No firm definition of “fair procedures”, but a hearing, witnesses, cross-examination, etc., are often part of it
- Due process isn’t needed to enact a law; it is necessary when the government uses its powers to act against an individual

(From [https://www.law.cornell.edu/wex/due\\_process](https://www.law.cornell.edu/wex/due_process))

# Tailored to the Circumstances

“The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.

- Most welfare recipients are (according to the Court) relatively uneducated and can't prepare a suitable written pleading
- They're also too poor to obtain professional assistance
- Written submissions are also inflexible
- There must therefore be an oral argument, possibly informal, where the affected people can be heard, state their case, and dispute the other side

# Disputing Purported Facts

“[W]here... the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”

- Evidence relied upon by the government may not be accurate
- “While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.”
- “Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.”
  - A Sixth Amendment right in criminal cases

# Statutory Approaches

- Apply existing laws to AI-based decision-making
- Create new laws

# Existing Laws

- The Consumer Financial Protection Bureau, Department of Justice, Equal Employment Opportunity Commission, and Federal Trade Commission jointly noted that “existing legal authorities apply to the use of automated systems and innovative new technologies.” (April 2023)
- In other words, you can’t discriminate against someone just because “the computer says so”

# Barry v. Lyon, 834 F.3d 706 (6th Cir. 2016)

- Pursuant to Federal law, Michigan law bars “fleeing felons” from receiving welfare assistance
- Walter Barry (and others) were denied assistance because a (non-AI) database system said there were outstanding felony warrants
- The database was wrong...
- The plaintiffs filed suit in Federal court and won: they were denied due process
- Just because “the computer says so” doesn’t make it so

# The Administrative Procedure Act (APA)

- The APA governs how government agencies can issue regulations. (Many states have their own equivalents)
- Some courts have held that installing a new computer system amounts to a regulatory change, and thus must comply with the APA
- For example, in an Arkansas case about home health care assistance, the state Supreme Court found that “by failing to provide proper notice, DHS did not substantially comply with section 25-15-204 in promulgating the new RUGs methodology” (Ark. Dep't of Human Servs. v. Ledgerwood, 530 S.W.3d 336 (Ark. 2017))

# Using the APA

- Modern government actions rely not just on laws passed by the legislature, but on “regulations” issued various agencies
- The APA governs how government agencies can issue regulations. (Many states have their own equivalents)
- For example: a regulation cannot simply be promulgated at will by an agency; a process must be followed
- One process: issue a “notice of proposed rule-making”, solicit public comments for at least 30 days (and all of those comments must be read), possibly hold public hearings, and then adopt a final rule

# State and Local Laws

- Several states (plus New York City) have passed or are considering laws regulating use of AI
- So far, contestability has not been the focus

# Contestability: It's Not About the Code

- Access to source code is *not* sufficient, though it may be necessary
- If nothing else, one has to have the training data, too—and that may contain other folks' private data
- But the output of AI systems is notoriously difficult to understand, even by their developers
- The law requires *process* to contest decisions

# Bottom Line

- Existing rights are not abrogated by any sort of automated processing
- Constitutional and statutory protections still apply
- And there are new laws coming that deal specifically with AI

# Questions?



Bald eagle, Tracey Brook, Richmond, MA, April 30, 2022