Reaction to: "Compounding Injustice: The Cascading Effect of Algorithmic Bias in Risk Assessments"

BRANDON BURKE*

O'Brien's article sets forth two propositions: (1) that there is algorithmic bias in risk assessments throughout criminal justice proceedings, and (2) that these biases have a negative cyclical effect that begins at the pretrial phase, with higher rates of bail and incarceration, and then continues towards lower socioeconomic outcomes once released, with higher rates of recidivism, and ultimately begins anew at the pretrial phase.

O'Brien's first proposition that there is algorithmic bias in risk assessments—such as those used at bail hearings—is structurally sound. O'Brien analyzes algorithmic biases in risk assessments from the pretrial phase through reentry and parole. O'Brien's pretrial arguments are especially salient, as they support his argument that there is algorithmic bias in risk assessments. O'Brien argues that the goal of the criminal justice system is to be fair and equitable. However, the pretrial risk assessments used to determine whether an individual is a flight risk are anything but fair. These risk assessments are administered through a questionnaire—usually without the lawyer present. From there, the questions are imputed into a model that determines whether an individual is a high or low flight risk. Classification as a high flight risk could prove to be the deciding factor when the judge is considering whether to grant bail or detention. This process of administering pretrial risk assessments that could potentially be the determining factor of whether an individual is granted bail or detention adds substance to O'Brien's argument that there is algorithmic bias in risk assessments, and that it leads to cascading effects that have far-reaching implications.

O'Brien's second proposition that bias in risk assessments has a negative cyclical effect seems factually sound. But, it has no basis due to a lack of research. Throughout his article, O'Brien prefaces that these algorithmic risk assessments have a domino effect that begins with biased risk assessments at the pretrial phase, and then compounds with other risk assessments as a person ventures further into the legal system. As structurally sound as this argument may seem, O'Brien runs amuck when he assumes that these algorithmic biases in risk assessments greatly sway the opinions of judges to incarcerate individuals. The decision to incarcerate rests solely on the discretion of the trial judge. The factors that weigh on the trial judge's discretion are not made available to the public. Therefore, it is conjecture to assume that risk assessments have substantive influence on judicial proceedings. Furthermore, an argument could be made that risk assessments have low probative value in influencing judicial decisions when compared against other factors like expert witnesses and evidence presented at trial that arguably influences the outcome of judicial proceedings even more.

* Staff Editor, GEO. J.L. & MOD. CRIT. RACE PERSP.; J.D. Candidate, Georgetown University Law Center, (L'22),

There is merit to O'Brien's first proposition that there is algorithmic bias in risk assessments when analyzed throughout criminal proceedings. However, O'Brien's second proposition that these biased risk assessments have a cascading effect on individuals throughout criminal proceedings is premature, as there is not enough empirical evidence to conclude that these risk assessments substantively influence judicial decisions.