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COMMENTARY

Reimagining Risk Assessment: Comment on Viljoen and Vincent (2020)

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The time is right to reimagine risk assessment. For the purposes of this comment, we consider risk assessment to be the formal appraisal of the likelihood that an individual will engage in a specified kind of act, usually accompanied by the identification of risk factors and protective factors that increase or decrease, respectively, this likelihood. For decades, researchers and practitioners in the behavioral sciences have pursued greater accuracy, developed specialized measures, and considered how certain interventions could decrease the risk of such outcomes—and the responsivity of individuals to such interventions (Douglas & Otto, 2021). There has been considerable progress, both conceptually and empirically, in risk assessment as it is applied to outcomes such as violence and other criminal offending. Yet risk assessment as a professional activity has had far less impact on legal decision making, legal policy, and clinical interventions than it might have. Why?

In this context, Viljoen and Vincent (2020) provide an analysis that is both simple and extraordinarily important. We find it so important that it rivals other "big ideas" in risk assessment, such as risk-need-responsivity theory (Andrews et al., 1990) and Structured Professional Judgment (Webster et al., 1995). At the heart of their analysis is the following: it cannot be useful it if you do not implement it effectively. In this comment, we explore the implications of their risk assessment and management pathway (RAMP) for research, practice, and legal policy (both existing and reformed), after first suggesting some minor modifications to Viljoen and Vincent's approach.

The RAMP

As the accuracy of specialized risk assessment measures has increased over three decades, with AUC values rising to the mid-1970s, researchers nonetheless encountered a thorny problem: these values did not seem to be getting much higher. If only our instrumentation could be improved, with increased accuracy in the measurement of independent variables and outcomes, then such specialized risk assessment measures would have more impact. Or so the thinking went.

Viljoen and Vincent (2020) begin with a different premise. Instead of chasing the Holy Grail of greater and greater accuracy by creating and validating newer instruments, what if we took a closer look at the influences adversely affecting the use of existing specialized measures? After all, such measures are generally good to very good in their current iterations (Douglas & Otto, 2021) and in any event are consistently superior to unstructured clinical judgment in appraising risk and identifying risk factors and treatment targets (Heilbrun et al., 2021). Drawing upon implementation science, Viljoen and Vincent identify challenges to both using instruments at all, and also to using them to construct and implement risk management plans. The heart of their analysis appears in Figure 1 of their article (Viljoen & Vincent, 2020, p. 3).

Here we offer several comments on their description of these challenges and their outcomes (the latter actually drawn from another source). We should be clear: these are relatively minor suggestions made in the interest of refining an extraordinarily valuable description. But like any initial proposal, it needs discussion and revision to yield a product that is maximally accurate and useful.

First, we offer some broad conceptual points that the RAMP process should reflect. "Risk" is multifaceted. It should include imminence, duration, severity, and nature of the possible harm in addition to likelihood. For instance, to what extent is the larger RAMP process incorporating a "harm reduction" perspective, and to what extent does it assume that our goal must be complete desistance from the identified outcome? An individual under the jurisdiction of a reentry court who commits several technical violations of program requirements (e.g., testing positive for marijuana on two occasions, crossing state lines to visit family without prior approval from his parole officer) but does not commit the kind of felony that resulted in his 15-year incarceration may be considered a "success" within a harm reduction framework but a "failure" in an absolute desistance one.

We also think the challenges that confront implementation can be supplemented. Two kinds of challenges are identified in their Figure 1: challenges to implementing risk assessment instruments, and challenges in subsequent steps in risk management. To the currently listed implementation challenges we would add (a) erroneous perceptions about risk (the assumption that seriousness of an offense is synonymous with risk level); (b) utility (efficiency,

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time, added value, and overlap with other information already obtained); (c) consistency with clinical preference (with some assessors preferring to use unstructured clinical judgment rather than specialized measures that retain a role for judgment, such as structured professional judgment, or those that do not, such as actuarial measures); and (d) balancing intervention goals (do we intervene primarily or exclusively to reduce an individual's risk, or do we broaden our focus to improve life quality even when not directly relevant to risk?).

We would also offer two additions to the "challenges in subsequent risk management" list. These include the availability of relevant interventions, and conceptual clarity about the goals of interventions that are provided. We can illustrate both with a single example. Does a program provide trauma treatment for individuals entering it? If yes, does that mean that all interventions are "trauma-informed," or that specific and specialized interventions for trauma are offered in addition? Do we consider trauma narrowly, or do we incorporate the kind of adverse experience (e.g., housing and food insecurity, violent neighborhoods, and racial prejudice) that is experienced by a high proportion of justice-involved individuals?

Our comments are a bit more detailed on the "risk management outcomes" that are cited in their Figure 1. Perhaps because these outcomes are drawn from another source, they are better viewed as a starting point than a well-fitting description of risk management outcomes in the present context. Instead of a single set of longer-term outcomes, we would suggest using both short-term/process outcomes and longer-range outcomes, with short-term outcomes conceptualized as important steps in facilitating the achievement of longer-term outcomes. We propose the following short-term outcomes: (a) agency-level service planning, (b) staff accountability, (c) communication, (d) consistency, (e) treatment engagement and motivation, (f) reductions in risk factors, and (g) adherence to risk and need principle. The list of longer-term outcomes might look like this: (a) cost savings, (b) prevention of lawsuits and liability, (c) reducing bias (perhaps retermed "fairness and equity"), (d) stigma reduction, (e) civil liberties (e.g., limits on detention), (f) fewer incidents of crime, violence, and reoffending, (g) maintained reductions in risk factors and increase in protective factors, (h) reduced racial and ethnic disparities, (i) fewer jail and/or prison days, (j) fewer inpatient hospital days, (k) employment, and (l) parenting and other family responsibilities.

None of these suggestions alter the basic aspects of the Viljoen and Vincent analysis. Identifying barriers to implementing the use of specialized risk assessment measures, and changing policy and practice to address these barriers, should make the use of these measures more feasible, consistent, and impactful. Citing relevant outcomes allows the use of program evaluation and outcome research to better gauge the impact of their usage.

A next-iteration RAMP has important implications for research, practice, and legal policy—to which we now turn.

Research and Practice Implications of Using the RAMP

There are a number of research implications to be drawn from this article. Perhaps the most important involves the movement from refining risk assessment measures to implementing them widely. Viljoen and Vincent demonstrate that current usage of specialized risk assessment measures is inconsistent at best, with associated impact limited. To what extent could using a RAMP process (particularly when it is refined and supported with a manual) increase this usage? Which of the cited challenges will be the most consequential bars to its success? How can professional resources be used most effectively, and funding invested most usefully, in this process? Which of the cited outcomes should be prioritized most highly?

Some of these are relatively value-neutral questions, while others are strongly value-laden. In our earlier comment on "harm reduction" versus "absolute desistance," for example, there are clearly arguments for each in a public policy context. Research can tell us about relationships between variables and sizes of effects. But values affect how we interpret such data. In the present context, there are interests associated with those who are justice-involved, with others who experience harm associated with criminal conduct, and with the larger society striving to balance these interests and promote public safety. To cite another example, values also guide the emphasis on punishment as a primary goal of the criminal justice system, so implementing risk assessment (a prospective enterprise seeking to prevent future harm) more effectively will be moot until we value the prevention of such future harm more strongly than the punishment of past harm.

Likewise, there are any number of practice implications associated with more frequent and impactful use of risk assessment and risk management. One such implication involves the nature of the services provided to justice-involved individuals, and a second involves the distribution of these services. A rational approach to addressing both might involve the promotion of specialized psychological services to justice-involved individuals in the community with a primary goal of lowering their risk of reoffending, while not providing such services to individuals who did not need them for risk-reducing purposes. That premise could be debated—some would argue that psychological services to improve lives should be available to any justice-involved individual who seeks them—but this argument raises the question of whether such services should be both promoted by the court and publicly funded. Perhaps there would be more widespread agreement that services that actually reduced reoffending risk would be better candidates for public funding if choices were necessary, as they routinely are in today's society. One cannot deliver specialized risk-reducing services to higher-risk individuals without effectively identifying those individuals, however, which returns us to the important clinical and service-delivery implications of using specialized risk assessment measures more widely.

Legal Implications of the RAMP (Using Sentencing as an Example)

Using the RAMP could also better inform legal decision making as our law presently operates. When justice-involved individuals are involved in legal proceedings such as juvenile adjudication, juvenile transfer and reverse transfer, or criminal sentencing—proceedings which already identify risk and risk reduction/treatment amenability as important elements—then operating a correctional system for youth and another for adults could be improved by the systematic, consistent use of specialized risk assessment measures that both appraise risk and identify needs/rehabilitation targets. A system built with these as core constructs might be a good deal more credible to judges and legal policy makers.

There are also implications for more systematic legal reforms that could be associated with using the RAMP. Using specialized risk

assessment could help inform decisions about different stages in the justice process. These might include interventions prior to or at first contact with police, diversion from standard prosecution (including to a problem-solving court), supervision intensity for those on probation or parole, and the reentry process (with possible participation in a problem-solving reentry court).

To illustrate this point about broader systemic legal reform, we turn to a proposal, termed "preventive justice," that focuses on significantly changing American sentencing practices. We begin with the observation that risk assessment and management are important in every U.S. jurisdiction. Even in jurisdictions with fully determinate sentencing, the analysis of risk and its reduction plays a significant role in determining whether an alternative to prison is warranted and, if imprisonment occurs, under what sorts of conditions (Klingele, 2016). Risk remains a significant consideration outside the criminal punishment context as well, in connection with pretrial detention determinations, civil commitment, sexually violent predator hearings, and other quasi-criminal proceedings. Risk and treatability have long been a central feature of juvenile court determinations in every jurisdiction. The original juvenile courts, created at the turn of the 20th century, were explicitly rehabilitation-focused and dispositions were very flexible, with detention considered a last resort. In the 1970s and 1980s, lagging slightly behind the determinate sentencing movement in adult court, many juvenile court systems turned away from rehabilitation as a priority; transfer to adult court became easier and even dispositions in juvenile court were more focused on culpability rather than amenability to treatment (Redding, 2006). However, bolstered by recent Supreme Court decisions recognizing the malleability of juveniles as a constitutional matter (see, e.g., Miller v. Alabama, 2012), juvenile court sentences in every state remain much more open-ended than adult court.

A number of commentators, concerned about the turn toward determinate sentencing and more punitive approaches in the last quarter of the twentieth century, have proposed various alternatives. The "preventive justice" alternative would make modern risk assessment and risk management techniques the centerpiece of sentencing, in both the juvenile and adult contexts (Slobogin, 2016, 2023). Borrowing heavily from the original Model Penal Code (MPC; American Law Institute, 1962), preventive justice in the adult context calls for broad sentence ranges, within which a parole board would operate. As with the older version of the MPC, the maximum sentence would depend on the seriousness of the crime. The principal difference between the original MPC and preventive justice, however, is the formal adoption of modern risk assessment and risk management tools both at the front end in determining whether prison is warranted after conviction, and at the back end when parole boards make their determinations about release and under what conditions. The same scheme would be followed in juvenile court, albeit with much shorter sentence maxima, given the diminished culpability of youth (which the U.S. Supreme Court has recognized, see, e.g., Miller, 2012). Furthermore, consistent with neuroscientific findings, the dispositional age for juveniles would be extended to 25 (with jurisdictional age still maintained at 18); given a potential 7-year maximum sentence, transfer to adult court would not be necessary even for the most serious crimes (Slobogin, 2016, pp. 57–60).

Information about risk assessment and risk management cannot influence a judge or a parole board unless it is admissible under the relevant evidentiary standards. To date, most courts have been remarkably lax about what counts as valid evidence at sentencing. As a constitutional matter, clinical testimony about risk that is highly suspect and unprofessional is admissible even in capital sentencing proceedings (Barefoot v. Estelle, 463 U.S. 880, 1983). While the evidentiary rules governing expert testimony could, in theory, be more restrictive (and are much more so at trial), in most jurisdictions they do not apply at all at sentencing (or, for that matter, in other settings where risk is considered; see Slobogin, 2021a). That must change. Deprivations of liberty should not be based on gross speculation or flawed science (see State v. Loomis, 881 N.W.2d 759, 2016). Thus, to the extent risk assessment plays an explicit role in determining the length of sentence, it should be subject to the strictures of the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) or the state analog to that decision. If Daubert applied, risk assessment and risk management tools would need to meet several criteria.

First, under Daubert, expert evidence must "fit" the legal question being asked. With respect to risk and consistent with our observations above, that should mean that, whenever feasible, a risk assessment should determine whether the individual's risk and protective factors place them in a group that (1) has the requisite probability (e.g., 50%), (2) of committing a legally relevant act (e.g., homicide, sexual assault or armed robbery), (3) within a specified time period (e.g., by the end of the maximum sentence), and (4) in the absence of detention. The probability, outcome, and duration variables (1, 2, and 3) are normative factors that need to be determined by the legislature or the courts and will probably vary depending on the context (e.g., capital sentencing v. pretrial detention; see Slobogin, 2021b, pp. 45–56). Once those thresholds are determined, risk assessment instruments must be geared to addressing them.

That leaves the intervention variable, (4), which calls for information about risk management options. This will often be the most the most important consideration in a preventive justice regime or any other system that focuses on risk. Even individuals who belong to a high-risk group may be less likely to recidivate when treated in a community-based substance abuse program than in prison, especially given the criminogenic effects of incarceration. Empirical information about the efficacy of various risk management programs and the extent to which they can be or have been successfully implemented, the focus of RAMP, is highly relevant on this issue.

Indeed, in a preventive justice approach, such information is arguably constitutionally required (see Slobogin, 2021b, pp. 138–142). Under the Supreme Court's decision in Jackson v. Indiana (1972), the due process clause of the Fourteenth Amendment requires that the "nature and duration" of a deprivation of liberty must bear a "reasonable relation" to its purpose (p. 738). If the purpose of a given sentence is public safety (as it would be in a preventive system) and that purpose can be more effectively accomplished through an alternative to prison, it ought to be preferred. Without the relevant data about the efficacy of such alternatives, however, prison is likely to be the default choice, both by the judge at the frontend and the parole board at the backend. Jackson's holding also stands for the proposition that, if the government's purpose is protection of the public, treatment designed to reduce risk is constitutionally required, at least if it is feasible to provide that treatment. Once again, empirical information about the efficacy of particular risk management programs and the ability to implement them to scale is crucial here.

In addition to fit or relevance, Daubert requires that the validity of expert evidence be subject to verification through some type of scientific process. Risk assessment instruments should be well-calibrated on the relevant population (including racially discreet groups), have good discriminate validity for that population, and be validated periodically (see Slobogin, 2021b, pp. 68–81). Risk management programs need analogous verification. To some extent courts can assist with relevant outcome research if they can assign participants (randomly, if possible) to control and experimental conditions.

As this discussion illustrates, Viljoen's and Vincent's "road map" will be of greatest benefit if it is supplemented more precisely with variables that can answer the questions that are important to evidentiary and constitutional law. The success of preventive justice or any other indeterminate or hybrid approach to adult and juvenile sentencing will depend on whether risk assessment and risk management can be consistently and effectively implemented. Viljoen and Vincent provide a superb start in providing the criteria for gauging this type of success. With fine-tuning, it can be a template integrating risk assessment and management into the legal system.

Conclusions

The RAMP has important implications for both the integration of risk assessment into existing practice and its use as part of substantial reform in the legal system. It offers guidance in reprioritizing our research agenda, moving from the pursuit of increasing accuracy (at a time when further improvements will probably come in small increments) to the implementation and ongoing use of measures that are good enough to promote considerable improvements in informed legal decision making and expansion of risk-reducing interventions. As the RAMP is modified through research attention, there will be associated training needs—from clinicians to clinical administrators to legal professionals and policy makers—for maximizing its usefulness and consistency. Even without using it as part of an approach to legal reform, it could certainly improve the quality of legal and clinical practice in this area. The prospect of integrating it into legal reforms such as the preventive justice example discussed in this comment provides even further justification for its modification, adoption, and widespread dissemination.

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