

Dangerousness and Expertise

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Why the Topic is Important

- Proliferation of prevention statutes
 - Sexually violent predator statutes
 - Dangerous offender statutes
 - Dangerousness assessments are everywhere
- New developments in prediction science
 - Flaws in earlier research
 - Sophisticated research re risk factors
 - New prediction instruments
- New evidentiary rules
 - Daubert v. Dow Chemical
 - Revision of Rule 702
- Illustrates some general issues connected with using social science for legal purposes

Prediction Methodologies

- Clinical (e.g., Dr. Kozol v. Dr. Grigson)
- Actuarial (e.g., Violence Risk Appraisal Guide--VRAG; Classification of Violence Risk--COVR)
- Adjusted actuarial (e.g., VRAG plus clinical judgment)
- Structured professional judgment (e.g., HCR-20, Psychopathy Checklist-Revised--PCL-R)

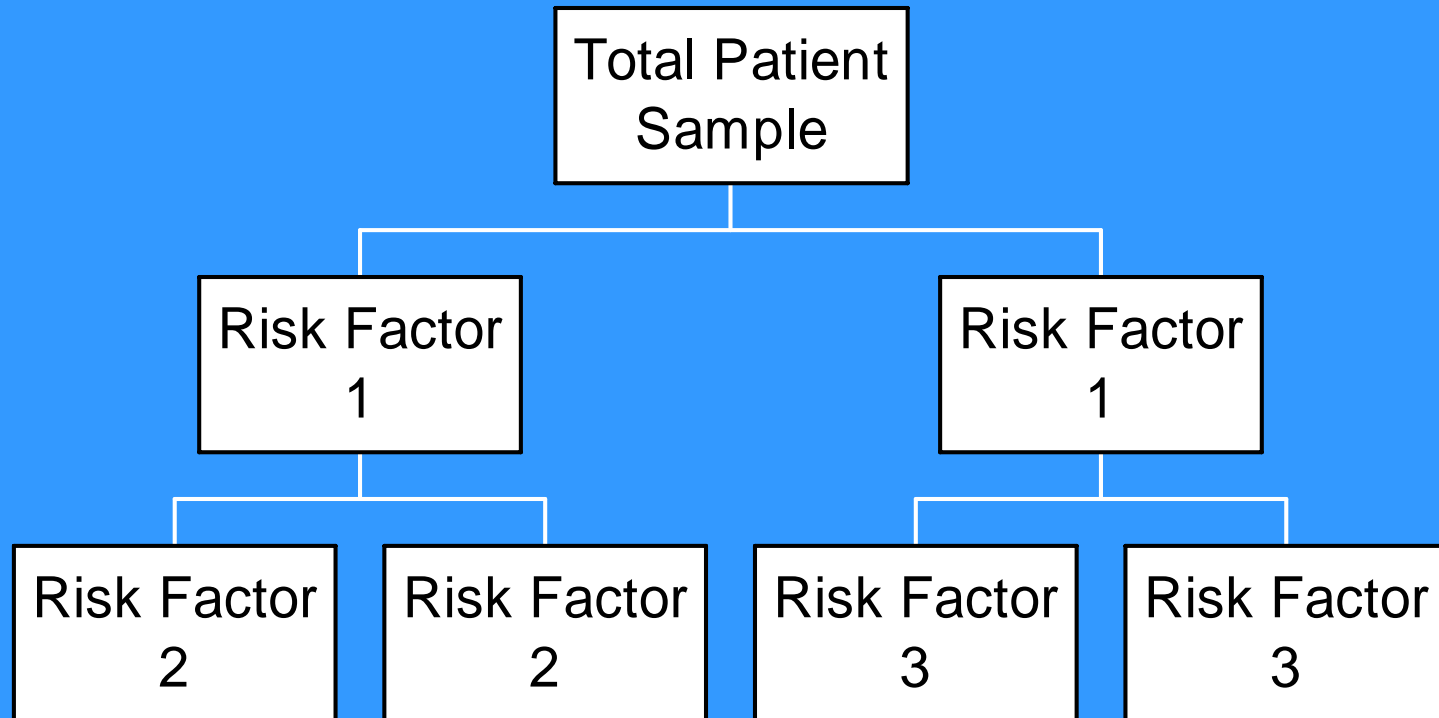
VRAG

- Twelve variables
 - *Psychopathy Checklist-Revised* (rating of 35 or more = 12 points on the VRAG, while a rating of 0-4 = -5 points on the VRAG)
 - *elementary school misconduct* (“severe” disciplinary problems = 5)
 - *DSM diagnosis* (two variables, with a diagnosis of personality disorder = 3 and a diagnosis of schizophrenia = -3 points)
 - *age at time of triggering offense* (26 or under = 2; 39+ = -5)
 - *absence of one or both living parents before 16* (3)
 - *failure on conditional release* (3)
 - *non-violent offense score* (more than two minor offenses or one serious offense, such as robbery, felony theft, or fraud = 3)
 - *marital status* (never married = 1)
 - *victim injury* (none = 2; death = -2)
 - *history of alcohol abuse* (alcoholic & alcohol at time of offense = 2)
 - *victim gender* (female = -1; male = 1).

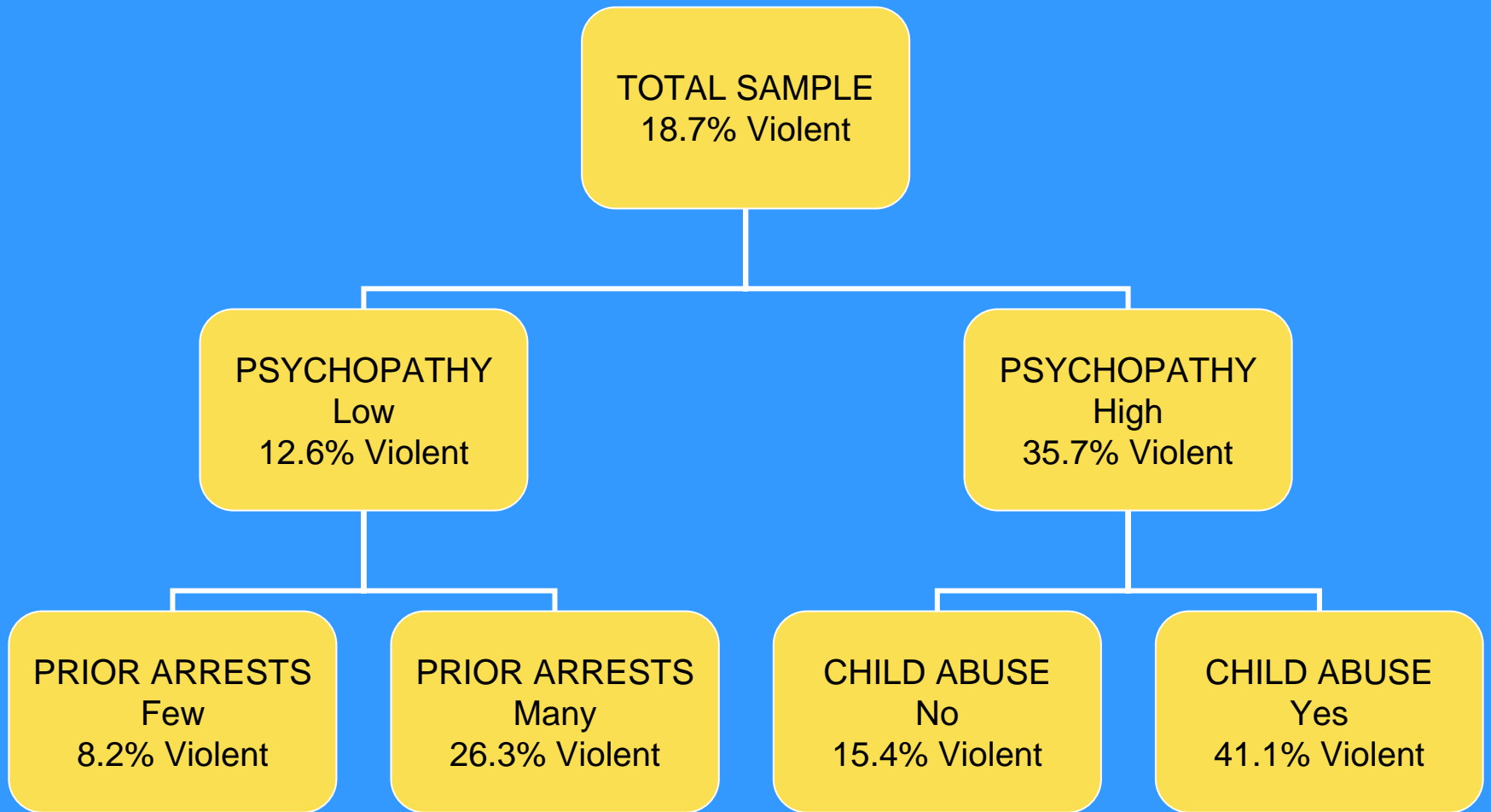
- Relationship between scores and probability of violent recidivism

	<u>7 years</u>	<u>10 years</u>
– Less than -21 points:	.00	.08
– -7 through -1	.17	.31
– +7 though + 13	.44	.58
– +21 through + 27	.76	.82

Classification of Violence Risk -- Iterative Classification Tree



COVR--Example



HCR-20

- **Historical variables (10)**
 - previous violence, age at first violent incident, relationship instability, employment problems, substance use problems, major mental illness, psychopathy, early maladjustment, personality disorder and prior supervision failure.
- **Clinical variables (5)**
 - lack of insight, negative attitudes, active symptoms of major mental illness, impulsivity, and unresponsiveness to treatment.
- **Risk management variables (5)**
 - unfeasibility of plans, exposure to destabilizers, lack of personal support, noncompliance with remediation attempts, and stress.
- **Examiners rate each item on a scale of 0 to 2, with 40 being the highest possible score.**
 - Score > 26 = 35% violent recidivism rate
 - Score > 35 = 75% violent recidivism rate

Comparison of Methodologies

Clinical Actuarial

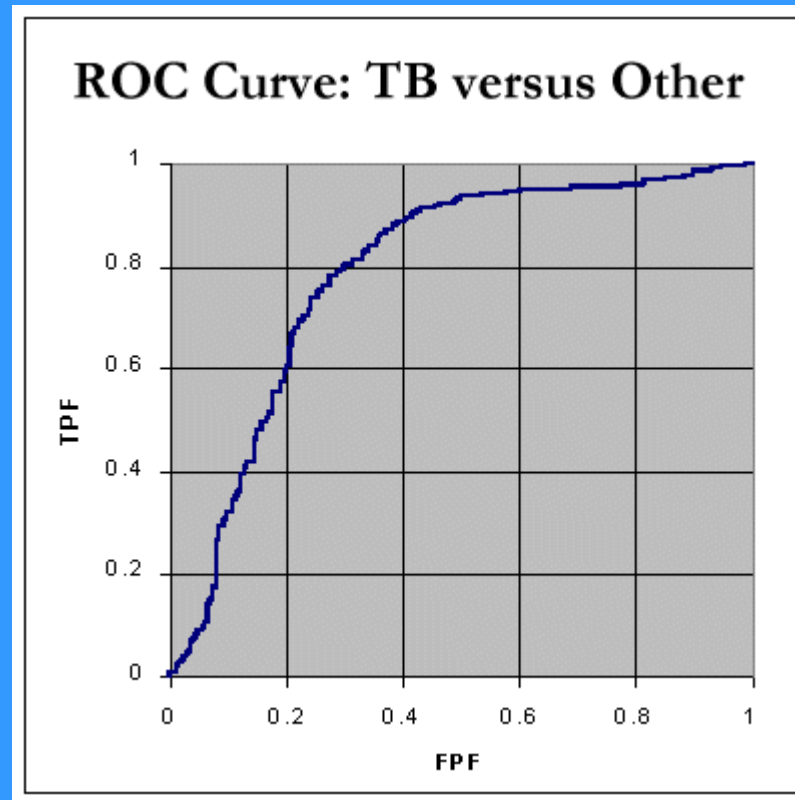
- Ex ante designation
of relevant criteria No Yes
- Explicit probability
estimates No Yes
- Norms No Limited
- Individualization Yes No
- Reliance only on
“hard” variables No Maybe

Validity of Prediction Methodologies

- True positive rates
 - Early studies: 10-40%
 - More recent studies: 35-70%
- Base rates
 - Coin-flipping base rate = 50%
 - Violent behavior base rate = 10-30%
- “Receiver operating characteristic” (ROC) curve and “area under the curve” (AUC)
 - AUC of .50 = chance; AUC of 1.0 = perfect
 - AUC of .75 = 75% chance “high risk” individual will receive a higher score than a “low risk” individual

Example of ROC curve for VRAG

The AUC value for this curve is 78%.



True Positive Fraction = proportion of recidivists who receive a particular score
False Positive Fraction = proportion of non-recidivists who receive a particular score

AUC Values

- Clinical prediction (avg. over 30 studies) = .67
- VRAG = .76 to .80
- COVR = .70
- RRASOR = .71
- HCR-20 = .69 to .89

Courts' Response

- Constitutional challenges
 - Barefoot v. Estelle (1983)
 - *Nenno* (1998) and *Cockrell* (2002)
- Evidentiary challenges (under *Frye* or *Daubert*)
 - Both clinical and actuarial testimony are virtually always admissible
 - A handful of cases exclude actuarial testimony
 - Only one court has excluded clinical testimony (but later permitted it if accompanied by actuarial data)

A Closer Evidentiary Analysis

- *Frye*—general acceptance test
- *Daubert*—testability, error rates, peer review, acceptance
- Federal Rules
 - Materiality (rule 401)
 - Probative value/reliability (rule 401)
 - Helpfulness (rule 702)
 - Countervailing factors/prejudice (rule 403)

Materiality Issues

- Nomothetic prediction data
 - Is using group data to make predictions about an individual permissible?
 - Probabilities (science) v. absolutes (law)
- Nomothetic data and individual cases
 - The norming problem
 - The criterion variable problem
 - The lack of individualization problem
- Illegitimate bases for prediction?
 - Race, gender, age
 - Diagnosis, personality
 - Prior acts

Probative Value

- Evidentiary threshold
 - Probative value: actuarial *and* clinical predictions > chance
 - *Daubert*: Predictions are “testable” and error rates exist
 - *Frye*/general acceptance: compare Grigson to Kozol
- Evidentiary sufficiency
 - BRD = 95%; clear & convincing evidence = 75%
 - But a brick is not a wall (McCormick)
 - Other methods of meeting sufficiency requirement:
 - AUC values;
 - proof of underlying facts;
 - proof that individual belongs to a group with X probability of recidivism
 - Ultimately, the sufficiency issue is a substantive issue: Given the difficulty of prediction, should dangerousness ever be a basis for deprivations of life/liberty?

Helpfulness

- Incremental validity
 - Mossman: “a nonclinician furnished with knowledge of past behavior may outperform a mental health professional relying solely on information garnered from a clinical interview”
 - However, there are no studies directly comparing expert-based v. non-expert-based predictions
 - Mental health professionals can provide insights re probabilities and risk factors
- Ultimate issue testimony (cf. R. 704)
 - Offender is “dangerous” or offender is “likely to recidivate” or offender represents a “moderate risk”
versus
 - Offender “belongs to a group with a X probability of recidivism” or offender “has the following risk factors and the following protective factors”

Prejudicial Impact

- *Barefoot*
 - Blackmun’s dissent: “[T]he specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialists’s words, equates with death itself.”
 - Majority opinion: the adversary system is “competent to uncover, recognize, and take due account of [prediction testimony’s] shortcomings.”
- Why adversarial process is inadequate:
 - Factfinder preconceptions
 - Difficulty of demonstrating “safeness”
 - Representativeness heuristic
 - High correlation between clinical predictions and disposition
 - Diamond and Krauss studies (noting inefficacy of adversarial process vis-a-vis *clinical* prediction testimony proffered by *state*)

Subject-First Regime

- Subject should control use of *clinical* prediction testimony
 - Prosecution will not be prejudiced by it
 - Character evidence rule analogy
 - Rock v. Arkansas and voice
- State can still use actuarial prediction evidence and lay testimony re past acts
- Subject opens door to state use of clinical prediction testimony with:
 - Clinical testimony re dangerousness
 - Clinical testimony re volitional impairment
 - Clinical testimony re treatability?
 - But not with testimony re culpability