



# Sexually violent predator risk assessments with the violence risk appraisal guide-revised: A shaky practice



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## ARTICLE INFO

### Article history:

Received 7 November 2016  
Received in revised form 13 February 2017  
Accepted 23 March 2017  
Available online 8 April 2017

### Keywords:

VRAG-R  
Sexual violent predator  
Base rate  
Sexual recidivism

## ABSTRACT

Twenty-two jurisdictions in the United States permit the involuntary civil confinement of sexual offenders upon expiration of their criminal sentence and, if committed, these individuals face possible lifetime commitment. One of the legal requirements that psychologists must address in sexually violent predator evaluations is the likelihood that an individual will engage in dangerous sexual behavior and consideration of the probabilities for sexual recidivism contained in actuarial experience tables best address this inquiry. Clinicians find it increasingly difficult to affirm the likelihood threshold in the face of decreasing base rates and score-wise probability estimates for sexual recidivism reported in contemporary actuarial experience tables. The Violence Risk Appraisal Guide-Revised (VRAG-R) has been promoted to assess sexually violent predators because it has been presented as a more accurate predictor of sexual recidivism and the results more likely satisfy the legal standard of sexual dangerousness. This article conducts an in-depth analysis of the predictive and psychometric properties of the VRAG-R that are most relevant to the fit of the VRAG-R when addressing the sexual dangerousness standard proscribed by SVP laws. Recommendations for future research are offered to improve the fit of the VRAG-R to the legal inquiry of sexual dangerousness and implications for using the current iteration of the VRAG-R in forensic practice are discussed.

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## 1. Introduction

Laws in twenty-one states and federally permit the petitioning of individuals for involuntary civil confinement as a sexually violent predators (SVPs) after they have served their criminal sentences (Knighton, Murrie, Boccaccini, & Turner, 2014). Sexually violent predator (SVP) statutes are premised on three underlying legal principles to justify involuntary civil confinement (Scurich & Krauss, 2014), including the existence of past qualifying criminal sexual conviction(s), the presence of a mental condition that causes serious difficulty controlling sexual behavior (hereinafter referred to as SVP mental disorder), and the SVP mental disorder makes the person sexually dangerous. The only exception to this legal scheme is the federal Adam Walsh Act where chapter 18 of the United States Code section 4247(a)(6) presumes the individual is sexually dangerous if he exhibits one of the qualifying sexual crimes and suffers from a current SVP mental disorder. When civilly confined, the individual faces indefinite commitment unless he can later prove he no longer suffers from the SVP mental disorder or is no longer sexually dangerous (Scurich & Krauss, 2014).

Except for the legally required history of qualifying sexual crimes, the remaining SVP criteria— a SVP mental disorder that makes the person sexually dangerous— fall under the purvey of forensic psychology. Not surprisingly, psychologists are typically the principal witnesses who provide evidence to the Trier of fact as to whether the individual's clinical presentation meets the legally defined requirements for involuntary civil confinement as a SVP (Krauss & Scurich, 2013).

Psychologists employ a range of diagnostic methods to assess for the presence of a SVP mental disorder that may include psychological testing, review of relevant background information, physiological assessment of sexual arousal, diagnostic interview, mental status examination, and differential diagnosis. Determining whether the individual's clinical presentation is consistent with a SVP mental disorder requires the clinician to make a dichotomous conclusion (i.e., present or absent). On the other hand, SVP statutory schemes employ probabilistic language to proscribe the threshold of risk sufficient to warrant involuntary civil confinement (Abbott, 2013; Donaldson & Abbott, 2011; Janus & Prentky, 2003; Knighton et al., 2014; Scurich & Krauss, 2014; Sreenivasan, Weinberger, & Garrick, 2003; Woodworth & Kadane, 2004) such as likely, more likely than not, highly probable, or much more probable than not (hereinafter referred to as likely). While psychologists who conduct SVP evaluations provide the fact finder results of risk assessments that address the legal inquiry, it remains in the purvey of the trier of fact to decide whether the testimony about the likelihood of sexual dangerousness is sufficient to meet the legally proscribed threshold (Scurich & Krauss, 2014).

### 1.1. Defining the likely threshold

In an analysis of statutory and decisional law among the jurisdictions with SVP laws, Knighton et al. (2014) identified four approaches to defining likely. Six states have specified a threshold of >50% as defining likely (Florida, Iowa, Missouri, Nebraska, Washington, and Wisconsin). To the contrary, five states have decided to reject the application of probability estimates to define likely (California, Kansas, Massachusetts, North Dakota, and Virginia). The statutes for another five states associate likely with probabilistic terms such as highly likely or substantially probable (Arizona, Minnesota, New Jersey, New York, and Illinois). Finally, there are five jurisdictions where statutory language or case law has not defined the meaning of likely (New Hampshire, Pennsylvania, South Carolina, Tennessee, and Texas). Contrary to the few states that prohibit consideration of probability estimates in SVP risk assessments, it is recognized in the sexual offender risk assessment field that probability estimates provide the necessary relevant and probative evidence for the fact finder to address the legal inquiry into the likely threshold (Duwe & Kim, 2016; Helmus, Hanson, Thornton, Babchishin, & Harris, 2012; Janus & Prentky, 2003; Prentky, Janus, Barbaree, Schwartz, &

Kafka, 2006). Guidance is available to SVP evaluators in states that have not quantified the likely threshold. Woodworth and Kadane (2004) conducted a legal and statistical analysis of the SVP likely threshold and concluded that probability estimates between 60% and 70% best approximate probabilistic terms representing likely when the burden of legal proof is beyond a reasonable doubt or clear and convincing evidence. This conclusion is consistent with other research that has quantified probabilistic terms associated with likely at similar probabilities (Kadane, 1990; Mosteller & Youtz, 1990).

The imperative for SVP evaluators to rely upon probability estimates to quantify probabilistic terms associated with likely (except in those states that specify or prohibit an explicit probability estimate cut-off) becomes starkly apparent based on research with SVP jurors. Knighton et al. (2014) examined how jurors in Texas SVP trials determined the likely threshold. The reader will recall that Texas law does not define likely. Inquiry revealed the following proportions of jurors determined that the corresponding probabilities of sexual recidivism satisfied the likely threshold: One out of two jurors (53.6%) considered a probability of 1%, eight out of ten fact finders (82%) identified a 15% possibility, and nearly all triers of fact (97.4%) endorsed a 25% likelihood. The thresholds of sexual recidivism risk jurors associate with likely raise substantial questions about the unnecessary detention of large proportions of sexual offenders who would otherwise not reoffend sexually. Four studies have demonstrated relatively low base rates of sexual recidivism among SVPs that range between 1% and 25% over follow up periods up to ten years, with all but one sample having sexual recidivism rates at or below 10% (DeClue & Rice, 2016; DeClue & Zavodny, 2014). The relatively low base rate of sexual recidivism among SVPs coupled with the minimal threshold of risk that most fact finders associate with likely creates a situation where most jurors would find the vast majority of SVP candidates as meeting the risk threshold.

Based on the foregoing analysis, it is entirely consistent with the role of forensic psychologists to base decisions regarding the likely threshold using a probability estimate cut-off, when permitted by law, which is known to narrow the class of sexual offenders who are subject to civil confinement consistent with *Kansas v. Hendricks* (1997). For the remainder of this article, it will be assumed that the threshold of >50% is sufficient to substantiate the likely threshold. Using this minimum threshold for SVP risk assessments reduces potential unnecessary abridgement of the liberty interests of individuals who would otherwise not reoffend sexually. This recommendation is further supported by the American Psychological Association Specialty Guidelines for Forensic Psychology section 2.04 (American Psychological Association, 2013) that instructs forensic psychologists to consider how laws and legal precedents affect professional practice and to manage professional conduct in a manner that does not threaten or impair the rights of the recipients of services.

### 1.2. Assessing the likely threshold

Application of sexual recidivism actuarial measures has been the preferred method by which to assess the likely threshold in SVP cases (Jackson & Hess, 2007; Schneider, Jackson, D'Orazio, Hebert, & McCulloch, 2014). Sexual recidivism actuarial measures provide experience tables that report the proportions of sexual recidivists at each score on the instrument ("score-wise risk estimate"). It becomes intuitively apparent how the score-wise probability estimates lend commonsense meaning to probabilistic statements that legally define likely and assist the trier of fact when deciding whether the individual meets the likely threshold for sexual dangerousness (Janus & Prentky, 2003; Prentky et al., 2006). Other accuracy data can be supplied to the trier of fact to assign appropriate weight as to the fit of the probability estimates to the legally defined likely criterion such as 95% confidence intervals.

The interpretation of the probabilities of sexual recidivism contained in actuarial tables assumes the risk estimates at each score are the true probabilities of sexual recidivism when applied to the SVP population

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