Immigration Consequences of Domestic Violence & Related Offenses

Presented by NACDL & the
DEFENDING IMMIGRANTS PARTNERSHIP
FEBRUARY 1, 2012

Presenters

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- Angie Junck, Immigrant Legal Resource Center
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Topics of Discussion

- Overview of Immigration Consequences of DV
- Aggravated Felony Crime of Violence
- Domestic Violence, Child Abuse, & Violation of a TRO
- Other: Crimes Involving Moral Turpitude & Firearms

Overview: Possible Immigration Consequences of DV Related Offenses

Conviction of Aggravated Felony Crime of Violence	Ground of Deportability
Conviction of Domestic Violence on or after Sept 30, 1996	Ground of Deportability
Conviction of Child Abuse, Neglect, Abandonment or Stalking on or after Sept 30, 1996	Ground of Deportability
Conviction of a Firearms Offense	Ground of Deportability
Conviction and/or Admission of Crime Involving Moral Turpitude	Ground of Inadmissibility & Deportability

Review: Defense Priorities

- Generally, most people want to avoid an aggravated felony.
- Generally, LPRs care most about avoiding grounds of deportability.
- Undocumented care most about avoiding grounds of inadmissibility.
- Everyone wants to preserve eligibility for discretionary relief.

Key Defense to Avoiding Immigration Consequences

Sanitize the record of conviction from bad facts!

The record of conviction includes:

- Elements of offense (statute & case law)
- Criminal charge (information, complaint, etc. **if incorporated into plea – i.e. pled as charged**)
- Written plea agreement
- Transcript of plea hearing
- Transcript of judgment
- Sentence
- Jury instructions

More on the Record of Conviction

The ROC does NOT include:

- Police reports, probation or pre-sentence reports
- Statements by non-citizen outside of judgment and sentence transcript (to police for example)
- Information from co-defendant's case

WARNING: Stipulating to facts in a document not otherwise part of the ROC incorporates them by reference into the ROC (i.e., stipulation to police reports)

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Aggravated Felony Crime of Violence

8 USC § 1101(a)(43)(F)

Aggravated Felony

Consequences

- Nearly automatic deportation
- Permanent exile from the U.S.
- Bar to almost every form of relief from deportation
- Mandatory detention.

COV Definition at18 USC § 16

a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Elements of18 USC § 16(a)

- **Has as an element**
- Intentional
- Use, attempted use, or threatened use
- Of violent physical force
- Against person or property of another
- Court orders imprisonment of 1 year or more

Elements of18 USC § 16(b)

- **Felony**
- Elements of offense by its nature
- Involve a substantial risk
- That violent physical force
- May intentionally be used
- Against the person or property of another
- Court orders imprisonment of 1 year or more

Comparing §16(a) and §16(b)

18 USC §16(a)	18 USC § 16(b)
May be felony or misdemeanor	Requires felony conviction
Requires element of use of force	Covers offenses with no element of use of force if substantial risk that defendant will use violent force in the commission of the offense

Defenses Against COV

- Force must be intentional – 16(a)
- Force must be violent – 16(a) and (b)
- Conviction must be felony – 16(b) only
- Risk of intentional use of violent force must be substantial – 16(b) only
- Imprisonment ordered must be 1 year or more – 16(a) and (b)

Intent Requirement

- Use of violent force must be intentional (§ 16(a))
- Insufficient intent:
  - Strict Liability
  - Negligence
  - Recklessness (where risk that violence will be used is not recognized by the defendant)
- BUT if FELONY offense (§ 16(b)):
  - nature of offense carries *substantial risk that intentional force* + mens rea above negligence (e.g. intentional, willful and malicious, recklessness)

Sentence

Under immigration law, a "sentence" includes any term of imprisonment whether committed or suspended.

EX: A 2 year sentence of imprisonment, 6 months to serve, the balance suspended = a 2 year sentence

Sentence Solutions

Take the time on a non-COV count

- Stack sentences, each 364 days or less. (3 conv. with sent. of 364 each = no sentences of 1 yr or more).
  - Consecutive sentences for separate counts are NOT combined
- Waive CTS. If D served 8 months before sentence and waives CTS, he can receive a formal sentence of under one year while serving same amount of time.
- Waive future conduct credits. Seek lower actual sentence but waive future conduct credits in exchange. Prosecutor gets time served that they wanted.
- When client facing additional sentence for probation violation (& additional sentence will make offense an Agg Fel), try for new conviction w/sentence of 364 or less.

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Deportable Offenses:

Domestic Violence

Includes *conviction* for:

- Crime of domestic violence
- Stalking
- Child abuse
- Child neglect
- Child abandonment

or

Violation of criminal or civil protective orders

Domestic Violence Deportation Ground

8 USC § 1227(a)(2)(E)(i)

DV Solutions

Crafting a Safe(r) Plea:

- Sanitize record by keeping out violence. In some Circuits sanitizing name of victim & relationship of victim to Defendant might help, but not a guaranteed defense.
- Plead to simple battery or assault or similar offenses that do not constitute COVs
  - Offensive or insulting touching
  - Negligent conduct
  - No specific intent to harm
  - No actual injury or no serious injury caused
- Violence must be against person, not property. Plead to trespass, theft (but may have other imm consequences)
- Plead to committing a COV against a non-listed victim such as former cohabitant, ex's new boyfriend, the neighbor

Child Abuse, Neglect, & Abandonment Deportation Ground

Any offense involving an intentional, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation.

Matter of Velasquez-Herrera, 24 I&N Dec. 503 (BIA 2008);

Matter of Soram, 25 I&N Dec. 378 (BIA 2010) (Child abuse even with no injury is a deportable offense)

Record of Conviction for Child Abuse Cases

- Conviction of a "crime of child abuse" does not have to have age of the victim as an element
- BUT record of conviction can be consulted to determine whether the victim is a child.

PRACTICE TIP: If possible, plead to an offense that does not involve a child. Sanitize the record of conviction so that there is no mention that the victim of the crime is a child.

Violation of a Protective Order Deportation Ground

- Civil or criminal court finds violation of a DV court order protecting against
  - Credible threats of violence
  - Repeated harassment
  - Bodily injury
- No conviction required
- Ninth Circuit found if your protection order is *issued to prevent domestic violence*, doesn't matter *how* you violate it, you are deportable.

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Crime Involving Moral Turpitude

Matter of Silva-Trevino, 24 I&N Dec. 687 (2008)

Inadmissible Offenses:

Crime Involving Moral Turpitude

A person is inadmissible based on conviction or admission of one crime involving moral turpitude, UNLESS:

- One crime committed when under 18 years old and at least 5 years before admission

or

- Maximum possible penalty is one year or less, sentence is less than 6 months, and first time committed a CIMT

Deportable Offenses:

Crime Involving Moral Turpitude

- One CIMT conviction within 5 years of admission, where a sentence of at least one year *may* be imposed

OR

- Two CIMT convictions at any time, not arising out of a single scheme of criminal misconduct

Deportable Offenses:

Firearm Offenses

- Includes a conviction for any crime of buying, selling, using, owning, possessing or carrying any firearm or destructive device
- Includes conspiracy and attempt
- Firearm does not necessarily have to be an element of the offense

Most Important Things to Remember

- Determine client's immigration status
- Determine client's goals
- Consider client's prior record
- Avoid aggravated felony conviction
- Tell client not to talk to immigration official, apply for anything, or leave U.S. without talking to immigration attorney first
- Get help from expert if you need it

RESOURCES

- Defending Immigrants Partnership: immigration resource library at www.defendingimmigrants.org

Litigating Domestic Violence Cases: Accurate, Reliable Research Can Make a Difference

When representing men accused of domestic violence, do lawyers consider hiring an expert for the defense? The authors note that experts can help attorneys and jurors better understand the role of stereotypes and how they play a significant role in domestic violence cases. Despite recent research finding that domestic violence is not necessarily a crime against women, the traditional ways of thinking about domestic violence continue to inform how cases are prosecuted.

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The Champion® Issue June 2023
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While most criminal defense attorneys do not think twice about contacting an expert to discuss their case when the domestic violence (DV) defendant is a heterosexual female, they may not consider contacting an expert when the defendant is a heterosexual male or a sexual minority. Working with any DV case, experts can help attorneys and jurors better understand the role of stereotypes and how it plays a significant role in DV cases. The truth is that DV is a human issue, not a gendered issue. In no way do we intend to minimize women's victimization. Instead, the goal of this article is to encourage a more inclusive perspective of DV, which can help to strengthen litigation strategies.

Since the advent of mandatory arrest laws and "no-drop" prosecution policies in the 1990s, criminal defense attorneys have seen an exponential increase in defendants seeking legal representation for DV-related crimes, typically consisting

of physical assaults but also stalking, threats to harm, and destruction of property. {1}

1 E. Buzawa & C. Buzawa, Domestic Violence: The Criminal Justice Response (2d ed. 2002).

Most attorneys would agree that DV cases pose unique challenges. In this article, we seek to help attorneys overcome these challenges by sharing a combined six decades of research, clinical, and forensic experience in the field of DV.

ABOUT THE AUTHORS

Following a brief period of training derived from the Duluth Model of offender treatment,{2}

2 E. Pence & M. Paymar, Education Groups for Men Who Batter: The Duluth Model (1993).

the first author began conducting court-mandated batterer intervention programs (BIPs) in 1992 in the San Francisco Bay Area for defendants convicted of DV offenses. Used as the primary approach among BIPs in the United States, this model views DV, also known as *intimate partner violence*, as a problem of men assaulting their female partners to control them and maintain their presumed "male privilege." When women are arrested for domestic violence, their assaults are thought to have been perpetrated in self-defense or in retaliation for years of previous abuse. This model closely parallels the beliefs of victim advocacy organizations with an external impact on the criminal justice system and reflects what researchers call the "gender paradigm" or the belief that DV is a crime against women.{3}

3 D. Dutton & T. Nicholls, *The Gender Paradigm in Domestic Violence Research and Theory: The Conflict of Theory and Data*, 10 Aggression and Violent Behavior 680-714 (Sept.-Oct. 2005), doi:10.1016/j.avb.2005.02.001; D. Dutton, K. Corvo & J. Hamel,

The paradigm further holds that no matter how minor the criminal offense might be, it is merely the first step in an inevitable progression toward more severe and consequential assaults and therefore requires an austere response, typically including criminal conviction, probation, and the maximum length of BIP participation prescribed by law.

The first author soon discovered that most of the men enrolled in his BIP groups had engaged in low levels of violence and harbored modern egalitarian attitudes, many involved with women who were as violent, or more violent, than them. These men often felt helpless in their relationships. They needed to learn how to communicate with their partners to ensure a healthier relationship, as much as they needed to learn how to control their aggressive impulses. They were hardly the monsters depicted in film and television. The first author went on to extensively research the causes, prevalence rates, dynamics, and consequences of domestic violence, and today has realized that, on the whole, attorneys are woefully misinformed on this topic. Too often, for instance, a public defender advises an innocent male defendant to take a plea deal in a weak "he said, she said" case out of fear that the jury is inclined to convict, which is a reasonable assumption. But what if the attorney, and the jury, were equipped with the knowledge that DV is far more symmetrical across the sexes than what the gender paradigm would suggest? Such information might make the difference between a verdict of guilty and not guilty.

The second author began studying domestic violence from the perspective of the gender paradigm. In this regard, she believed, as most people do, that women were the primary victims of DV. She researched battered women who killed their male partners{4}

4 B.L. Russell & L.S. Melillo, *Attitudes Toward Battered Women Who Kill: Defendant Typicality and Judgments of Culpability*, 33(2) Criminal Justice and Behavior 219-241 (2006).

and tested the hypothesis argued by many legal scholars that the "battered woman syndrome" created a stereotypical view of a battered woman (typically ascribed to gendered roles, passive, submissive, etc.) to which defendants would be compared. The more likely a defendant fits the "stereotype" of a battered woman, the less guilt would be attributed. Those deviating from the stereotype of a battering victim would be more likely to be found guilty. This study found the typicality of the defendant directly influenced verdicts. Women who were described as a "typical" victim were much less likely to be found guilty and more credible than women portrayed as "atypical" or deviating from the prototype of a battered woman.

This study, coupled with the mounting research demonstrating that heterosexual men and those in the LGBTQ+ community experienced the same or higher rates of domestic violence, informed a research agenda that subsequently studied mock jurors' perceptions of defendants in various types of DV cases, comparing heterosexual male and female and gay/lesbian same-sex couple defendants in DV cases. These studies consistently showed that heterosexual males were most likely to be found guilty, while heterosexual females were found least guilty, with gay or lesbian defendants falling somewhere in between.

CORRECTING THE MYTHS

Below are the most recent, accurate findings on domestic violence, as found in comprehensive literature reviews and national surveys.{5}

5 M.C. Black et al., (NISVS): 2010 Summary Report, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2011), retrieved from http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf

(http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf), R.W. Leemis et al., The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence (2022), National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

The latest National Intimate Partner and Sexual Violence Study found the lifetime prevalence of domestic violence victimization was 47.3% of women and 44.2% of men.

- Overall rates of DV, defined as any physical, sexual, and psychological aggression, are comparable across the sexes and sexual orientations. However, men perpetrate sexual assaults at significantly higher rates than women.

- Men assault their partners primarily for personality and relationship reasons — to get what they want, to punish, out of jealousy, in retaliation, when they are under the influence of substances, in self-defense, or to express anger or other emotions. Motives are the same for women and LGBTQ perpetrators. Self-defense is one of the least-endorsed motives.

- In most abusive relationships, both partners are violent, and assaults are instigated on average as often by the female partner as the male partner. When psychological aggression is considered, the percentage of bi-directional aggression is even higher.

- Women unquestioningly incur the most serious injuries and account for approximately 80% of domestic violence homicide victims. However, most DV-related injuries are relatively minor and incurred by men and women in comparable numbers. This is a crucial consideration for arrest and prosecution policies, given that injuries are not required in most states for an arrest to be made.

- In the most intimate relationships, the frequency of assaults tends to diminish over time rather than increase. In severe, chronic violence cases, psychological abuse may continue over time and even increase, even when there has been a lessening of physical assaults.

- The short-term impact of observing DV by the father, as opposed to the mother, is somewhat more significant on children in terms of their emotional states (e.g., anxiety, depression), but children are at risk for displaying conduct problems regardless of the parent's sex. Additionally, because observational learning is not dependent on the actor's size and strength, children who observe DV by either parent are in the long run at risk for perpetrating DV in adolescence and adulthood and exhibiting various mental health and substance abuse disorders.

BEWARE THE EXPERTS

The gender paradigm has persisted primarily because of gendered stereotypes. For example, gender role stereotypes dictate that men are larger, stronger, more aggressive than women, and responsible for most criminal assaults. In contrast, women are physically smaller, weaker, vulnerable, passive, nurturing, and need protection. DV laws of the 80s and 90s were enacted at the behest of advocates for battered women tied to feminist organizations, with a much-needed political agenda — to acknowledge and legally respond to DV victimization among women. With this push for recognition came a significant focus on research of female DV victims, which would create a greater public platform and evidence-based need for major legislative change.

While this was occurring, lesser known to the public was the series of research studies conducted around the same time finding abusive strategies were being used by both men and women at similar rates.{6}

6 See M.A. Straus & R.J. Gelles, Physical Violence in American Families, 1976 (Vol. 7733) (1982); R.J. Gelles & M.A. Straus, *Violence in the American Family*, 35(2) J. Social Issues 15-39 (1979).

Much of this research was dismissed by the masses to the point where the authors of these studies received death threats for trying to challenge the status quo. Yet, the research findings remained consistent over the years. Despite the empirical research over the past 40+ years demonstrating the existence of gender symmetry in DV, organizations supporting female victims chose not to acknowledge the research and/or vigorously challenged the validity of the increasing evidence of gender symmetry in DV. Despite the evidence that DV was not necessarily a "crime against women," the paradigm has and continues to inform how legal statutes are written, the way police are trained to conduct DV investigations, how cases are prosecuted,{7}

7 E. Douglas & D. Hines, *The Help-Seeking Experiences of Men Who Sustain Intimate Partner Violence: An Overlooked Population and Implications for Practice*, 26 J. Family Violence 473-485 (2011), **-- endnote**

() and how court-mandated intervention programs for offenders are conducted.{8}

8 J. Babcock, C. Green & C. Robie, *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 Clinical Psychology Review 1023-1053 (2004), doi: **https://doi.org/10.1016/j.cpr.2002.07.001 (https://doi.org/10.1016/j.cpr.2002.07.001)**; J. Babcock et al., *Domestic Violence Perpetrator Programs: A Proposal for Evidence-Based Standards in the United States*, 7(4) Partner Abuse 1-107 (2016), doi: 10.1891/1946-6560.7.4.355.

Accurate statistics are found almost entirely in peer-reviewed journals accessible to DV scholars within academia. Formal trainings for professionals (e.g., attorneys, advocates) may not be reliable because they rarely draw on the latest research and are typically conducted by representatives of either battered women's organizations

or by individuals with a similar ideological bent who are unwilling or unable to contradict the dominant narrative. The paradigm narrative of DV is further perpetuated in television and other forms of social media. For example, Hines{9}

9 D. Hines, *Extent and Implications of the Presentation of False Facts by Domestic Violence Agencies in the United States*, 5(1) Partner Abuse (2014), https://doi.org/10.1891/1946-6560.5.1.69 (https://doi.org/10.1891/1946-6560.5.1.69).

examined the online information pages of 338 prominent victim advocacy organizations (e.g., the National Coalition Against Domestic Violence) and found that almost a third presented false facts about domestic violence, such as the claim that a woman is beaten every 15 seconds in the United States. This statistic in fact refers not to incidents of serious assaults, which the term "battering" implies, but rather to the number of times that a woman suffers any type of physical abuse, including minor incidents (e.g., pushing.) The claim does not acknowledge that every 15 seconds a man is also victimized. In another study by Hamel et al.,{10}

10 J. Hamel et al., *Domestic Violence and Child Custody: Are Family Court Professionals' Decisions Based on Erroneous Beliefs?* 1(2) J. Aggression, Conflict and Peace Research 37-52 (July 2009), https://doi.org/10.1108/17596599200900011 (https://doi.org/10.1108/17596599200900011).

victim advocates and child custody evaluators scored an average of three correct responses on a 10–item quiz on basic domestic violence knowledge, not significantly better than a sample of college undergraduates. Predictably, previous American Bar Association (ABA) publications on domestic violence were concerned predominantly with female victims, framing domestic violence as a "gendered" crime.{11}

11 A.B.A., Know Your Basic Rights: Domestic Violence (2001), retrieved 12/24/21 from https://www.americanbar.org/content/dam/aba/administrative/public_education/resources/domviol.pdf (https://www.americanbar.org/content/dam/aba/administrative/public_education/resources/domviol.pdf); A.B.A. Commission on Domestic & Sexual Violence,

Recommended Legal Reforms for Inclusion in the U.S. National Action Plan on Gender-Based Violence (2021), retrieved 12/21/21 from https://www.americanbar.org/content/dam/aba/publications/domestic-violence/aba_nap-gbv_report.pdf (https://www.americanbar.org/content/dam/aba/publications/domestic-violence/aba_nap-gbv_report.pdf); D. Dutton et al., *supra* note 3.

Thankfully, this perspective seems to be changing, as ABA's recent White Paper{12}

12 A.B.A. Commission on Domestic & Sexual Violence, *supra* note 11.

recommended legal reforms to gender-based violence, including DV.

The dearth of correct, empirically derived information leaves attorneys and defendants at the mercy of "experts" whose assistance in many cases can result in poor legal outcomes. For example, the first author was asked to review a lengthy report submitted on behalf of a mother who sought custody of the children with a spurious restraining order request, alleging DV by the father. Written by a well-known and respected forensic consultant in the San Francisco Bay Area, the report contained dozens of cherry-picked references, which to the untrained eye would appear authoritative, yet failed to cite a single study published after 1985. The first author merely had to cite the many more recent literature reviews and large-scale population surveys to effectively undermine this expert's arguments, resulting in a dismissal of the restraining order and, later, a shared custody agreement.

Further, choosing not to introduce an expert into the case because it seems to be a clear-cut case of self-defense can also be detrimental. For example, the second author was involved in an attempted murder case involving a man who shot his girlfriend. The girlfriend entered his bedroom with a baseball bat while he was sleeping and tried to attack him. The couple had many previous experiences with DV, admittedly initiated by the girlfriend. The girlfriend was petite in stature (exhibiting mental illness and a criminal history), and the man was twice her size

(with no criminal history or mental illness). His attorney believed this was a clear case of self-defense and chose not to focus on the defendant's DV victimization. Unsurprisingly, the prosecution focused on his size and stature, ability to get away (he could not), and why the defendant did not seek help from police. The first trial led to a hung jury. The defendant was to stand trial again when the second author was called as an expert. She focused on the dynamics of DV and male victimization, along with an in-depth history and review of the relationship. The case was pled down to negligence with a firearm.

DOMESTIC VIOLENCE IS NOT ALL THE SAME

Individuals arrested for a DV-related crime are ubiquitously referred to as *batterers*, regardless of their criminal history or the level of danger they may pose to the victim. Among experts, the term denotes an individual with a chronic pattern of physical assaults and dominating and controlling behavior, also known as *controlling-coercive abuse.*{13}

13 E. Buzawa & C. Buzawa, Domestic Violence: The Criminal Justice Response (2d ed. 2002); J. Hamel et al., *supra* note 10; J. Hamel, Gender Inclusive Treatment of Intimate Partner Abuse: Evidence-Based Approaches (2d ed. 2014).

Batterers comprise a small percentage of offenders and are responsible for most incidents of repeat violence. In contrast, most adjudicated defendants engage primarily in infrequent, lower-level violence that results in no or minimal injuries. This is referred to as *situational violence* (SV), which occurs among opposite-sex and sexual minority couples and constitutes the large majority of DV cases. Such violence involves infrequent non-injurious assaults, such as pushing and grabbing, that occur within the context of mutually escalating conflict. SV is not part of an overall pattern of dominance and control but instead arises from escalated conflicts and poor impulse control and does not necessarily worsen over time.{14}

14 J. Hamel (2014), *supra* note 13.

In such cases, particularly among first-time offenders with minimal injuries, pre-sentence diversion rather than criminal prosecution would be sufficient.

Attorneys who litigate DV cases will at some point surely come across the so-called "cycle of violence," initially formulated by psychologist Lenore Walker{15}

15 L. Walker, The Battered Woman (1979); L. Walker, *The Battered Woman Syndrome Study, in* D. Finklehor, The Dark Side of Families 31-48 (1983).

and typically represented as a circle depicting the stages of abuse, and the ubiquitous "power and control wheel," a pictorial description of the various ways men psychologically abuse and control their female partners. While helpful in some contexts, these tools are simplistic at best and misleading at worst. For example, Walker's cycle accurately describes the building internal tension experienced by the batterer and the increasingly more aggressive ways he treats his partner (phase 1); its culmination in physical assaults upon the victim (phase 2); and a short-lived "honeymoon" period during which the abuser promises to change (phase 3); followed all too quickly by the next inevitable build-up phase. This model appears everywhere: at conferences, in the courtroom, and on social media. However, while this model is presented as depicting *the* cycle of abuse, it represents only one type of DV dynamic — a heterosexual male perpetrator with features of borderline personality disorder, the dominant aggressor in a relationship, with a heterosexual female victim. It fails to account for anti-social or psychopathic offenders, violence by borderline women, sexual minority victims, or the more common varieties of mutually escalating couple dynamics.{16}

16 J. Hamel, *"But she's violent, too!": Holding Domestic Violence Offenders Accountable Within a Systemic Approach to Batterer Intervention*, 4(3) J. Aggression, Conflict and Peace Res. 124-135 (2012); J. Hamel, *Perpetrator or Victim? A Review of the Complexities of Domestic Violence Cases*, 12(2) J. Aggression, Conflict and Peace Res. 55-62 (2020), https://doi.org/10.1108/JACPR-12-2019-0464 (https://doi.org/10.1108/JACPR-12-2019-0464).

Clearly, legal implications inherent in determining how an assault is motivated and whether it is perpetrated by one party, or both, should be considered.

Likewise, the "wheel" only describes psychological abuse tactics used by male perpetrators. More reliable, evidence-based measures of psychological abuse currently in use are based on both male and female populations and, more recently, LGBTQ+ perpetrators. Further, so-called "power and control" behaviors are not always well-defined, and their impact on victims depends on many factors, including the extent to which they constitute a pattern of psychological abuse, whether they are accompanied by physical violence or the threat of such violence. The use of psychological tactics described in the Duluth "wheel" is rare in cases of SV and more effectively addressed in couples therapy rather than batterer group intervention. Similarly, in civil cases, charges of "power and control" are used to obtain an order of protection when the alleged behaviors are often nothing more than normal disagreements and the complainant has no reason to fear the other party.{17}

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17 H. Douglas, *Legal Systems Abuse and Coercive Control*, 18(1) Criminology & Crim. Just. 84-99 (2018), https://doi.org/10.1177/1748895817728380 (https://doi.org/10.1177/1748895817728380); J. Hamel, *In the Best Interests of Children: What Family Law Attorneys Should Know About Domestic Violence*, 28 J. Am. Acad. Matrimonial Law. 201-228 (2016); D. Hines, E. Douglas & J. Berger, *A Self-Report Measure of Legal and Administrative Aggression Within Intimate Relationships*, 41(4) Aggressive Behav. 295-309 (2015), https://doi.org/10.1002/ab.21540.

While these models can be appropriate in some instances, attorneys must realize they rose to popularity in the 1980s, and researchers have since learned a great deal. The models perpetuate the gender paradigm, suggesting that DV is a crime committed by men toward women. Legal actors and even some DV experts and advocates rarely question the use of these models in courts.

REPORTING TENDENCIES AND THE LEGACY OF MANDATORY ARREST LAWS

Survey research finds that men report more accurate events from the previous 12 months{18}

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18 S.L. Desmarais et al., *Prevalence of Physical Violence in Intimate Relationships - Part 2: Rates of Male and Female Perpetration*, 3(2) Partner Abuse 170-198 (2012).

than those further in the past due to their lesser ability to retain emotional memories than women, as well as their tendency to minimize the importance of lesser assaults. Men and sexual minorities also tend to under-report assaults overall, whereas females acknowledge having hit their male partner more frequently than male partners admit being hit.{19}

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19 J. Archer, *Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review*, 126(5) Psych. Bull. 651–68 (2000).

Men call the police significantly less often than women, often due to male bravado and the genuine fear that if they report domestic violence against their female partner, they might be arrested themselves.{20}

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20 P. Cook, Abused Men: The Hidden Side of Domestic Violence (2d ed. 2009); E. Douglas & D. Hines, *supra* note 7.

When a man is arrested, the female partner often shares in perpetrating assaults throughout the relationship, any of which would have led to an arrest if police were called.{21}

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21 D.M. Capaldi et al., *Official Incidents of Domestic Violence: Types, Injury, and Associations With Nonofficial Couple Aggression*, 24 Violence and Victims 502–519 (2009).

Similarly, sexual minorities are much less likely to call the police for fear of discrimination and general mistrust of law enforcement.

In California and some other states, as part of mandatory arrest guidelines, police are prohibited from asking complainants if they wish their assailant to be arrested. It has been the first author's experience that police do not always apply this rule to men, allowing them a way to save face and avoid derision, real or imagined. Defense attorneys should know that there are ways to talk to abused men to help them admit their victimization and avoid foolishly "taking the fall" for their partner.{22}

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22 P. Cook, *supra* note 20; J. Hamel (2014), *supra* note 13.

Sometimes, complainants will withdraw their statements after an arrest during the prosecution process. When asked about their reasons for doing so by social science researchers, women traditionally give several reasons, such as fear of retaliation, the hope that the partner will change, and fear of economic insecurity if he is incarcerated and unable to work. Tellingly, a large number of respondents provide only sketchy explanations.{23}

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23 A. Robinson & D. Cook, *Understanding Victim Retraction in Cases of Domestic Violence: Specialist Courts, Government Policy, and Victim-Centered Justice*, 9 Contemp. L. Rev. 189-213 (2006).

Research on false allegations continues to be a contentious topic, given the difficulty of studies evaluating the substantiation of such claims. However, given the frequency of false accusations levied against men,{24}

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24 P. Cook, *supra* note 20; E. Douglas & D. Hines, *supra* note 7; J. Hamel (2016), *supra* note 17; J. Johnston et al., *Allegations and Substantiations of Abuse in Custody Disputing Families*, 43(2) Fam. Ct. Rev. 283-294 (2005), https://doi.org/10.1111/j.1744-1617.2005.00029.x (https://doi.org/10.1111/j.1744-1617.2005.00029.x); E. Sleath & L. Smith, *Understanding the Factors That Predict Victim Retraction in Police-Reported Allegations of Intimate Partner Violence*, 7(1) Psychol. Violence 140-149 (2017), https://doi.org/10.1037/vio0000035 (https://doi.org/10.1037/vio0000035).

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it is reasonable to infer that among the female complainants, there might be a number of them who are guilty of having been the sole or co-perpetrator in the incident, and do not wish to face their own DV charges, or for making false statements to the police.

Legal distinctions between who is deemed a "victim" and who is deemed a "perpetrator" are based more on gender roles, politics, and perhaps convenience, than anything else.{25}

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25 J. Hamel (2020), *supra* note 16.

Given the preponderance of mutually abusive couples,{26}

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26 Langhinrichsen-Rohling et al., *Rates of Bidirectional Versus Unidirectional Intimate Partner Violence Across Samples, Sexual Orientations, and Race/Ethnicities: A Comprehensive Review*, 3(2) Partner Abuse 199-230 (2012).

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it would be in the interest of the state, the couple themselves, and their loved ones, if both were held responsible, either criminally and/or directed to counseling. Unfortunately, they are put on a dual track, one party criminally prosecuted and the other referred to shelter services. Police are discouraged from enforcing dual arrest statutes, even when the evidence at the scene, and the known base rate in the general population, strongly suggest bi-directional abuse. Aside from the twin dilemmas of what to do with the children if both parents are incarcerated, and the limitations for the prosecution in obtaining testimony from a defendant's spouse, there remains the unyielding opposition from victim organizations who believe that women rarely assault their male partners other than in self-defense or in response to years of abuse.{27}

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27 M. Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women*, 2(1) Criminology & Pub. Pol'y 81–90 (2002), **-- endnote**

() Indeed, after many states passed the first set of mandatory arrest laws in the 1990s, there was a spike in male arrests, which was welcomed, but advocates viewed the corresponding increase in female arrests with alarm and lobbied legislators to address this perceived injustice by adding to existing statutes so-called *predominant aggressor* guidelines.{28}

28 E. Buzawa & C. Buzawa, Domestic Violence: The Criminal Justice Response (2d ed. 2002).

At first glance, these guidelines would appear reasonable. A large body of research, as well as legal precedent, has established the existence of a phenomenon known as *battered woman syndrome* or *battered person syndrome*.{29}

29 B. Russell, Battered Woman Syndrome as a Legal Defense: History, Effectiveness and Implications (2010).

Though the syndrome is not an official legal defense of its own, most states allow expert testimony regarding the syndrome to aid judges and jurors in the decision-making process. While a specific syndrome may be absent, severely abused individuals can experience high levels of fear and trauma, relevant for determining the degree of culpability — for instance, when they initiate a physical assault against a partner, having come to believe, based on past experience, they are in imminent danger of physical harm. Justice requires consideration of such a history so that the person who is predominantly the victim is not arrested. In most of the United States,{30}

30 J. Hamel & B. Russell (2014).

the dominant aggressor is defined in language similar to California's as "the person determined to be the most significant, rather than the first, aggressor,"{31}

31 California Legislative Information (2022), retrieved 1/25/23 from https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=13701 (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=13701).

and police are given a variety of criteria to consider when deciding whom to arrest.

Police Officer Standards and Training (POST) manuals offer law enforcement officers additional guidelines. In California, for example, police are asked to consider weight, height, and strength; criminal history and domestic violence history; use of weapons; offensive and defensive injuries; use of alcohol and drugs; who called 911; who is in fear and demeanor of parties; as well as the presence of power and control behaviors. Although some of these criteria have empirical support (e.g., degree of severity of injuries, witness statements) others do not, and are written in language that is extremely vague (e.g., "the context of power and control"). Moreover, the manual fails to explain precisely how the officer should assess these criteria, much less how to assign weight to each in any useful formula. A person may be in a great deal of fear but be reluctant to express it (as men tend to do in situations where their male pride may be at stake) or express a great deal of fear not due to any objective reason but due to a neurotic personality. Likewise, "age, weight, and height of the parties" are not empirically correlated with the frequency of assaults, and martial arts training only matters if an individual uses it. The person who called 911 may be the perpetrator, manipulating the system (to punish, for example, an unfaithful partner).

An examination of such statutes across the United States was conducted by the organization SAVE.{32}

32 Stop Abusive and Violence Environments, *Predominant Aggressor Policies: Leaving the Abuser Unaccountable* (2010), retrieved from http://www.saveservices.org/pdf/SAVE-Predominant_Aggressor.pdf (http://www.saveservices.org/pdf/SAVE-Predominant_Aggressor.pdf).

Only a handful of states (Alaska, Iowa, Nevada, and Rhode Island) define the aggressor in a way that is "consistent with Black's legal definition of aggressor as the person 'who first employs hostile force.'" The statutes in Florida, Maryland, Utah, and South Carolina refer to either a "dominant aggressor" or "predominant aggressor" but fail to define these terms. In 15 other states, they are defined in ways similar to California and explicated no more clearly.

How, then, does an officer determine the predominant aggressor in a situation with no visible injuries when the woman called the police, is smaller than her male partner, expresses fear of further harm, but is the only one in the relationship with a previous arrest for domestic violence? The fact that she was previously arrested is telling but not necessarily indicative of culpability in the present case, given the other factors. Suppose she is truly the predominant aggressor in the relationship. In that case, her calling the police or saying she is in danger could be dismissed as victim-blaming and a form of power and control known as Legal and Administrative Abuse. If the police were to know with any degree of certainty that she, and not the partner, is the controlling party, this would lend support to their decision to arrest her. However, assessing for such behaviors requires using validated psychological testing instruments administered by a trained expert beyond the ken of police officers. Officers must rely on their professional judgment when faced with these uncertainties and are expected (in states with mandatory arrest) to arrest proactively. Unfortunately, that judgment can often be wrong, as research has shown that police officers are no better at detecting deception than lay people.{33}

33 *E.g.*, C. Bond & B. DePaulo, *Accuracy of Deception Judgments*, 10(3) Personality and Soc. Psychol. Rev. 214-234 (2006); M. Hartwig & P. Granhag, *Exploring the Nature and Origin of Beliefs About Deception: Implicit and Explicit Knowledge Among Lay People and Presumed Experts*, *in* Detecting Deception: Current Challenges and Cognitive Approaches 125-154 (P. Granhag, A. Vrij & B. Verschuere eds., 2015).

Controlling for extent of injuries, men are arrested at significantly higher rates than women, given known general population rates.{34}

34 S. Shernock & B. Russell, *Gender and Racial/Ethnic Differences in Criminal Justice Decision Making in Intimate Partner Violence Cases*, 3(4) Partner Abuse 501-530 (2012), doi: 10.1891/1946-6560.3.4.501.

A male suspect may be assumed to be the aggressor because of a criminal history unrelated to domestic violence, but even without such a history, on the basis that he is bigger and stronger, as men usually are. Sadly, such bias begins in police academies, where cadets are first taught about domestic violence laws. For example, researchers{35}

35 J. Hamel & B. Russell (2013), *supra* note 7.

examined law enforcement training manuals in 16 states with dominant aggressor statutes. While most included gender-neutral language when citing various legal codes, in the sections instructing officers how to respond to DV disputes, most states depicted hypothetical arrest training scenarios with males as the perpetrator and females as the victim. For example, in one state manual with approximately 50 training scenarios, not one scenario depicted a male or sexual minority victim. Other states demonstrated similar trends.

Additionally, 44% of states utilized the term "battered women" or addressed the cycle of violence and/or power and control wheel (87% of which was for heterosexual relationships). Only one state addressed DV with sexual minorities. Examination of training resources found that all but one state included no evidence-based research (beyond 1985). Of the one state including scholarly research, three scholarly references out of 31 resources were used. The message between the lines is obvious: When in doubt, arrest the man.

As previously noted, gender bias sometimes works against female defendants when they deviate from the stereotype of a victim of abuse. For instance, officers might arrest a woman because she displayed hostility, behavior deemed unbecoming of a woman, or have other attributes (financially stable, history of aggression, etc.). The woman may, in fact, have been the victim of chronic abuse and is lashing out at the police in exasperation for arriving at the scene hours after she called. In homicide cases, juries are suspicious of a defense based on the long-discredited "learned helplessness" part of the battered woman syndrome theory when the defendant presents as competent and in charge. A few years ago, the first author testified on behalf of the state in a case involving a woman accused of murdering her male partner. Despite overwhelming evidence indicating jealousy as the primary motive for the homicide, the defense attorney relied on a typical battered woman defense and seemed genuinely incredulous upon learning that women who kill their partners generally did not previously experience years of abuse.{36}

36 J. Hamel, D. Dutton & A. Lysova, *Intimate Partner Homicide and the Battered Woman Syndrome, in* Gender and Domestic Violence: Contemporary Legal Practice and Intervention Reforms 129-164 (B. Russell & J. Hamel eds., 2022).

The jury found the defendant guilty, and she was sentenced to a life term in state prison.

Research indicates the primary way juries render verdicts is according to the *cognitive story model*,{37}

37 N. Pennington & R. Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62(2) J. Personality & Soc. Psychol. 189 (1992).

where they create a narrative about the evidence presented to make sense of it and interpret its importance and meaning. This narrative, unfortunately, is shaped by pre-existing expectations — e.g., that men are usually the aggressors or that truly abused women do not show strength.{38}

38 For more information on jury decision-making and the use of expert testimony, see B. Russell & B. McKimmie, *Jury Decision-Making: Understanding and Overcoming Bias in the Courtroom*, *in* Gender and Domestic Violence: Contemporary Legal Practice and Intervention Reforms 165-204 (B. Russell & J. Hamel eds., 2022).

But jury members can be swayed by evidence that challenges their biases when it is compelling and relatable. Many jury members have known someone personally whose experiences with domestic violence did not fit the usual stereotypes and may need only to hear a well-presented counternarrative, such as what has been presented in this article, based on reliable, well-documented research, to arrive at the correct verdict. Further, the more knowledge attorneys have about stereotypes and biases associated with DV, the more equality and justice can be promoted in the courtroom.

ENDNOTES ()

7. E. Douglas & D. Hines, *The Help-Seeking Experiences of Men Who Sustain Intimate Partner Violence: An Overlooked Population and Implications for Practice*, 26 J. Family Violence 473-485 (2011), https://doi.org/10.1007/s10896-011-9382-4 (https://doi.org/10.1007/s10896-011-9382-4); J. Hamel & B. Russell, *The Partner Abuse State of Knowledge Project: Implications for Law Enforcement Responses to Domestic Violence, in* Perceptions of Female Offenders: How Stereotypes and Social Norms Affect Criminal Justice Responses 151-180 (B. Russell ed., 2013), doi: 10.1007/978-1-4614-5871-5; A. Lysova et al., *A Qualitative Study of the Male Victims' Experiences With the Criminal Justice Response to Intimate Partner Abuse in Four English-Speaking Countries*, 20(10) Criminal Justice and Behavior, 1-8 (2020), https://doi.org/10.1177/0093854820927442 (https://doi.org/10.1177/0093854820927442); B. Russell & J. Hamel, Gender and Domestic Violence: Contemporary Legal Practice and Intervention Reforms (2022). [^^] ()

27. M. Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women*, 2(1) Criminology & Pub. Pol'y 81–90 (2002), https://doi.org/10.1111/j.1745-9133.2002.tb00108.x (https://doi.org/10.1111/j.1745-9133.2002.tb00108.x); W. DeLeon-Granados, W. Wells & R. Binsbacher, *Arresting Developments: Trends in Female Arrests for Domestic Violence and Proposed Explanations*, 12(4) Violence Against Women 355-371 (2006), https://doi.org/10.1177/1077801206287315 (https://doi.org/10.1177/1077801206287315); R. Dobash & E. Dobash, Violence Against Wives: A Case Against the Patriarchy (1979); M. McMahon & E. Pence, *Making Social Change: Reflections*

on Individual and Institutional Advocacy With Women Arrested for Domestic Violence, 9(1) Violence Against Women 47–72 (2003), https://doi.org/10.1177/10778012022384 30 (https://doi.org/10.1177/10778012022384 30). [^^]

EXPLORE KEYWORDS TO FIND INFORMATION

- Domestic violence (/search?term=*&activefilter=Domestic violence)
- Expert Testimony (/search?term=*&activefilter=Expert Testimony)
- Resources (/search?term=*&activefilter=Resources)

2-2021

The Use of Deferred Dispositions in Domestic Violence and Sexual Assault Cases in Maine

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February 2021

CUTLER INSTITUTE
MUSKIE SCHOOL OF PUBLIC SERVICE

Acknowledgments

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Special Thanks

Maine Coalition Against Sexual Assault

Elizabeth Ward Saxl, Executive Director

Maine Coalition to End Domestic Violence

Francine Garland Stark, Executive Director

Maine District Attorney Technical Services (MEDATS)

Joseph Maranda, Director

Maine Prosecutors' Association

Stephanie Anderson

The researchers gratefully acknowledge the assistance and expertise of the Maine Prosecutors' Association and in particular District Attorney Andy Robinson.

Graphics, Layout, & Design

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Suggested Citation:

Dumont, R., Wheeler, T., Shaler, G., Snell, E., & Vail, B. (2020). *The Use of Deferred Dispositions in Domestic Violence and Sexual Assault Cases in Maine*. Maine Statistical Analysis Center. University of Southern Maine.

Table of Contents

Executive Summary

This report summarizes the findings from an examination of how deferred disposition is used in Maine. This option typically involves the accused pleading guilty to a charge and agreeing to meet certain conditions over a period of time, commonly one year. If conditions are met, the case is either dismissed or the defendant is found guilty of a lesser crime than the one with which he/she was originally charged. A deferred disposition can also include a more favorable outcome for the defendant (eg., a fine instead of jail). If the terms are not met, the defendant is convicted of the charge to which he/she pled guilty.

There are a number of reasons for using deferred dispositions, including the desire to hold offenders accountable while sparing more stringent sanctions that have deleterious effects on recidivism. Deferral may also be used when victims are reluctant to cooperate with the prosecution, and it may be used as a solution to overcrowding.

This study was conducted by the Maine Statistical Analysis Center (Maine SAC) with the cooperation of the Maine Coalition Sexual Against Assault (MECASA) and the Maine Coalition to End Domestic Violence (MCEDV) to ascertain the impact of deferred disposition on future criminal activity, specifically among offenders who are given deferred dispositions for domestic violence and sexual assault offenses. Data for this study were obtained from the Maine District Attorneys Technical Services (MEDATS), the electronic repository for Maine district attorney data, and include variables related to deferral as well as prior and recidivating events. Because the database is specific to Maine, any prior or recidivating cases that occurred elsewhere are not captured in this study. Analysis was limited to cases deferred between 2014 and 2019, cases that were closed, and cases involving defendants 18 years of age and older at time of deferral. Because individuals can be deferred more than once, some defendants appear in the dataset more than once.

Key Findings:

Background

- During the study period, District 1, with 4,154 cases, had the highest number of deferrals in the state, while District 5 had the fewest, at 652. When looking at deferral as a percentage of total cases, however, Region 6 was highest at 4.7% of its total caseload in 2017. The lowest rate occurs in District 5, at just 0.6%.
- Just a little over a third of deferral cases, 36%, were female cases. The majority of deferred individuals, 95%, were non-Hispanic Caucasians, proportionate to Maine's population. The remaining 5% were other races/ethnicity or race was unknown.

Case Types

- Slightly under one-fifth (19%) of all cases resulting in deferral contained a domestic violence charge. The most frequently occurring domestic violence charge was *domestic violence assault*. This charge accounted for 70% of all domestic violence charges.
- A small percentage of all deferred disposition cases, 2%, included a sexual assault charge. The most frequently occurring sexual assault charges were *unlawful sexual contact* (24%) and *possession of sexually explicit materials* (23%).
- On average, deferred disposition cases had an average of 2.0 offenses, and 22% of the cases included one or more felonies.

Prior Cases

- Two-thirds of deferred individuals had prior cases recorded by a court in Maine. On average, deferred cases had 3.5 cases prior to deferral.

Recidivism of Deferred Disposition Cases

- Almost half of all deferred cases (49%) had subsequent cases. On average, deferral cases had 1.4 subsequent cases or recidivating events during the study period.
- At 68%, the majority of cases with recidivating offenses had recidivating misdemeanor offenses. An additional 30% of cases with recidivating offenses had felonies.

- Younger males are more likely to recidivate than older males. While controlling for other variables, 59% of those age 18 to 29 can be expected to recidivate, compared to 31% of those age 60 and older.
- Males and females with prior cases were more likely to recidivate. While controlling for other variables, 27% and 25% of males and females respectively with no prior cases can be expected to recidivate, compared to 62% and 59% of males and females with prior cases, respectively.
- While controlling for other variables, 58% and 56% of males and females, respectively, with prior nonfelony cases can be expected to recidivate, compared to 72% and 71% of males and females, respectively, with prior felony cases.
- Males with prior domestic violence offenses are more likely to recidivate than males with other types of priors. While controlling for other variables, 71% of males with prior domestic violence cases can be expected to recidivate, compared to 61% of males with other types of prior cases.
- While controlling for other variables, 71% and 66% of males and females, respectively, with juvenile priors can be expected to recidivate, compared to 60% and 59% of males and females, respectively, with non-juvenile priors.
- While controlling for other variables, 3% of males deferred with non-domestic violence cases and no prior cases can be expected to recidivate with a domestic violence offense, compared 23% of males deferred with domestic violence cases and prior cases.

The findings from this study show that those deferred with domestic violence and sexual assault offenses are more likely to recidivate than those with other types of offenses; they are higher-risk populations. What is not known from this study is how the recidivism rates of these high-risk deferred populations compare to the rates of similar high-risk populations who are sentenced to a period of confinement or probation. If domestic violence and sexual assault offenders who are deferred have lower recidivism rates than domestic violence and sexual assault offenders who receive other sentences, that would be an argument for the continued use of deferred dispositions with this high-risk group. In any case, however, the higher rates of recidivism for this high-risk group relative to other offenders clearly argue for a higher level of supervision when deferred dispositions are used with them.

Introduction

Deferred dispositions were established as an official sentencing option in Maine in 2004. A deferred disposition, also known in some jurisdictions as an accelerated rehabilitative disposition, deferred adjudication, adjournment in contemplation of dismissal, or a conditional sentencing, is a plea or sentencing alternative that is increasingly available in many states. In Maine, deferred dispositions typically involve the accused pleading guilty to a charge and agreeing to meet certain conditions over a period of time, commonly one year. If conditions are met, the case is either dismissed or the defendant is found guilty of a lesser crime than the one with which he/she was originally charged. A deferred disposition can also include a more favorable outcome for the defendant (eg., a fine instead of jail). If the terms are not met, the defendant is convicted of the charge to which he/she pled guilty.

There are a number of reasons some jurisdictions may offer deferred dispositions to defendants, and each case, crime, offender and victim undoubtedly will pose different circumstances. However, an overarching hope behind this type of sentencing alternative is that deferral of jail time will steer offenders away from future criminal activity and offer the opportunity for community diversion programs, such as addiction treatment, community supervision or other options. Jail time may interrupt offenders' ability to maintain jobs and pro-social relationships.[1,2] Likewise, a criminal record may hinder offenders' ability to obtain jobs and housing, both of which contribute to the stability that facilitates law-abiding choices. Thus, deferral seeks to hold offenders accountable while sparing more stringent sanctions that have deleterious effects.[3]

Other factors, such as the impact of the criminal justice process on a victim, a victim's willingness to testify (or whether they are even appropriate to testify), and the victim's preferences and needs should be considered when offering deferred disposition to an offender.[4, 5] Finally, deferral can also serve as a solution to overcrowding, which is an issue in Maine's jails, and keeps court costs lower, due to offenders' cooperation, which allows cases to move more swiftly through the judicial system.[6]

While this limited, albeit growing, body of research seems to support the claim that deferred dispositions are effective at reducing recidivism; much less is known about how effective deferred disposition is in specific cases, such as those involving domestic violence or sexual assault crimes.[7] To learn more about the use of deferred dispositions in Maine, and particularly in these types of cases, the Maine Statistical Analysis Center (SAC) proposed and received funding for a study through the Bureau of Justice Statistics, Department of Justice (BJS grant 2018-86-CX-K010). This study was conducted with the cooperation of the Maine Coalition Against Sexual Assault (MECASA) and the Maine Coalition to End Domestic Violence (MCEDV). This report summarizes the Maine SAC's findings from this study.

Methodology & Limitations

Data for this study were obtained from the Maine District Attorneys Technical Services (MEDATS),[8] and include variables related to deferred cases as well as prior and recidivating cases. Because the database is specific to Maine, any prior or recidivating cases that occurred elsewhere are not captured in this study. Analysis was limited to cases deferred between 2014 and 2019, cases that were closed, and cases involving defendants 18 years of age and older at time of deferral. Because individuals can be deferred more than once, some defendants appear in the dataset more than once.

*This dataset includes **18,357** aggregated, closed cases with deferred dispositions occurring between **2014 - 2019**. **Adult** (eighteen years of age or older) cases from all **eight** prosecutorial districts of Maine are included, with demographics such as age, **race/ethnicity, and gender**, and other descriptive information such as **offense type, severity, and length of deferral** for each case as well.*

The Maine SAC worked with the Maine Coalition to End Domestic Violence (MCEDV) and the Maine Coalition Against Sexual Assault (MECASA) to identify domestic violence and sexual assault offenses included within these data. Cases including one or more such offenses were then categorized as domestic violence or sexual assault cases. One limitation of these data is that in Maine, the primary charge in some domestic violence cases is a general offense, such as *assault*, rather than the more specific *domestic violence assault*. This suggests that some domestic violence cases may not have been categorized as such because the offenses with which a person is charged in cases involving domestic violence do not always relate exclusively to domestic violence. This is mediated to some degree by the method with which cases were classified; specifically, if any offense in a case was domestic violence in nature, the case was classified as such.

The analysis contained in this report includes descriptive analysis for deferral case variables along with prior and recidivating event variables. In addition, it includes logistic regression analysis to identify which attributes predict recidivism and to measure the impact of each attribute while holding other attributes constant. All analysis is presented graphically in the body of this report with brief summary descriptions. Logistic regression tables and additional statistical information can be found in Appendix B. Additional analysis by county can be found in Appendix C. This study was approved by the University of Southern Maine's Institutional Review Board.

Part I: Deferrals

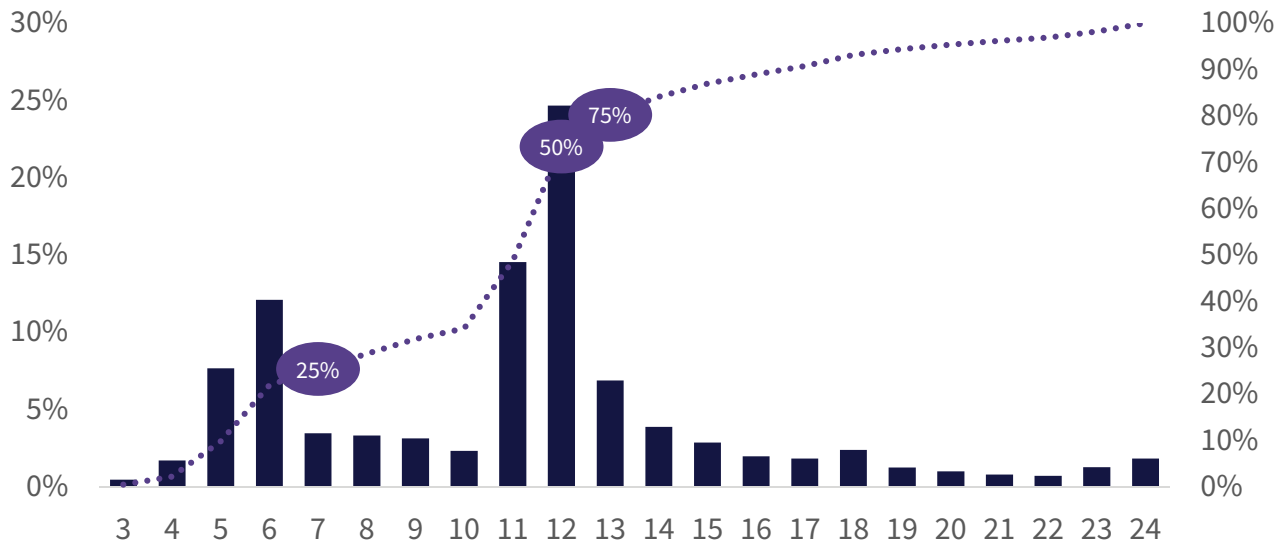
The data summarized in this report include variables related to each offender, including gender, race/ethnicity, and age; identification of the court district that deferred the case; and a description of each offense along with its designated class. Offense descriptions were used to classify cases as domestic violence or sexual assault when appropriate and to identify cases involving a felony. This section of the report summarizes findings related to deferral cases, providing a snapshot of deferral in Maine over the past six years.

Time-frame

Records for this study spanned the years from 2014 to 2019. In order to be eligible for analysis, cases had to have been marked closed, and individuals had to have been adults (18 years of age or older) at the time of deferral. A total of 18,357 cases were eligible for analysis. Because cases from more recent years were less likely to have had time to close, the number of cases from these years is comparably smaller to the previous years. A scan of all records, including those deemed ineligible, shows that the use of deferred dispositions for these later years was in line with earlier years.

Time Deferred

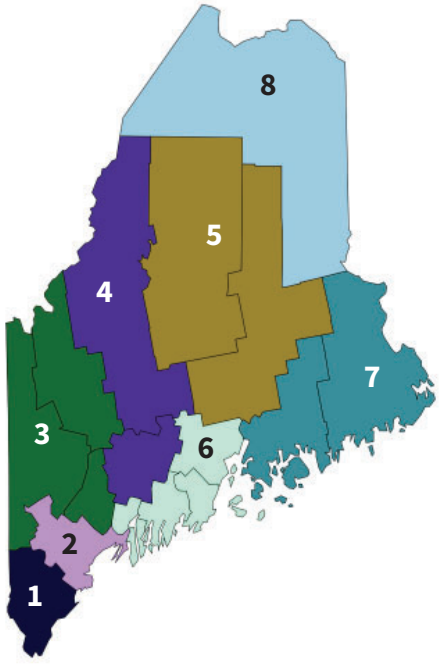
Cases can be deferred for various lengths of time. On average, eligible cases were deferred for 11 months. A quarter of cases were deferred for 7 months, and three-quarters were deferred for 13 months.



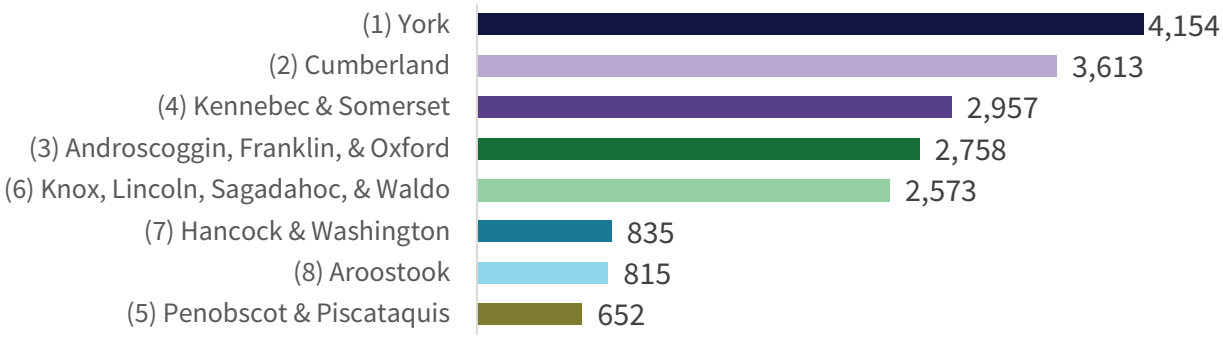
*Trimmed distribution

Court Districts

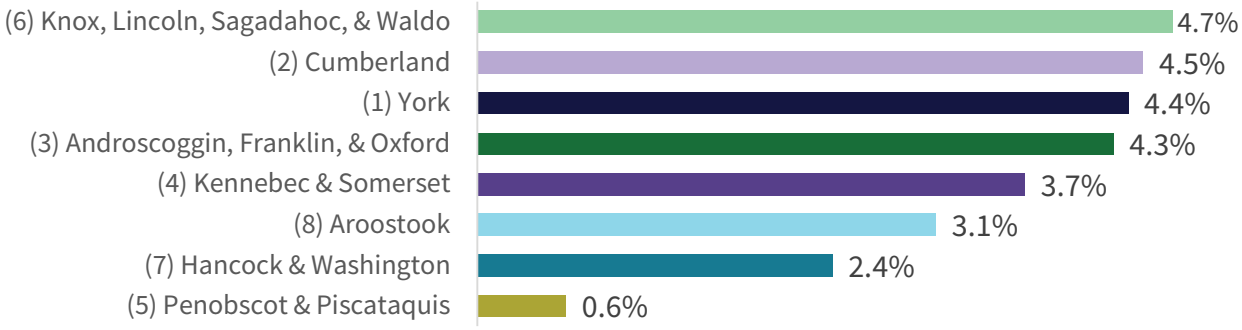
With 4,154 cases, District 1 had the highest number of deferrals in the state, while District 5 had the fewest, at 652. While these numbers show how each district is represented, they do not give an indication of how frequently judges within a particular district opt to use deferred dispositions. To accomplish this, rates were calculated using frequencies for 2017, the most recent year with a substantial number of closed cases, along with caseload statistics from the same year.[9] These rates put District 6 ahead of District 1; the number of cases deferred in Region 6 was 4.7% of its total caseload for the year. The lowest rate occurs in District 5, at just 0.6%. Additional district rates may be found in Appendix C.



Deferred Disposition Cases, 2014-2019



Deferred Cases as a Percentage of Caseload, 2017

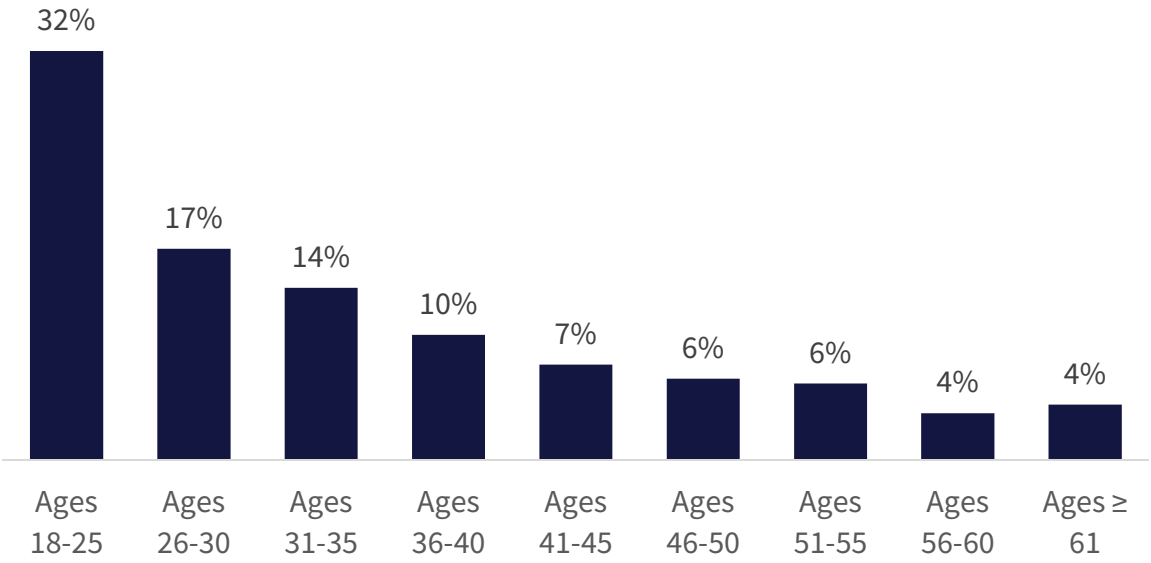


Gender, Race/Ethnicity, and Age

Just a little over a third of deferral cases, 36%, were female cases.

The majority of deferred individuals, 95%, were non-Hispanic Caucasians. The remaining 5% were other races/ethnicity or race was unknown.

The mean age for deferred persons was 34.2 and the median was 31.



See Appendix C-1 to C-3 for district rates.

Offense Descriptions

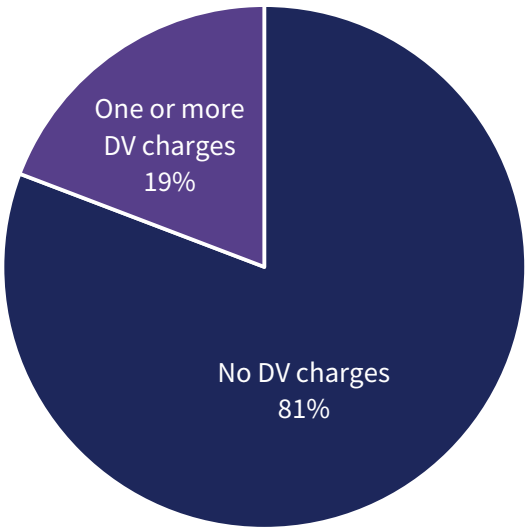
There were a total of 36,359 offenses represented in the deferral data—nearly twice as many as the number of cases due to cases with multiple offenses. On average, each case involved two offenses. Five specific offenses accounted for more than a third of these offenses (39%):

Theft by unauthorized taking	11%
Domestic violence assault	8%
Criminal OUI	8%
Unlawful possession of scheduled drugs	6%
Operating after suspension	6%

See Appendix C-4 for district offenses and rates.

Domestic Violence

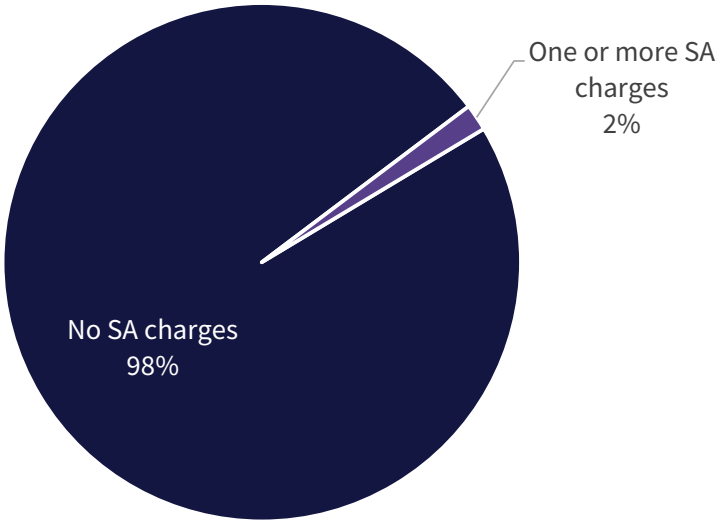
Slightly under one-fifth (19%) of all cases contained a domestic violence charge.[10] This rate varied slightly by gender, with 21% of male cases containing a domestic violence charge and 17% of female cases including one. The most frequently occurring domestic violence charge was domestic violence assault. This charge accounted for 70% of all domestic violence charges.



See Appendix C-5 for district rates.

Sexual Assault

A small percentage of all deferred disposition cases, 2%, included a sexual assault charge.[11] The most frequently occurring sexual assault charges were unlawful sexual contact (24%) and possession of sexually explicit materials (23%). Together, these accounted for 47% of all sexual assault charges in deferred disposition cases.

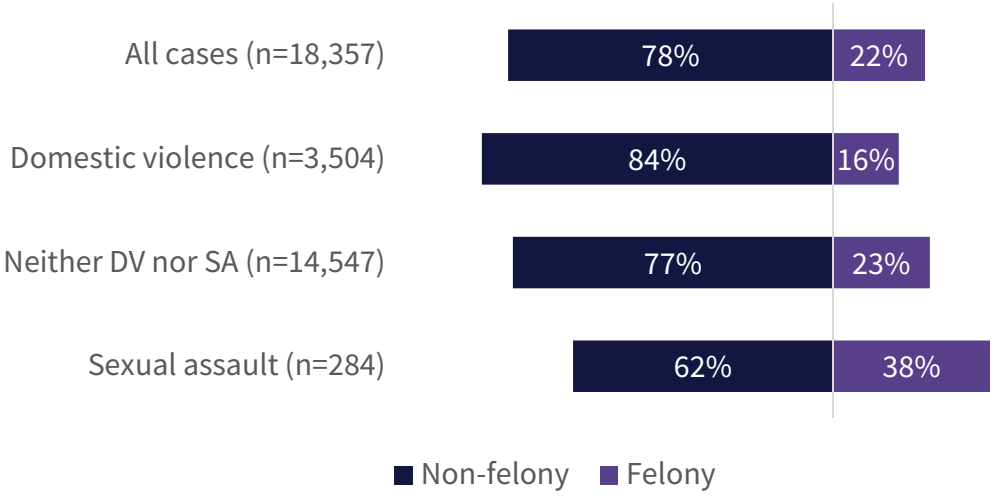


See Appendix C-6 for district rates.

Offense Severity

Cases varied in terms of severity. Some cases consisted of only civil offenses, others consisted of one or more misdemeanors, and some consisted of one or more felonies. Case severity is determined by the offense with the highest level of severity; thus, a case with a civil and a misdemeanor but no felonies is classified as a misdemeanor case. Overall, 22% of cases included one or more felonies.

This rate varied, however, depending on the type of case. Cases with a domestic violence offense were less likely to be felony cases, at 16%, while cases with a sexual assault offense were more likely to be felony cases, at 38%. Note here that the sexual assault and domestic violence offenses in a particular case did not need to be felonies; one offense in the case did, but in cases with multiple offenses it may not have been the sexual assault or domestic violence offense that was a felony.



See Appendix C-7 for district rates.

Number of Offenses per Case

On average, cases had an average of 2.0 offenses, with a range of 1 to 55. Most cases (98%) had between 1 and 5 offenses. This value varied, however, depending on the type of case. Cases with a sexual assault offense had an average of 2.7 charges, cases with a domestic violence offense had an average of 2.2 charges, and cases with neither domestic violence nor sexual assault offenses had an average of 1.9 charges.

See Appendix C-8 for district rates.

Part II: Prior Cases

The data summarized in this report include information about prior cases, including a description of each offense and its designated class. These descriptions, as with deferral offenses, allowed for the classification of each case as having domestic violence or sexual assault offenses. It likewise made it possible to identify deferral cases in which there was a prior felony offense and to count the number of prior cases. This section of the report summarizes findings related to prior cases.

Prior Cases and Descriptions

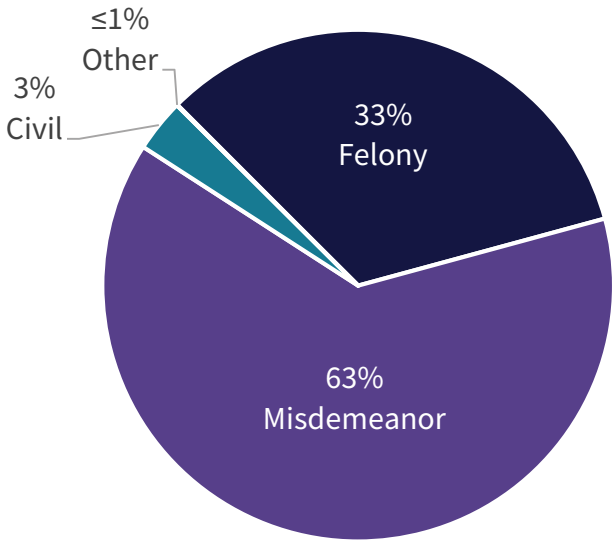
Two-thirds of deferred individuals had prior cases recorded by a court in Maine. On average, deferred cases had 3.5 cases prior to deferral.

Five offenses accounted for 38% of all prior offenses:

Violation of condition of release	10%
Operating after suspension	9%
Theft by unauthorized taking	9%
Assault	6%
Criminal OUI	4%

Prior Case Severity

At 63%, the majority of deferred cases with prior cases involved prior misdemeanor cases. An additional third (33%) of deferred cases had prior felony cases. A small number had prior civil cases (3%), and a smaller number (n=5) had prior cases that were unclassified or otherwise classified.



See Appendix C-9 for district rates.

Prior Domestic Violence Cases

Thirteen percent of deferral cases had a prior cases involving domestic violence.

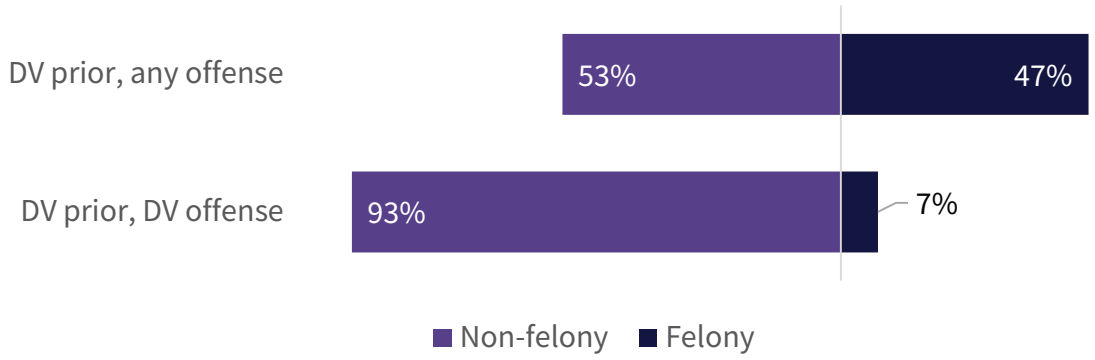
Five offenses accounted for 93% of all prior domestic violence offenses:

Domestic violence assault	54%
Violation of a protective order	24%
Endangering the welfare of a child	6%
Domestic violence terrorizing	6%
Domestic violence criminal threatening	4%

See Appendix C-10 for district rates.

Domestic Violence Prior Severity

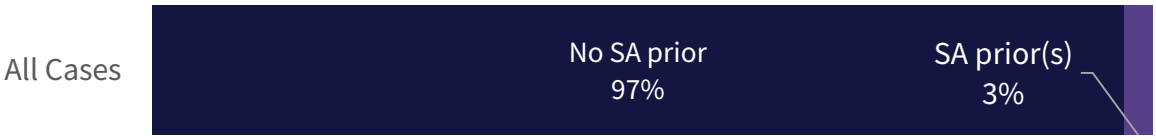
A little less than half the cases (47%) with prior domestic violence offenses had prior felonies. These felonies were not necessarily domestic violence felonies, however. In fact, most were not; 7% of cases with prior domestic violence offenses had prior domestic violence felonies. The remaining 40% had prior felonies that were not domestic violence.



See Appendix C-11 for district rates.

Prior Sexual Assault Cases

Three percent (n=532) of the deferral cases in the dataset had prior sexual assault offenses.



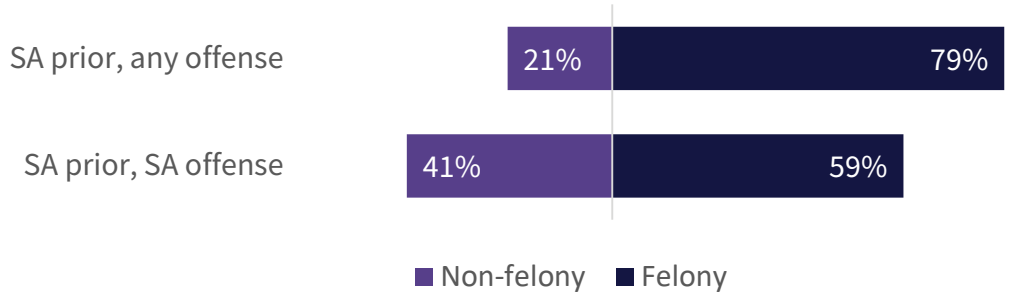
Five offenses accounted for 86% of all sexual assault offenses:

Gross sexual assault	28%
Unlawful sexual contact	27%
Indecent conduct	13%
Sexual abuse of a minor	9%
Unlawful sexual touching	9%

See Appendix C-12 for district rates.

Sexual Assault Prior Severity

Over three-quarters of the cases (79%) with prior sexual assault offenses had prior felonies. These felonies were not necessarily sexual assault felonies. Fifty-nine percent of cases with prior sexual assault offenses had prior sexual assault felonies. The remaining 20% had prior felonies that were not sexual assault.



See Appendix C-13 for district rates.

Part III: Recidivism

This data summarized in this report include information about recidivating offenses, including a description of each offense and its designated class. These descriptions allowed for the classification of each case as having domestic violence or sexual assault recidivism. It likewise made it possible to identify deferral cases in which there was felony recidivism and to count the number of recidivism cases. This section of the report looks at offenses occurring after deferral, providing an overview of recidivism.

Recidivism Offenses

Almost half of all deferred cases (49%) had subsequent cases. On average, deferral cases had 1.4 subsequent cases or recidivating events.

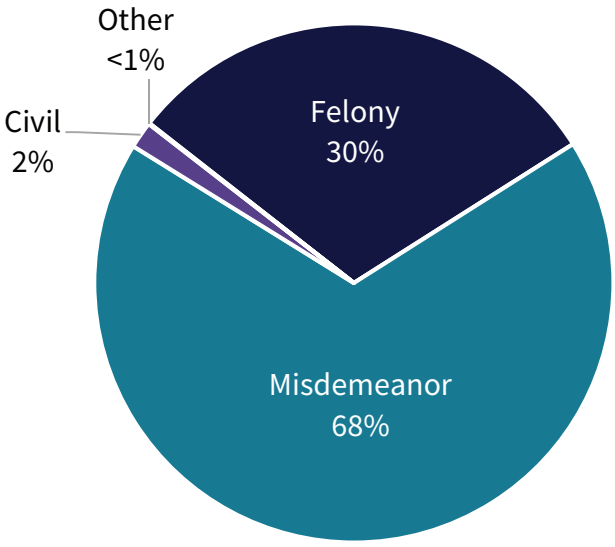
Five offenses accounted for 49% of all recidivating offenses:

Violation of conditional release	24%
Theft by unauthorized taking	9%
Operating after suspension	7%
Unlawful possession of scheduled drugs	5%
Domestic violence assault	4%

See Appendix C-14 for district rates.

Recidivism Severity

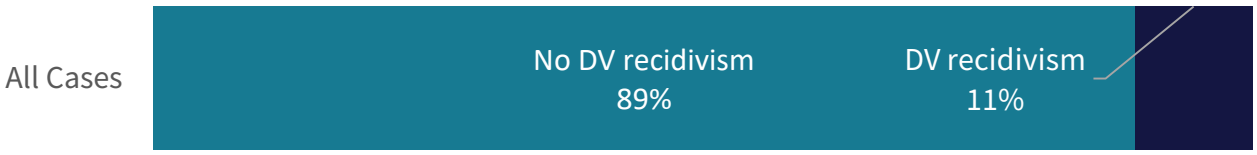
At 68%, the majority of cases with recidivating offenses had recidivating misdemeanor offenses. An additional 30% of cases with recidivating offenses had felonies. A small proportion had civils (2%), and a smaller proportion (<1%) were unclassified or otherwise classified.



See Appendix C-15 for district rates.

Domestic Violence Recidivism

Eleven percent of all deferral cases contained in the dataset, had recidivism that was classified as domestic violence (n=1,963).



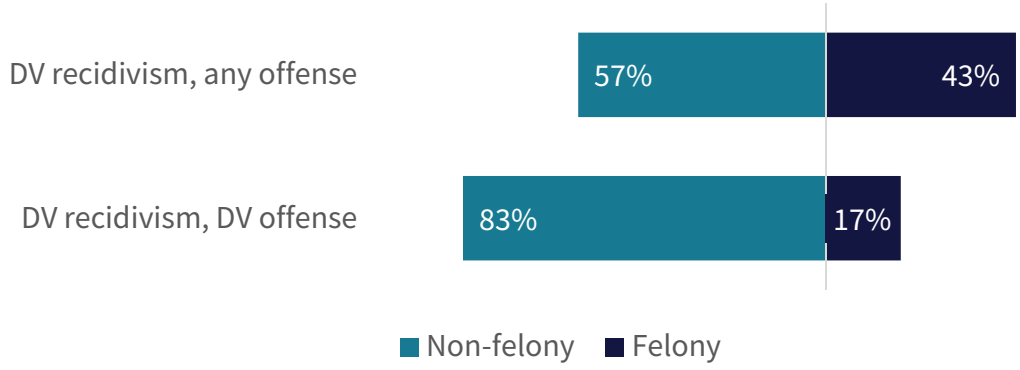
Five offenses accounted for 93% of all domestic violence recidivism:

Domestic violence assault	54%
Violation of a protective order	23%
Domestic violence terrorizing	6%
Domestic violence criminal threatening	6%
Endangering the welfare of a child	5%

See Appendix C-16 for district rates.

Domestic Violence Recidivism Severity

Forty-three percent of cases with domestic violence recidivism had felony recidivism. These felonies were not necessarily domestic violence felonies, however. In fact, most were not; 17% of cases with domestic violence recidivism had domestic violence felonies (n=337). The remaining 26% had felony recidivism that was not domestic violence (n=516).



See Appendix C-17 for district rates.

Sexual Assault Recidivism

Only one percent of all deferral cases had recidivism that was classified as sexual assault (n=240).

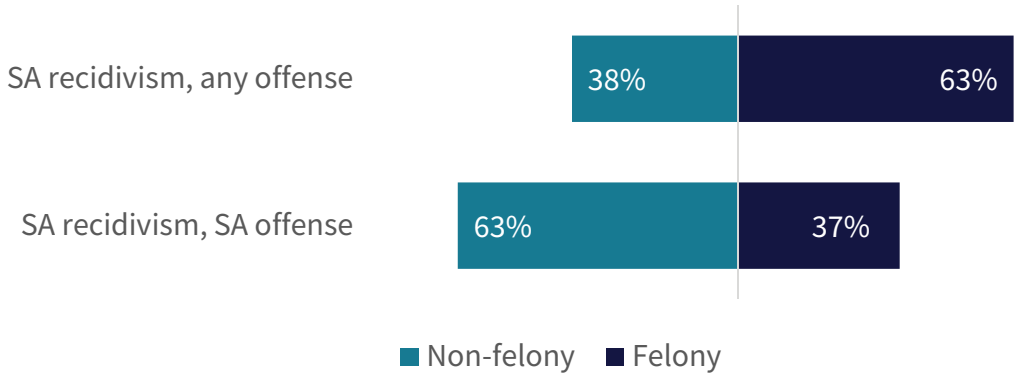
Three offenses accounted for 61% of all sexual assault recidivism:

Indecent conduct	25%
Gross sexual assault	19%
Unlawful sexual contact	17%

See Appendix C-18 for district rates.

Sexual Assault Recidivism Severity

Almost two-thirds (63%) of cases with sexual assault recidivism had felony recidivism. The felonies were not necessarily sexual assault felonies, however. Thirty-seven percent of cases with sexual assault recidivism had sexual assault felonies (n=88). The remaining 26% had felony recidivism that was not sexual assault.



See Appendix C-19 for district rates.

Part IV: Making Connections

Using logistic regression, recidivism was analyzed in terms of both deferral case attributes and prior cases in order to identify attributes that predict recidivism. Because recidivism was predicted by different attributes for males and females, they were analyzed separately. Furthermore, because different attributes predict domestic violence and sexual assault recidivism, these specific types of recidivism were likewise analyzed separately. The number of cases in which there was sexual assault recidivism was relatively small (n=240) and smaller yet for females (n=39), eliminating the possibility of analyzing females separately for this population.

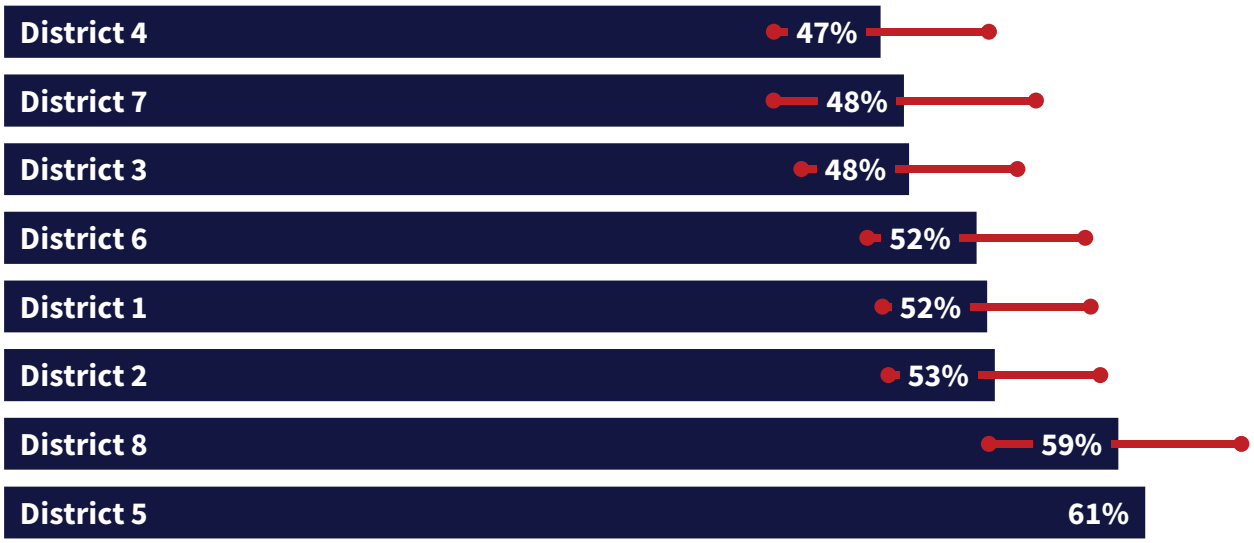
This section of the report identifies connections between deferral and prior offense attributes, summarized in previous sections of this report, and recidivism. It includes five subsections: recidivism in general among males, recidivism in general among females, domestic violence recidivism among males, domestic violence recidivism among females, and sexual assault recidivism among males.

(Note: Logistic regression tables can be found in Appendix B)

Recidivism in General, Males

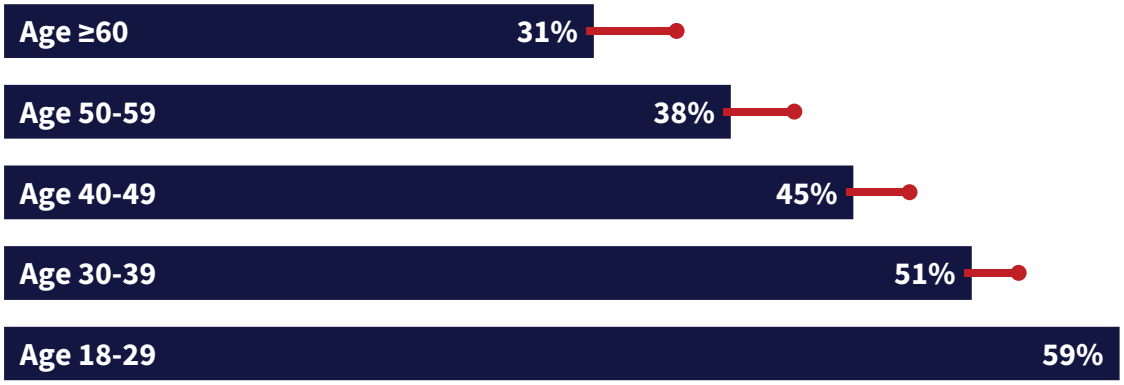
PROSECUTORIAL DISTRICT

The prosecutorial district in which a case was charged has a small impact on whether males recidivate. While controlling for other variables, 61% of males from District 5 can be expected to recidivate, though it should be noted that District 5 had the fewest number of deferred dispositions. This rate is statistically significantly different from six of the remaining seven districts, as shown by error bars.[12]



AGE

Across the state, younger males are more likely to recidivate than older males. While controlling for other variables, 59% of those age 18 to 29 can be expected to recidivate, compared to 31% of those age 60 and older.



Recidivism in General, Males

RACE/ETHNICITY

Deferred males of color were more likely to recidivate than white males. While controlling for other variables, 51% of white males can be expected to recidivate, compared to 57% of males of color.

PRIOR CASES

Males with prior cases were more likely to recidivate. While controlling for other variables, 27% of males with no prior cases can be expected to recidivate, compared to 62% of males with prior cases.

FELONIES

Males deferred with felony offenses were more likely to recidivate than males deferred with non-felony offenses. While controlling for other variables, 50% of those deferred with non felonies can be expected to recidivate, compared to 55% of those deferred with felonies.

Recidivism in General, Males

PRIOR FELONY CASES

Clearly the presence of prior cases influences recidivism as does being deferred with a felony, but there are attributes related to prior cases that influence it further, such as the presence of a prior felony case. While controlling for other variables, 58% of males with prior non felony cases can be expected to recidivate, compared to 72% of males with prior felony cases.

PRIOR DOMESTIC VIOLENCE CASES

Males with prior cases involving domestic violence are more likely to recidivate than males with other types of prior cases. While controlling for other variables, 61% of males with non-domestic violence related types of prior cases can be expected to recidivate, compared with 71% of males with prior domestic violence cases.

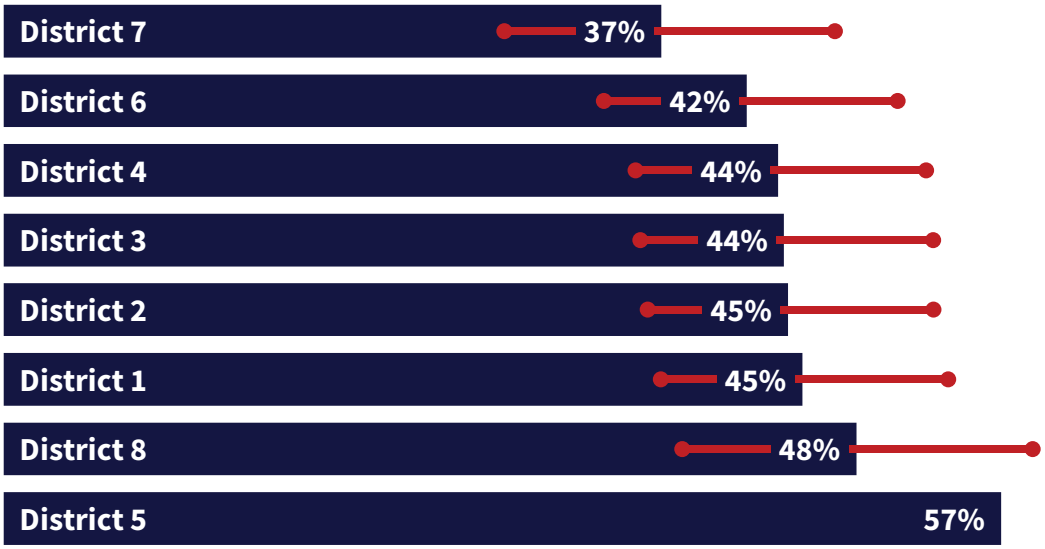
PRIOR JUVENILE CASES

Males with prior juvenile cases are more likely to recidivate than males with prior non-juvenile cases. While controlling for other variables, 60% of males with prior non-juvenile cases can be expected to recidivate, compared with 71% of males with prior juvenile cases.

Recidivism in General, Females

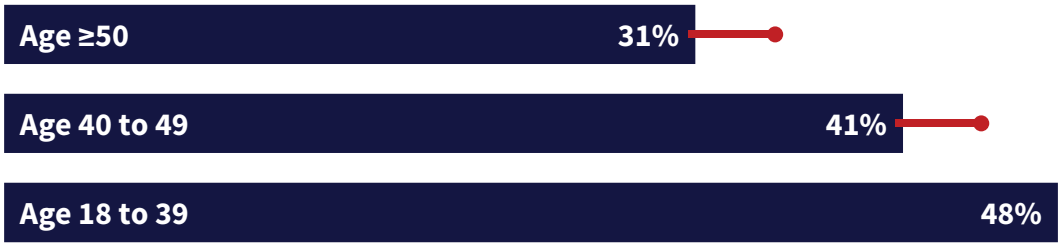
PROSECUTORIAL DISTRICT

District has a small impact on whether females recidivate. While controlling for other variables, 57% of females from District 5 can be expected to recidivate—the highest rate, while 37% of females from District 7 can be expected to recidivate—the lowest rate.



AGE

Younger females are more likely to recidivate than older females. While controlling for other variables, 48% of females aged 18 to 39 can be expected to recidivate, compared to 41% of females aged 40 to 49.[13]



Recidivism in General, Females

PRIOR CASES

Females with prior cases were more likely to recidivate. While controlling for other variables, 25% of females with no prior cases can be expected to recidivate, compared to 59% of females with prior cases.

FELONIES

Females deferred with felony offenses were more likely to recidivate than females deferred with non-felony offenses. While controlling for other variables, 44% of females deferred with non-felonies can be expected to recidivate, compared to 48% of females deferred with felonies.

PRIOR FELONY CASES

Clearly the presence of prior cases influences recidivism as does being deferred with a felony, but there are attributes related to prior cases that influence it further, such as the presence of a prior felony case. While controlling for other variables, 56% of females with prior non-felony cases can be expected to recidivate, compared to 71% of females with prior felony cases.

Recidivism in General, Females

PRIOR JUVENILE CASES

Females with prior juvenile cases are more likely to recidivate than females with prior non juvenile cases. While controlling for other variables, 59% of females with prior non-juvenile cases can be expected to recidivate, compared to 66% of females with prior juvenile cases.

PRIOR DOMESTIC VIOLENCE CASES

Females with prior domestic violence cases are more likely to recidivate than females with other types of prior cases. While controlling for other variables, 58% of females with prior non-domestic violence cases can be expected to recidivate, compared to 70% of females with prior domestic violence cases.

PRIOR SEXUAL ASSAULT CASES

Females with prior cases involving sexual assault are more likely to recidivate than females with other types of prior cases. While controlling for other variables, 60% of females with prior non-sexual assault cases can be expected to recidivate, compared to 87% of females with prior sexual assault cases. It bears mentioning that the cohort of females with prior sexual assault cases was small—out of 4,007 cases involving females with prior cases, only 57 cases contained prior sexual assault cases.

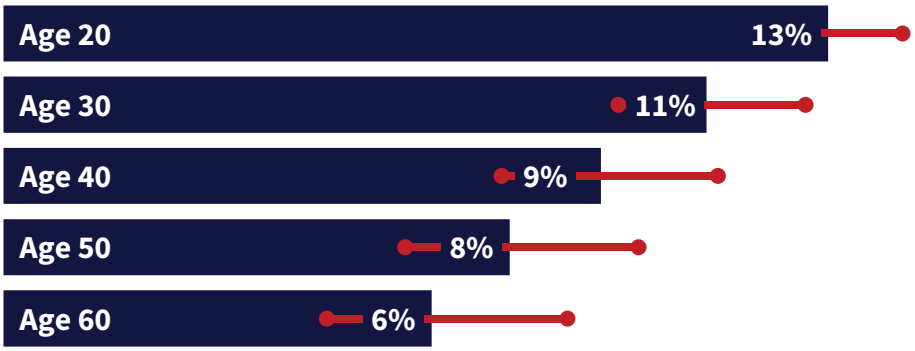
Domestic Violence Recidivism, Males

DOMESTIC VIOLENCE & PRIOR CASES

Males deferred with domestic violence offenses are more likely to recidivate with a domestic violence offense than males deferred with other types of offenses, but these rates vary further depending on whether the male had prior cases. In essence, there is an interaction between domestic violence offenses and prior cases that must be considered in predicting domestic violence recidivism. While controlling for other variables, 3% of males deferred with non-domestic violence cases and no prior cases can be expected to recidivate with a domestic violence offense, compared to 10% of males deferred with domestic violence cases and no prior cases, 13% of males deferred with non-domestic violence cases and no prior cases, and 23% of males deferred with domestic violence cases and prior cases.

AGE

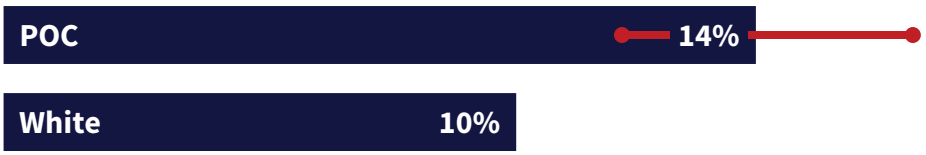
Younger males are more likely to recidivate with a domestic violence offense than older males. While controlling for other variables, 13% of those age 20 can be expected to recidivate with a domestic violence offense, compared to 11% of those age 30, 9% of those age 40, 8% of those age 50, and 6% of those age 60.



Domestic Violence Recidivism, Males

RACE/ETHNICITY

Deferred males of color are more likely to recidivate with a domestic violence offense than white males. While controlling for other variables, 10% of white males can be expected to recidivate with a domestic violence offense, compared to 14% of males of color.



PROSECUTORIAL DISTRICT

Males deferred in District 7 (Hancock & Washington) are less likely to recidivate with a domestic violence offense than males deferred in other districts. While controlling for other variables, 7% of males deferred in District 7 can be expected to recidivate with a domestic violence offense, compared to 10% of males deferred elsewhere.

Domestic Violence Recidivism, Females

PRIOR CASES

Females with prior offenses are more likely to recidivate with a domestic violence offense than those with no prior cases. While controlling for other variables, 3% of females with no prior cases can be expected to recidivate with domestic violence offenses, compared to 10% of females with prior cases.

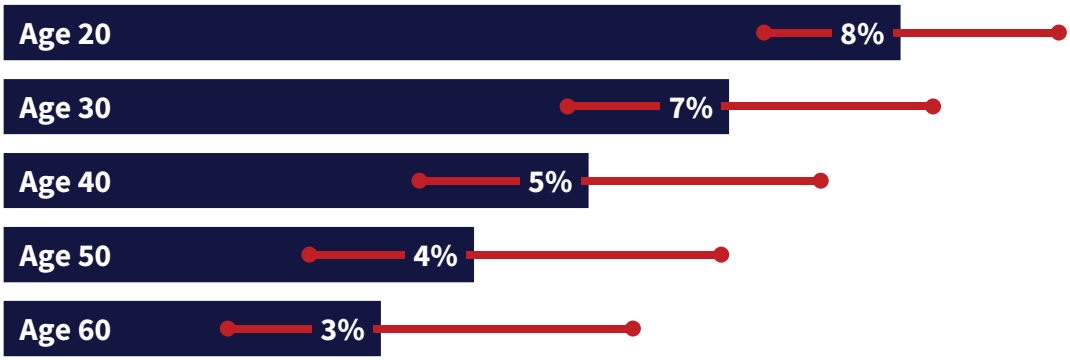
DOMESTIC VIOLENCE CASES

Females deferred with domestic violence cases are more likely to recidivate with a domestic violence offense than females deferred with other types of cases. While controlling for other variables, 5% of females deferred with non-domestic violence cases can be expected to recidivate with a domestic violence offense, compared to 11% of females deferred with a domestic violence case.

Domestic Violence Recidivism, Females

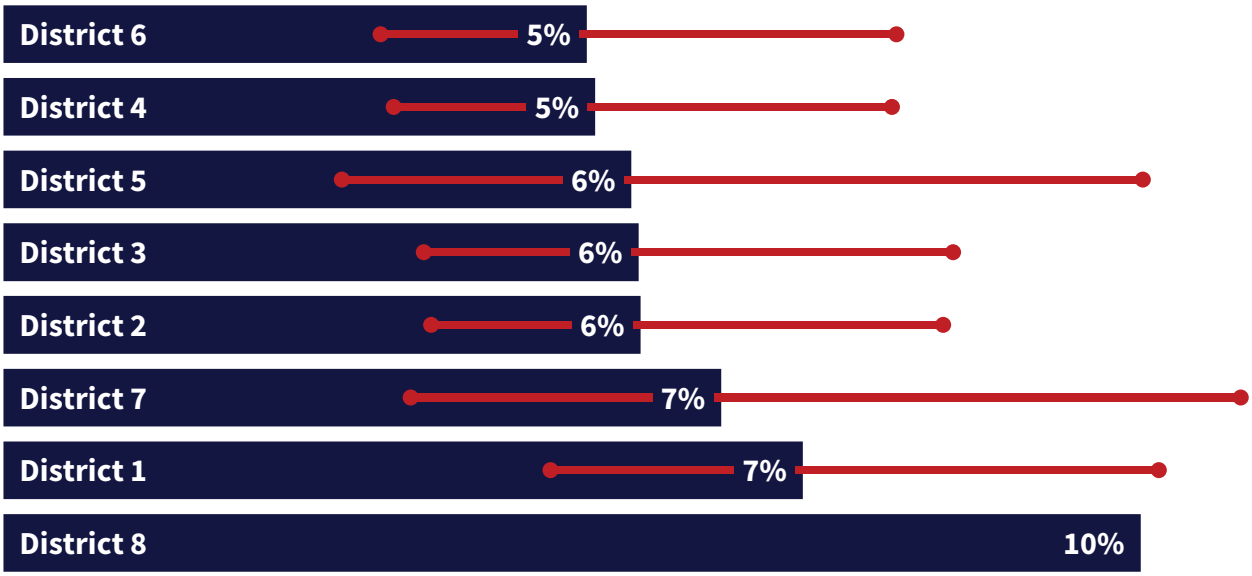
AGE

Younger females are more likely to recidivate with a domestic violence offense than older females. While controlling for other variables, 8% of those age 20 can be expected to recidivate with a domestic violence offense, compared to 7% of those age 30, 5% of those age 40, 4% of those age 50, and 3% of those age 60.



DISTRICT

District has an impact on whether females recidivate with domestic violence offenses. While controlling for other variables, 10% of females from District 8 can be expected to recidivate with a domestic violence offense—the highest rate, while 5% of females from District 6 can be expected to recidivate with a domestic violence offense—the lowest rate.



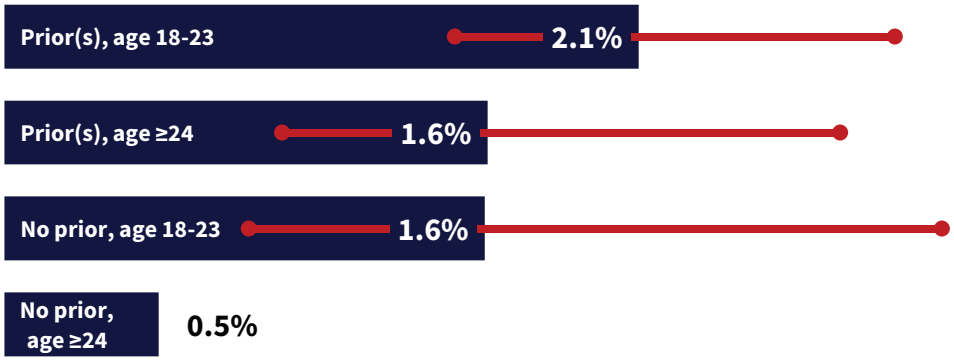
Sexual Assault Recidivism, Males

SEXUAL ASSAULT CASES

Males deferred with sexual assault offenses are more likely to recidivate with a sexual assault offense than those with other types of offenses. While controlling for other variables, 1.3% of males deferred with no sexual assault offenses can be expected to recidivate with a sexual assault offense, compared to 5.9% of those deferred with sexual assault offenses.

AGE & PRIOR CASES

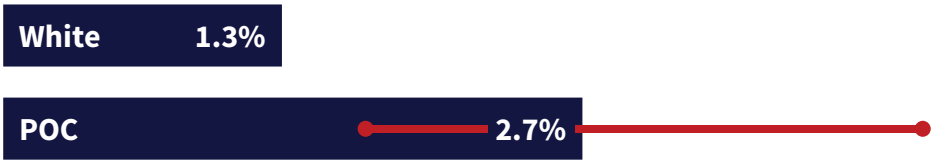
Younger males were more likely to recidivate with sexual assault offenses, but there is an interaction between age and prior cases, thus rates vary further depending on whether the male had prior cases. While controlling for other variables, 0.5% of older males (aged 24 and older) with prior cases can be expected to recidivate with a sexual assault offense. The expected rate rises to 1.6% for younger males (aged 18 to 23) with no prior cases as well as for older males (aged 24 and older) with prior cases. The expected rate for younger males (aged 18 to 23) with prior cases rises yet again to 2.1%.



Sexual Assault Recidivism, Males

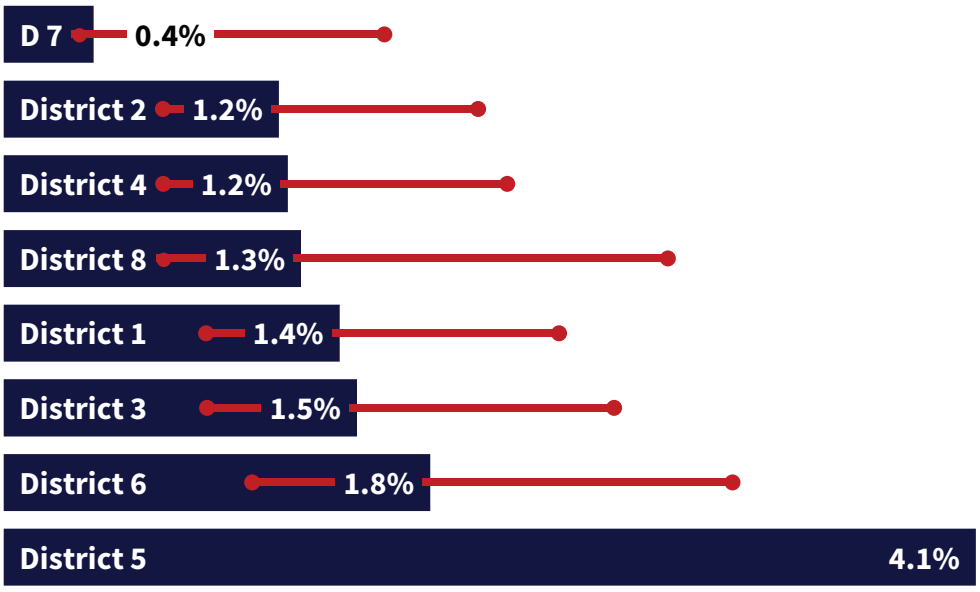
RACE/ETHNICITY

Males of color were more likely to recidivate with sexual assault offenses than white males. While controlling for other variables, 1.3% of white males can be expected to recidivate, compared to 2.7% of males of color.



PROSECUTORIAL DISTRICT

District has an impact on whether males recidivate with sexual assault offenses. While controlling for other variables, 4.1% of those from District 5 can be expected to recidivate. This rate is statistically significantly higher than each of the remaining districts.



Summary

The findings from this study show that those deferred with domestic violence and sexual assault offenses are more likely to recidivate than those with other types of offenses. This is true for recidivism in general, for domestic violence recidivism, and sexual assault recidivism. Deferred dispositions are less effective when used with domestic violence and sexual assault offenders; they are a higher-risk population.

What is not known from this study is how the recidivism rates of these high-risk deferred populations compare to the rates of similar high-risk populations who are sentenced to a period of confinement or probation. In other words, what is the effect of deferred disposition compared to other sanctions? Comparing these two groups would disclose how effective deferred dispositions are in cases involving domestic violence and sexual assault.

If domestic violence and sexual assault offenders who are deferred have lower recidivism rates than domestic violence and sexual assault offenders who receive other sentences, that would be an argument for the continued use of deferred dispositions with this high-risk group. In any case, however, the higher rates of recidivism for this high-risk group relative to other offenders clearly argue for more monitoring/supervision when deferred dispositions are used with them.

Also, while recidivism is the typical measure in criminal justice research for the effectiveness of a given intervention, it should not be the sole measure. Domestic violence and sexual assault are personal offenses and, as such, have personal victims. Victims' perceptions of the appropriateness and effectiveness of deferred dispositions should be examined and considered as well. The Maine SAC is currently working to discover how deferred dispositions impact victim satisfaction, perceptions of safety, and well-being in cases of domestic violence and sexual assault. The findings from this study will be reported separately.

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[5] Alliance for Safety and Justice. *http://allianceforsafetyandjustice.org/CrimeSurvivorsSpeak*

[6] Colgate, Love, M. (2009). Alternatives to conviction: Deferred adjudication as a way of avoiding collateral consequences. *Federal Sentencing Reporter, 22*(1), 6-16.

[7] Boots, D.P. Wareham, J., Bartula, A. & Canas, R. (2016). A comparison of the batterer intervention program with alternative court dispositions on 12-month recidivism. *Violence Against Women, 22*(9), 1134-1157.

[8] All eight district attorney offices in Maine submit their data electronically to this database, which is housed in Augusta.

[9] Caseload statistics were obtained online, from *https://www.courts.maine.gov/about/reports-data.html*

[10] Please see Appendix A for a full list of charges that were classified as domestic violence.

[11] Please see Appendix B for a full list of charges that were classified as sexual assault.

[12] Logistic regression requires a reference group. In this graphic, District 5 is the reference group. All other districts are compared to the reference group to determine whether there is a statistically significant difference between them in terms of recidivism. Logistic regression supplies a point estimate for each district; this is the percentage that appears on each bar. Because these are expected rates, a confidence interval is also supplied, to show the range within which we can be reasonably certain the actual rate falls. Confidence intervals are depicted by error bars in each graphic. The confidence interval for District 4 is 41% to 52%. Because this range does not include the point estimate for District 5 (61%), we conclude that these two districts are statistically significantly different from one another in terms of male recidivism.

[13] More age categories were tested for significance but none was found.

Appendix A

The following list is not a comprehensive account of all domestic violence and sexual assault offenses; rather, it is an inventory of the offenses that appear in this study's data records.

Domestic Violence

Criminal restraint by a parent
Domestic violence assault
Domestic violence assault on a child less than six years old
Domestic violence criminal threatening
Domestic violence criminal threatening with a dangerous weapon
Domestic violence reckless conduct
Domestic violence reckless conduct with a dangerous weapon
Domestic violence stalking
Domestic violence terrorizing
Domestic violence terrorizing with a dangerous weapon
Endangering the welfare of a child
Endangering the welfare of a dependent person
Domestic violence assault
Domestic violence criminal threatening
Domestic violence reckless conduct
Endangering the welfare of a child
Violation of a protective order
Violation of protection from abuse

Sexual Assault

Aggravated promotion of prostitution
Aggravated sex trafficking
Dissemination of sexually explicit material
Engaging a prostitute
Engaging in prostitution
Gross sexual assault
Indecent conduct
Possession of sexually explicit materials
Promotion of prostitution
Sex trafficking
Sexual abuse of a minor
Sexual exploitation of a minor
Sexual misconduct with a child
Solicitation of a child to commit a prohibited act
Unauthorized dissemination of certain private images
Unlawful sexual contact
Unlawful sexual touching
Visual sexual aggression against a child

Appendix B

Logistic Regression for Recidivism in General, Males

Independent Variables	ß	s.e.	Sig.	Exp(ß)
Person of color	0.249	0.092	0.007	1.282
District 1	-0.343	0.114	0.003	0.709
District 2	-0.326	0.116	0.005	0.721
District 3	-0.509	0.118	0.000	0.601
District 4	-0.570	0.118	0.000	0.565
District 6	-0.365	0.119	0.002	0.694
District 7	-0.520	0.144	0.000	0.594
District 8	-0.059	0.143	0.678	0.942
Felony	0.188	0.048	0.000	1.207
Prior case	1.465	0.047	0.000	4.328
Ages 30 to 39	-0.315	0.051	0.000	0.730
Ages 40 to 49	-0.565	0.061	0.000	0.569
Ages 50 to 59	-0.831	0.071	0.000	0.436
Ages 60 and up	-1.150	0.100	0.000	0.317
Tracking time (time from deferral start to query)	0.017	0.001	0.000	1.017
Constant	-1.030	0.126	0.000	0.357

Nagelkerke R^2=0.192, $X^2(15)$=1799.5, p<0.001 and classifies 66.9% of cases correctly

Note: Additional variable tested but not found to be statistically significantly associated with general recidivism was *offense count*.

Logistic Regression for Recidivism in General, Males With Prior Cases

Independent Variables	ß	s.e.	Sig.	Exp(ß)
Felony	0.112	0.056	0.045	1.119
Prior felony case	0.627	0.054	0.000	1.871
Prior DV case	0.460	0.062	0.000	1.585
Prior juvenile case	0.493	0.068	0.000	1.637
Age 30 to 39	0.261	0.114	0.022	1.298
Age 40 to 49	-0.244	0.062	0.000	0.783
Age 50 to 59	-0.393	0.077	0.000	0.675
Age 60 and up	-0.765	0.089	0.000	0.465
Tracking time (time from deferral start to query)	-1.008	0.127	0.000	0.365
Constant	0.019	0.001	0.000	1.019

Nagelkerke R^2=0.121, $X^2(10)$=760.5, p<0.001 and classifies 65.0% of cases correctly

Logistic Regression for Recidivism in General, Females

Independent Variables	ß	s.e.	Sig.	Exp(ß)
District 1	-0.454	0.169	0.007	0.635
District 2	-0.487	0.169	0.004	0.615
District 3	-0.496	0.174	0.004	0.609
District 4	-0.510	0.172	0.003	0.601
District 6	-0.582	0.176	0.001	0.559
District 7	-0.785	0.207	0.000	0.456
District 8	-0.330	0.206	0.109	0.719
Felony	0.173	0.069	0.011	1.189
Prior case	1.477	0.058	0.000	4.381
Ages 40 to 49	-0.286	0.074	0.000	0.751
Ages 50 and up	-0.698	0.084	0.000	0.498
Tracking time (time from deferral start to query)	0.012	0.002	0.000	1.013
Constant	-1.027	0.180	0.000	0.358

Nagelkerke R^2=0.191, $X^2(12)$=1013.1, p<0.001 and classifies 67.2% of cases correctly

Note: Additional variables tested but not found to be statistically significantly associated with general recidivism were *race/ethnicity* and *offense count*.

Logistic Regression for Recidivism in General, Females With Prior Cases

Independent Variables	ß	s.e.	Sig.	Exp(ß)
Felony	0.149	0.080	0.064	1.160
Prior felony case	0.638	0.082	0.000	1.893
Prior juvenile case	0.299	0.098	0.002	1.349
Prior DV case	0.530	0.093	0.000	1.698
Prior SA case	1.456	0.439	0.001	4.287
Age (continuous)	-0.020	0.003	0.000	0.980
Tracking time (time from deferral start to query)	0.013	0.002	0.000	1.013
Constant	0.217	0.150	0.148	1.242

Nagelkerke R^2=0.086, $X^2(7)$=264.8, p<0.001 and classifies 62.5% of cases correctly

Logistic Regression for Domestic Violence Recidivism in Males

Independent Variables	ß	s.e.	Sig.	Exp(ß)
Race/ethnicity	0.435	0.115	0.000	1.545
DV case	1.241	0.173	0.000	3.458
Prior case	1.525	0.114	0.000	4.595
Age (continuous)	-0.018	0.003	0.000	0.982
Tracking time (time from deferral start to query)	0.017	0.002	0.000	1.017
District 7	-0.356	0.177	0.044	0.700
DV case by prior case (interaction)	-0.512	0.186	0.006	0.599
Constant	-3.541	0.155	0.000	0.029

Nagelkerke R^2=0.106, $X^2(7)$=666.5, p<0.001 and classifies 87.6% of cases correctly

Note: Additional variable tested but not found to be statistically significantly associated with domestic violence recidivism in males was *case severity (felony)*.

Logistic Regression for Domestic Violence Recidivism in Females

Independent Variables	ß	s.e.	Sig.	Exp(ß)
DV case	0.768	0.109	0.000	2.155
Prior cases	1.277	0.125	0.000	3.586
Age (continuous)	-0.023	0.005	0.000	0.977
Tracking time (time from deferral start to query)	0.011	0.003	0.000	1.011
District 1	-0.386	0.206	0.061	0.680
District 2	-0.629	0.213	0.003	0.533
District 3	-0.632	0.221	0.004	0.532
District 4	-0.707	0.222	0.001	0.493
District 5	-0.644	0.330	0.051	0.525
District 6	-0.722	0.232	0.002	0.486
District 7	-0.501	0.304	0.099	0.606
Constant	-2.729	0.282	0.000	0.065

Nagelkerke R^2=0.089, $X^2(11)$=250.5, p<0.001 and classifies 92.3% of cases correctly

Note: Additional variable tested but not found to be statistically significantly associated with domestic violence recidivism in females was *race/ethnicity*.

Logistic Regression for Sexual Assault Recidivism in Males

Independent Variables	ß	s.e.	Sig.	Exp(ß)
Race/ethnicity	0.746	0.244	0.002	2.109
District 1	-1.090	0.261	0.000	0.336
District 2	-1.292	0.282	0.000	0.275
District 3	-1.040	0.285	0.000	0.354
District 4	-1.260	0.297	0.000	0.284
District 6	-0.848	0.280	0.002	0.428
District 7	-2.418	0.742	0.001	0.089
District 8	-1.214	0.418	0.004	0.297
Sexual assault case	1.540	0.274	0.000	4.663
Prior case	1.152	0.286	0.000	3.165
Age 18 to 23	1.146	0.349	0.001	3.147
Tracking time (time from deferral start to query)	0.015	0.004	0.001	1.015
Age 18 to 23 by prior case (interactions)	-0.869	0.391	0.026	0.419
Constant	-4.790	0.401	0.000	0.008

Nagelkerke R^2=0.052, $X^{2(}$13)=97.8, p<0.001 and classifies 98.3% of cases correctly

Note: Additional variable tested but not found to be statistically significantly associated with sexual assault recidivism in males was *deferral case severity (felony).*

Appendix C

C-1: GENDER DISTRIBUTION

	Female	Male
District 2 | Cumberland	40%	60%
District 4 | Kennebec, Somerset	38%	62%
District 3 | Androscoggin, Franklin, Oxford	37%	63%
Statewide	**36%**	**64%**
District 7 | Hancock, Washington	36%	64%
District 8 | Aroostook	34%	66%
District 1 | York	33%	67%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	33%	67%
District 5 | Penobscot, Piscataquis	30%	70%

C-2: RACE/ETHNICITY DISTRIBUTION

	POC/ Unknown	White
District 7 | Hancock, Washington	10%	90%
District 5 | Penobscot, Piscataquis	9%	91%
District 2 | Cumberland	8%	92%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	8%	92%
District 3 | Androscoggin, Franklin, Oxford	6%	94%
Statewide	**6%**	**94%**
District 1 | York	5%	95%
District 8 | Aroostook	3%	97%
District 4 | Kennebec, Somerset	3%	97%

C-3: MEAN AGE

District 6 | Knox, Lincoln, Sagadahoc, Waldo	36.47
District 7 | Hancock, Washington	34.96
District 3 | Androscoggin, Franklin, Oxford	34.61
Statewide	**34.18**
District 8 | Aroostook	34.11
District 5 | Penobscot, Piscataquis	34.09
District 1 | York	33.99
District 4 | Kennebec, Somerset	33.78
District 2 | Cumberland	32.61

C-4: TOP 5 OFFENSES (N=14,639)

	District								
	1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**State**
Assault				5%				6%	
Criminal OUI		10%	12%	7%		10%	6%		8%
Disorderly conduct					6%	6%	5%	7%	
Domestic violence assault	10%	5%	10%	9%	8%	9%	6%	10%	8%
Driving to endanger		5%	6%			5%			
Operating after suspension	6%			10%	9%			7%	6%
Theft by unauthorized taking	6%	19%	8%	12%	12%	7%	11%	11%	11%
Unlawful possession of scheduled drugs	7%	7%	7%		7%		5%		6%
Violation of condition of release	6%								

C-5: DOMESTIC VIOLENCE CASES

District 3 | Androscoggin, Franklin, Oxford	24%
District 1 | York	24%
District 8 | Aroostook	23%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	20%
District 5 | Penobscot, Piscataquis	19%
Statewide	**19%**
District 4 | Kennebec, Somerset	17%
District 7 | Hancock, Washington	12%
District 2 | Cumberland	12%

C-6: SEXUAL ASSAULT CASES

District 2 | Cumberland	2.5%
District 3 | Androscoggin, Franklin, Oxford	1.7%
Statewide	**1.7%**
District 6 | Knox, Lincoln, Sagadahoc, Waldo	1.6%
District 1 | York	1.5%
District 4 | Kennebec, Somerset	1.5%
District 5 | Penobscot, Piscataquis	1.4%
District 8 | Aroostook	1.0%
District 7 | Hancock, Washington	0.7%

C-7: FELONY CASES

District 5 | Penobscot, Piscataquis	36%
District 8 | Aroostook	28%
District 2 | Cumberland	27%
District 7 | Hancock, Washington	26%
District 3 | Androscoggin, Franklin, Oxford	23%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	22%
Statewide	**22%**
District 1 | York	17%
District 4 | Kennebec, Somerset	15%

C-8: AVERAGE NUMBER OF OFFENSES

District 5 | Penobscot, Piscataquis	2.27
District 6 | Knox, Lincoln, Sagadahoc, Waldo	2.05
District 8 | Aroostook	2.05
District 2 | Cumberland	2.01
District 1 | York	2.01
District 3 | Androscoggin, Franklin, Oxford	2.00
Statewide	**1.98**
District 7 | Hancock, Washington	1.97
District 4 | Kennebec, Somerset	1.73

C-9: CASES WITH PRIOR FELONIES

District 5 | Penobscot, Piscataquis	40%
District 2 | Cumberland	37%
Statewide	**33%**
District 3 | Androscoggin, Franklin, Oxford	33%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	33%
District 1 | York	32%
District 4 | Kennebec, Somerset	32%
District 7 | Hancock, Washington	32%
District 8 | Aroostook	26%

C-10: CASES WITH PRIOR DOMESTIC VIOLENCE OFFENSES

District 8 | Aroostook	17%
District 3 | Androscoggin, Franklin, Oxford	16%
District 5 | Penobscot, Piscataquis	15%
District 1 | York	15%
Statewide	**13%**
District 4 | Kennebec, Somerset	12%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	12%
District 2 | Cumberland	11%
District 7 | Hancock, Washington	9%

C-11: CASES WITH PRIOR DOMESTIC VIOLENCE FELONIES

District 1 | York	10%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	8%
District 5 | Penobscot, Piscataquis	8%
Statewide	**7%**
District 3 | Androscoggin, Franklin, Oxford	6%
District 8 | Aroostook	6%
District 4 | Kennebec, Somerset	6%
District 2 | Cumberland	5%
District 7 | Hancock, Washington	3%

C-12: CASES WITH PRIOR SEXUAL ASSAULT OFFENSES

District 5 | Penobscot, Piscataquis	5.1%
District 4 | Kennebec, Somerset	3.8%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	3.2%
District 3 | Androscoggin, Franklin, Oxford	3.1%
Statewide	**2.9%**
District 8 | Aroostook	2.8%
District 1 | York	2.5%
District 2 | Cumberland	2.3%
District 7 | Hancock, Washington	1.1%

C-13: CASES WITH PRIOR SEXUAL ASSAULT FELONIES

District 7 | Hancock, Washington	*
District 4 | Kennebec, Somerset	77%
District 8 | Aroostook	65%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	59%
Statewide	**59%**
District 3 | Androscoggin, Franklin, Oxford	58%
District 1 | York	53%
District 2 | Cumberland	43%
District 5 | Penobscot, Piscataquis	42%

Number of prior sexual assault cases is too low in this district to report a felony rate.

C-14: RECIDIVISM

District 5 | Penobscot, Piscataquis	62%
District 8 | Aroostook	57%
District 1 | York	52%
District 2 | Cumberland	50%
Statewide	**49%**
District 6 | Knox, Lincoln, Sagadahoc, Waldo	48%
District 3 | Androscoggin, Franklin, Oxford	47%
District 4 | Kennebec, Somerset	45%
District 7 | Hancock, Washington	40%

C-15: FELONY RECIDIVISM

District 5 | Penobscot, Piscataquis	44%
District 8 | Aroostook	35%
District 2 | Cumberland	34%
District 7 | Hancock, Washington	33%
Statewide	**30%**
District 6 | Knox, Lincoln, Sagadahoc, Waldo	29%
District 3 | Androscoggin, Franklin, Oxford	28%
District 1 | York	27%
District 4 | Kennebec, Somerset	27%

C-16: DOMESTIC VIOLENCE RECIDIVISM

District 8 | Aroostook	14%
District 5 | Penobscot, Piscataquis	13%
District 1 | York	12%
Statewide	**11%**
District 3 | Androscoggin, Franklin, Oxford	11%
District 4 | Kennebec, Somerset	10%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	10%
District 2 | Cumberland	10%
District 7 | Hancock, Washington	7%

C-17: FELONY DOMESTIC VIOLENCE RECIDIVISM

District 1 | York	19%
District 8 | Aroostook	19%
District 5 | Penobscot, Piscataquis	18%
Statewide	**17%**
District 4 | Kennebec, Somerset	17%
District 2 | Cumberland	17%
District 3 | Androscoggin, Franklin, Oxford	16%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	16%
District 7 | Hancock, Washington	12%

C-18: SEXUAL ASSAULT RECIDIVISM

District 5 | Penobscot, Piscataquis	4%
District 1 | York	1%
District 2 | Cumberland	1%
District 6 | Knox, Lincoln, Sagadahoc, Waldo	1%
Statewide	**1%**
District 3 | Androscoggin, Franklin, Oxford	1%
District 8 | Aroostook	1%
District 4 | Kennebec, Somerset	1%
District 7 | Hancock, Washington	0%

C-19: FELONY SEXUAL ASSAULT RECIDIVISM

District 7 | Hancock, Washington	*
District 4 | Kennebec, Somerset	61%
District 1 | York	47%
District 3 | Androscoggin, Franklin, Oxford	44%
Statewide	**37%**
District 6 | Knox, Lincoln, Sagadahoc, Waldo	35%
District 5 | Penobscot, Piscataquis	26%
District 8 | Aroostook	*
District 2 | Cumberland	12%

**** Number of sexual assault recidivism cases in these districts is too low to report felony rates.***

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US DEPARTMENT OF JUSTICE

The Use of Deferred Dispositions in Domestic and Sexual Violence Cases in Maine Report was developed under the auspices of the State Justice Statistics Program, Bureau of Justice Statistics (BJS), Department of Justice (DOJ). Funding for this initiative was provided by the BJS grant 2018-86-CX-K010.

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No. 14-10154
SUPREME COURT OF THE UNITED STATES

Voisine v. United States

136 S. Ct. 2272 (2016) · 195 L. Ed. 2d 736
Decided Jun 27, 2016

No. 14–10154.

06-27-2016

Stephen L. VOISINE and William E. Armstrong, III, Petitioners v. UNITED STATES.

Virginia G. Villa, appointed by the Court, St. Croix Falls, WI, for Petitioners. Ilana H. Eisenstein, Washington, DC, for Respondent. Sarah M. Konsky, Brenna Woodley, Steven J. Horowitz, Jason G. Marsico, Sidley Austin LLP, Chicago, IL, Jeffrey T. Green, Sarah O'Rourke Schrup, Chicago, IL, Virginia G. Villa, St. Croix Falls, WI, for Petitioners. Donald B. Verrilli, Jr., Solicitor General, Leslie R. Caldwell, Assistant Attorney General, Michael R. Dreeben, Deputy Solicitor General, Ilana H. Eisenstein, Assistant to the Solicitor General, Joseph C. Wyderko, Finnuala K. Tessier, Attorneys, Department of Justice, Washington, DC, for Respondent.

Justice KAGAN delivered the opinion of the Court.

Virginia G. Villa, appointed by the Court, St. Croix Falls, WI, for Petitioners.

Ilana H. Eisenstein, Washington, DC, for Respondent.

Sarah M. Konsky, Brenna Woodley, Steven J. Horowitz, Jason G. Marsico, Sidley Austin LLP, Chicago, IL, Jeffrey T. Green, Sarah O'Rourke Schrup, Chicago, IL, Virginia G. Villa, St. Croix Falls, WI, for Petitioners.

Donald B. Verrilli, Jr., Solicitor General, Leslie R. Caldwell, Assistant Attorney General, Michael R. Dreeben, Deputy Solicitor General, Ilana H. Eisenstein, Assistant to the Solicitor General, Joseph C. Wyderko, Finnuala K. Tessier, Attorneys, Department of Justice, Washington, DC, for Respondent.

Justice KAGAN delivered the opinion of the Court.

Federal law prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). That phrase is defined to include any misdemeanor committed against a domestic relation that necessarily involves the "use ... of physical force." § 921(a)(33)(A). The question presented here is whether misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct trigger the statutory firearms ban. We hold that they do.

I

Congress enacted § 922(g)(9) some 20 years ago to "close [a] dangerous loophole" in the gun control laws. *United States v. Castleman,* 572 U.S. ——, ——, 134 S.Ct. 1405, 1409, 188 L.Ed.2d 426 (2014) (quoting *United States v. Hayes,* 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009)). An existing provision already barred convicted felons from possessing firearms. See § 922(g)(1) (1994 ed.). But many perpetrators of domestic violence are charged with misdemeanors rather than felonies, notwithstanding the harmfulness of their conduct. See *Castleman,* 572

U.S., at ——, 134 S.Ct., at 1408–1409. And "[f]irearms and domestic strife are a potentially deadly combination." *Hayes,* 555 U.S., at 427, 129 S.Ct. 1079. Accordingly, Congress added § 922(g)(9) to prohibit any person convicted of a "misdemeanor crime of domestic violence" from possessing any gun or ammunition with a connection to interstate commerce. And it defined that phrase, in § 921(a)(33)(A), to include a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that "has, as an element, the use or attempted use of physical force."

Two Terms ago, this Court considered the scope of that definition in a case involving a conviction for
2277 a knowing or intentional assault. See *2277 *Castleman,* 572 U.S., at —— – ——, 134 S.Ct., at 1409–1415. In *Castleman* , we initially held that the word "force" in § 921(a)(33)(A) bears its common-law meaning, and so is broad enough to include offensive touching. See *id.,* at ——, 134 S.Ct., at 1409–1410. We then determined that "the knowing or intentional application of [such] force is a 'use' of force." *Id.,* at ——, 134 S.Ct., at 1415. But we expressly left open whether a reckless assault also qualifies as a "use" of force—so that a misdemeanor conviction for such conduct would trigger § 922(g)(9)'s firearms ban. See *id.,* at ——, n. 8, 134 S.Ct., at 1413–1414, n. 8. The two cases before us now raise that issue.

Petitioner Stephen Voisine pleaded guilty in 2004 to assaulting his girlfriend in violation of § 207 of the Maine Criminal Code, which makes it a misdemeanor to "intentionally, knowingly or recklessly cause[ ] bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A). Several years later, Voisine again found himself in legal trouble, this time for killing a bald eagle. See 16 U.S.C. § 668(a). While investigating that crime, law enforcement officers learned that Voisine owned a rifle. When a background check turned up his prior misdemeanor conviction, the Government charged him with violating 18 U.S.C. § 922(g)(9).[1]

[1] In *United States v. Hayes,* 555 U.S. 415, 418, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), this Court held that a conviction under a general assault statute like § 207 (no less than one under a law targeting only domestic assault) can serve as the predicate offense for a § 922(g)(9) prosecution. When that is so, the Government must prove in the later, gun possession case that the perpetrator and the victim of the assault had one of the domestic relationships specified in § 921(a)(33)(A). See *id.,* at 426, 129 S.Ct. 1079.

Petitioner William Armstrong pleaded guilty in 2008 to assaulting his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by § 207 (the general statute under which Voisine was convicted) against a family or household member. See Me. Rev. Stat. Ann., Tit. 17–A, § 207–A(1)(A). A few years later, law enforcement officers searched Armstrong's home as part of a narcotics investigation. They discovered six guns, plus a large quantity of ammunition. Like Voisine, Armstrong was charged under § 922(g)(9) for unlawfully possessing firearms.

Both men argued that they were not subject to § 922(g)(9)'s prohibition because their prior convictions (as the Government conceded) could have been based on reckless, rather than knowing or intentional, conduct. The District Court rejected those claims. Each petitioner then entered a guilty plea conditioned on the right to appeal the District Court's ruling.

The Court of Appeals for the First Circuit affirmed the two convictions, holding that "an offense with a *mens rea* of recklessness may qualify as a 'misdemeanor crime of violence' under § 922(g)(9)." *United States v. Armstrong,* 706 F.3d 1, 4 (2013) ; see *United States v. Voisine,* 495 Fed.Appx. 101, 102 (2013) (*per curiam*). Voisine

and Armstrong filed a joint petition for certiorari, and shortly after issuing *Castleman* , this Court (without opinion) vacated the First Circuit's judgments and remanded the cases for further consideration in light of that decision. See *Armstrong v. United States,* 572 U.S. ——, 134 S.Ct. 1759, 188 L.Ed.2d 590 (2014). On remand, the Court of Appeals again upheld the convictions, on the same ground. See 778 F.3d 176, 177 (2015).

We granted certiorari, 577 U.S. ——, 136 S.Ct. 386, 193 L.Ed.2d 309 (2015), to resolve a Circuit split over whether a misdemeanor *2278 conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun under § 922(g)(9).[2] We now affirm.

[2] Compare 778 F.3d 176 (C.A.1 2015) (case below) with *United States v. Nobriga,* 474 F.3d 561 (C.A.9 2006) (*per curiam*) (holding that a conviction for a reckless domestic assault does not trigger § 922(g)(9)' s ban).

II

The issue before us is whether § 922(g)(9) applies to reckless assaults, as it does to knowing or intentional ones. To commit an assault recklessly is to take that action with a certain state of mind (or *mens rea*)—in the dominant formulation, to "consciously disregard[ ]" a substantial risk that the conduct will cause harm to another. ALI, Model Penal Code § 2.02(2)(c) (1962); Me. Rev. Stat. Ann., Tit. 17–A, § 35(3) (Supp. 2015) (adopting that definition); see *Farmer v. Brennan,* 511 U.S. 825, 836–837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (noting that a person acts recklessly only when he disregards a substantial risk of harm "of which he is aware"). For purposes of comparison, to commit an assault knowingly or intentionally (the latter, to add yet another adverb, sometimes called "purposefully") is to act with another state of mind respecting that act's consequences—in the first case, to be "aware that [harm] is practically certain" and, in the second, to have that result as a "conscious object." Model Penal Code §§ 2.02(2)(a)-(b) ; Me. Rev. Stat. Ann., Tit. 17–A, §§ 35(1)-(2).

Statutory text and background alike lead us to conclude that a reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under § 922(g)(9). Congress defined that phrase to include crimes that necessarily involve the "use ... of physical force." § 921(a)(33)(A). Reckless assaults, no less than the knowing or intentional ones we addressed in *Castleman* , satisfy that definition. Further, Congress enacted § 922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns. Because fully two-thirds of such state laws extend to recklessness, construing § 922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision's design.

A

Nothing in the word "use"—which is the only statutory language either party thinks relevant—indicates that § 922(g)(9) applies exclusively to knowing or intentional domestic assaults. Recall that under § 921(a)(33)(A), an offense counts as a "misdemeanor crime of domestic violence" only if it has, as an element, the "use" of force. Dictionaries consistently define the noun "use" to mean the "act of employing" something. Webster's New International Dictionary 2806 (2d ed. 1954) ("[a]ct of employing anything"); Random House Dictionary of the English Language 2097 (2d ed. 1987) ("act of employing, using, or putting into service"); Black's Law Dictionary 1541 (6th ed. 1990) ("[a]ct of employing," "application").[3] On that common understanding, the force involved *2279 in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. See *Castleman,* 572 U.S., at ——, 134 S.Ct., at 1415 ("[T]he word ‘use’ conveys the idea that the thing used (here, ‘physical force’) has been made the user's instrument" (some internal

quotation marks omitted)). But the word "use" does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.

[3] In cases stretching back over a century, this Court has followed suit, although usually discussing the verb form of the word. See, *e.g., Bailey v. United States,* 516 U.S. 137, 145, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) (to use means " '[t]o convert to one's service,' 'to employ,' [or] 'to avail oneself of' "); *Smith v. United States,* 508 U.S. 223, 229, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) (to use means " '[t]o convert to one's service' or 'to employ' "); *Astor v. Merritt,* 111 U.S. 202, 213, 4 S.Ct. 413, 28 L.Ed. 401 (1884) (to use means "to employ [or] to derive service from").

Consider a couple of examples to see the ordinary meaning of the word "use" in this context. If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not "use[d]" physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That hurl counts as a "use" of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife. Similarly, to spin out a scenario discussed at oral argument, if a person lets slip a door that he is trying to hold open for his girlfriend, he has not actively employed ("used") force even though the result is to hurt her. But if he slams the door shut with his girlfriend following close behind, then he has done so—regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb. See Tr. of Oral Arg. 10–11 (counsel for petitioners acknowledging that this example involves "the use of physical force"). Once again, the word "use" does not exclude from § 922(g)(9)'s compass an act of force carried out in conscious disregard of its substantial risk of causing harm.

And contrary to petitioners' view, nothing in *Leocal v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), suggests a different conclusion—*i.e.,* that "use" marks a dividing line between reckless and knowing conduct. See Brief for Petitioners 18–22. In that decision, this Court addressed a statutory definition similar to § 921(a)(33)(A) : there, "the use ... of physical force against the person or property of another." 18 U.S.C. § 16. That provision excludes "merely accidental" conduct, *Leocal* held, because "it is [not] natural to say that a person actively employs physical force against another person by accident." 543 U.S., at 9, 125 S.Ct. 377. For example, the Court stated, one "would not ordinarily say a person 'use[s] ... physical force against' another by stumbling and falling into him." *Ibid.* That reasoning fully accords with our analysis here. Conduct like stumbling (or in our hypothetical, dropping a plate) is a true accident, and so too the injury arising from it; hence the difficulty of describing that conduct as the "active employment" of force. *Ibid.* But the same is not true of reckless behavior—acts undertaken with awareness of their substantial risk of causing injury (in our contrasting hypo, hurling the plate). The harm such conduct causes is the result of a deliberate decision to endanger another—no more an "accident" than if the "substantial risk" were "practically certain." See *supra,* at 2278 (comparing reckless and knowing acts). And indeed, *Leocal* itself recognized the distinction between accidents and recklessness, specifically reserving the issue whether the definition in § 16 embraces reckless conduct, *2280 see 543 U.S., at 13, 125 S.Ct. 377 —as we now hold § 921(a)(33)(A) does.[4]

4 Like *Leocal,* our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states. Cf. *United States v. Castleman,* 572 U.S. ——, ——, n. 4, 134 S.Ct. 1405, 1411, n. 6, 188 L.Ed.2d 426 (2014) (interpreting "force" in § 921(a)(33)(A) to encompass any offensive touching, while acknowledging that federal appeals courts have usually read the same term in § 16 to reach only "violent force"). All we say here is that *Leocal* 's exclusion of accidental conduct from a definition hinging on the "use" of force is in no way inconsistent with our inclusion of reckless conduct in a similarly worded provision.

In sum, Congress's definition of a "misdemeanor crime of violence" contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly "use[s]" force, no less than one who carries out that same action knowingly or intentionally. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms.

B

So too does the relevant history. As explained earlier, Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns. See *supra,* at 2276 – 2277; *Castleman,* 572 U.S., at ——, ——, 134 S.Ct., at 1408–1409, 1411 ; *Hayes,* 555 U.S., at 426–427, 129 S.Ct. 1079. Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. See Brief for United States 7a–19a (collecting statutes). That agreement was no coincidence. Several decades earlier, the Model Penal Code had taken the position that a *mens rea* of recklessness should generally suffice to establish criminal liability, including for assault. See § 2.02(3), Comments 4–5, at 243–244 ("purpose, knowledge, and recklessness are properly the basis for" such liability); § 211.1 (defining assault to include "purposely, knowingly, or recklessly caus[ing] bodily injury"). States quickly incorporated that view into their misdemeanor assault and battery statutes. So in linking § 922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct. See, *e.g., United States v. Bailey,* 9 Pet. 238, 256, 9 L.Ed. 113 (1835) (Story, J.) ("Congress must be presumed to have legislated under this known state of the laws"). And indeed, that was part of the point: to apply firearms restrictions to those abusers, along with all others, whom the States' ordinary misdemeanor assault laws covered.

What is more, petitioners' reading risks rendering § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness—that is, inapplicable even to persons who commit that crime knowingly or intentionally. Consider Maine's statute, which (in typical fashion) makes it a misdemeanor to "intentionally, knowingly or recklessly" injure another. Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A). Assuming that provision defines a single crime (which happens to list alternative mental states)—and accepting petitioners' view that § 921(a)(33)(A) requires at least a knowing *mens rea* —then, under *Descamps v. United States,* 570 U.S. ——, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), *no* conviction obtained under Maine's statute could qualify as a "misdemeanor crime of domestic violence." See *id.,* at ——, 133 S.Ct., at 2281 2283 (If a state *2281 crime "sweeps more broadly" than the federally defined one, a conviction for the state offense "cannot count" as a predicate, no matter what *mens rea* the defendant actually had). So in the 35 jurisdictions like Maine, petitioners' reading risks allowing domestic abusers of all

mental states to evade § 922(g)(9)'s firearms ban. In *Castleman* , we declined to construe § 921(a)(33)(A) so as to render § 922(g)(9) ineffective in 10 States. See 572 U.S., at ——, 134 S.Ct., at 1412–1413. All the more so here, where petitioners' view would jeopardize § 922(g)(9)'s force in several times that many.

Petitioners respond that we should ignore the assault and battery laws actually on the books when Congress enacted § 922(g)(9). In construing the statute, they urge, we should look instead to how the common law defined those crimes in an earlier age. See Brief for Petitioners 13–15. And that approach, petitioners claim, would necessitate reversing their convictions because the common law "required a *mens rea* greater than recklessness." *Id.,* at 17.

But we see no reason to wind the clock back so far. Once again: Congress passed § 922(g)(9) to take guns out of the hands of abusers convicted under the misdemeanor assault laws then in general use in the States. See *supra,* at 2276 – 2277, 2280. And by that time, a substantial majority of jurisdictions, following the Model Penal Code's lead, had abandoned the common law's approach to *mens rea* in drafting and interpreting their assault and battery statutes. Indeed, most had gone down that road decades before. That was the backdrop against which Congress was legislating. Nothing suggests that, in enacting § 922(g)(9), Congress wished to look beyond that real world to a common-law precursor that had largely expired. To the contrary, such an approach would have undermined Congress's aim by tying the ban on firearms possession not to the laws under which abusers are prosecuted but instead to a legal anachronism.[5]

> 5 As petitioners observe, this Court looked to the common law in *Castleman* to define the term "force" in § 921(a)(33)(A). See 572 U.S., at —— – ——, 134 S.Ct., at 1409–1410 ; Brief for Petitioners 13–15. But we did so for reasons not present here. "Force," we explained, was "a common-law term of art" with an "established common-law meaning." 572 U.S., at ——, 134 S.Ct., at 1410 (internal quotation marks omitted). And we thought that Congress meant to adhere to that meaning given its "perfect[ ]" fit with § 922(g)(9)'s goal. *Ibid* . By contrast, neither party pretends that the statutory term "use"—the only one identified as potentially relevant here—has any particular common-law definition. And as explained above, the watershed change in how state legislatures thought of *mens rea* after the Model Penal Code makes the common law a bad match for the ordinary misdemeanor assault and battery statutes in Congress's sightline.

And anyway, we would not know how to resolve whether recklessness sufficed for a battery conviction at common law. Recklessness was not a word in the common law's standard lexicon, nor an idea in its conceptual framework; only in the mid– to late–1800's did courts begin to address reckless behavior in those terms. See Hall, Assault and Battery by the Reckless Motorist, 31 J. Crim. L. & C. 133, 138–139 (1940). The common law traditionally used a variety of overlapping and, frankly, confusing phrases to describe culpable mental states—among them, specific intent, general intent, presumed intent, willfulness, and malice. See, *e.g., Morissette v. United States,* 342 U.S. 246, 252, 72 S.Ct. 240, 96 L.Ed. 288 (1952) ; Model Penal Code § 2.02, Comment 1, at 230. Whether and where conduct that we would today describe as reckless fits into that obscure scheme is anyone's guess: Neither petitioners' citations, 2282 nor the Government's *2282 competing ones, have succeeded in resolving that counterfactual question. And that indeterminacy confirms our conclusion that Congress had no thought of incorporating the common law's treatment of *mens rea* into § 921(a)(33)(A). That provision instead corresponds to the ordinary misdemeanor assault and battery laws used to prosecute domestic abuse,

regardless of how their mental state requirements might—or, then again, might not—conform to the common law's.[6]

[6] Petitioners make two last arguments for reading § 921(a)(33)(A) their way, but they do not persuade us. First, petitioners contend that we should adopt their construction to avoid creating a question about whether the Second Amendment permits imposing a lifetime firearms ban on a person convicted of a misdemeanor involving reckless conduct. See Brief for Petitioners 32–36. And second, petitioners assert that the rule of lenity requires accepting their view. See *id.,* at 31–32. But neither of those arguments can succeed if the statute is clear. See *Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (noting that "the doctrine of constitutional doubt ... enters in only where a statute is susceptible of two constructions" (internal quotation marks omitted)); *Abramski v. United States,* 573 U.S. ——, ——, n. 10, 134 S.Ct. 2259, 2272, n. 10, 189 L.Ed.2d 262 (2014) (stating that the rule of lenity applies only in cases of genuine ambiguity). And as we have shown, § 921(a)(33)(A) plainly encompasses reckless assaults.

III

The federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the "use ... of physical force" against a domestic relation. § 921(a)(33)(A). That language, naturally read, encompasses acts of force undertaken recklessly—*i.e.,* with conscious disregard of a substantial risk of harm. And the state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said. Each petitioner's possession of a gun, following a conviction under Maine law for abusing a domestic partner, therefore violates § 922(g)(9). We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

Justice THOMAS, with whom Justice SOTOMAYOR joins as to Parts I and II, dissenting.

Federal law makes it a crime for anyone previously convicted of a "misdemeanor crime of domestic violence" to possess a firearm "in or affecting commerce." 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" includes "an offense that ... has, as an element, the use or attempted use of physical force ... committed by [certain close family members] of the victim." § 921(a)(33)(A)(ii). In this case, petitioners were convicted under § 922(g)(9) because they possessed firearms and had prior convictions for assault under Maine's statute prohibiting "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A) (2006). The question presented is whether a prior conviction under § 207 has, as an element, the "use of physical force," such that the conviction can strip someone of his right to possess a firearm. In my view, § 207 does not qualify as such an offense, and the majority errs in holding otherwise. I respectfully dissent.

I

To qualify as a " 'misdemeanor crime of domestic violence,' " the Maine assault statute must have as an element the "use of physical force." § 921(a)(33)(A)(ii). Because 2283 *2283 mere recklessness is sufficient to sustain a conviction under § 207, a conviction does not necessarily involve the "use" of physical force, and thus, does not trigger § 922(g)(9)'s prohibition on firearm possession.

A

Three features of § 921(a)(33)(A)(ii) establish that the "use of physical force" requires intentional conduct. First, the word "use" in that provision is best read to require intentional conduct. As the majority recognizes, the noun "use" means "the 'act of employing' something." *Ante,* at 2278 (quoting dictionaries). A "use" is "[t]he act of employing a thing for any ... purpose." 19 Oxford English Dictionary 350 (2d ed. 1989). To "use" something, in other words, is to employ the thing for its instrumental value, *i.e.,* to employ the thing to accomplish a further goal. See *United States v. Castleman,* 572 U.S. ——, ——, 134 S.Ct. 1405, 1414–1415, 188 L.Ed.2d 426 (2014). A "use," therefore, is an inherently intentional act—that is, an act done for the purpose of causing certain consequences or at least with knowledge that those consequences will ensue. See Restatement (Second) of Torts § 8A, p. 15 (1965) (defining intentional acts).

We have routinely defined "use" in ways that make clear that the conduct must be intentional. In *Bailey v. United States,* 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), for example, we held that the phrase "[use of] a firearm" required "active employment" of the firearm, such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." *Id.,* at 143, 148, 116 S.Ct. 501 (emphasis deleted). We have similarly held that the use of force requires more than "negligent or merely accidental conduct." *Leocal v. Ashcroft,* 543 U.S. 1, 9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). We concluded that "[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." *Ibid.* Thus, shooting a gun would be using a firearm in relation to a crime. *Bailey, supra,* at 148, 116 S.Ct. 501. Recklessly leaving a loaded gun in one's trunk, which then discharges after being jostled during the car ride, would not. The person who placed that gun in the trunk might have acted recklessly or negligently, but he did not actively employ the gun in a crime.

Second, especially in a legal context, "force" generally connotes the use of violence against another. Black's Law Dictionary, for example, defines "force" to mean "[p]ower, violence, or pressure directed against a person or thing." Black's Law Dictionary 656 (7th ed. 1999). Other dictionaries offer similar definitions. *E.g.,* Random House Dictionary of the English Language 748 (def. 5) (2d ed. 1987) ("force," when used in law, means "unlawful violence threatened or committed against persons or property"); 6 Oxford English Dictionary 34 (def. I(5)(c)) ("Unlawful violence offered to persons or things"). And "violence," when used in a legal context, also implies an intentional act. See Black's Law Dictionary 1564 ("violence" is the "[u]njust or unwarranted use of force, usu. accompanied by fury, vehemence, or outrage; physical force unlawfully exercised with the intent to harm").[1] *2284 When a person talks about "using force" against another, one thinks of intentional acts—punching, kicking, shoving, or using a weapon. Conversely, one would not naturally call a car accident a "use of force," even if people were injured by the force of the accident. As Justice Holmes observed, "[E]ven a dog distinguishes between being stumbled over and being kicked." O. Holmes, The Common Law 3 (1881).

[1] Some of our cases have distinguished "violent force"—force capable of causing physical injury—and common-law force, which included all nonconsensual touching, see *Johnson v. United States,* 559 U.S. 133, 140–141, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), but others have not, see *United States v. Castleman,* 572 U.S. ——, ——, 134 S.Ct. 1405, 1410, 188 L.Ed.2d 426 (2014). The common law did not draw this distinction because the common law considered nonconsensual touching as a form of violence against the person. 3 W. Blackstone, Commentaries *120 ("[T]he

law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it"). The Court should assume that, absent a contrary textual indication, Congress legislated against this common-law backdrop. See *Castleman, supra,* at 2250, 134 S.Ct., at 1409–1410. Consequently, I treat nonconsensual touching as a type of violence.

Third, context confirms that "use of physical force" connotes an intentional act. Section 921(a)(33)(A)(ii)'s prohibitions also include "the threatened use of a deadly weapon." In that neighboring prohibition, "use" most naturally means active employment of the weapon. And it would be odd to say that "use" in that provision refers to active employment (an intentional act) when threatening someone with a weapon, but "use" here is satisfied by merely reckless conduct. See *Sorenson v. Secretary of Treasury,* 475 U.S. 851, 860, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986) (the same words in a statute presumptively have the same meaning). Thus, the "use of physical force" against a family member refers to intentional acts of violence against a family member.

B

On this interpretation, Maine's assault statute likely does not qualify as a "misdemeanor crime of domestic violence" and thus does not trigger the prohibition on possessing firearms, § 922(g)(9). The Maine statute appears to lack, as a required element, the "use or attempted use of physical force." Maine's statute punishes at least some conduct that does not involve the "use of physical force." Section 207 criminalizes "recklessly caus[ing] bodily injury or offensive physical contact to another person." By criminalizing all reckless conduct, the Maine statute captures conduct such as recklessly injuring a passenger by texting while driving resulting in a crash. Petitioners' charging documents generically recited the statutory language; they did not charge intentional, knowing, and reckless harm as alternative counts. Accordingly, Maine's statute appears to treat "intentionally, knowingly, or recklessly" causing bodily injury or an offensive touching as a single, indivisible offense that is satisfied by recklessness. See *Mathis v. United States,* —— U.S. ——, 136 S.Ct. 2243, —— – ——, —— L.Ed.2d ——, 2016 WL 3434400 (2016). So petitioners' prior assault convictions do not necessarily have as an element the use of physical force against a family member. These prior convictions, therefore, do not qualify as a misdemeanor crime involving domestic violence under federal law, and petitioners' convictions accordingly should be reversed. At the very least, to the extent there remains uncertainty over whether Maine's assault statute is divisible, the Court should vacate and remand for the First Circuit to determine that statutory interpretation question in the first instance.

II

To illustrate where I part ways with the majority, consider different mental states with which a person could create and apply force.[2] First, a 2285 person can create force *2285 intentionally or recklessly.[3] For example, a person can intentionally throw a punch or a person can crash his car by driving recklessly. Second, a person can intentionally or recklessly harm a particular person or object as a result of that force. For example, a person could throw a punch at a particular person (thereby intentionally applying force to that person) or a person could swing a baseball bat too close to someone (thereby recklessly applying force to that person).

2 Although "force" generally has a narrower legal connotation of intentional acts designed to cause harm, see *supra,* at 2283 – 2284, I will use "force" in this Part in its broadest sense to mean "strength or power exerted upon an object." Random House Dictionary of the English Language 748 (def. 2) (2d ed. 1987).

3 To simplify, I am using only those mental states relevant to the Court's resolution of this case. A person could also create a force negligently or blamelessly.

These different mental states give rise to three relevant categories of conduct. A person might intentionally create force and intentionally apply that force against an object (*e.g.,* punching a punching bag). A person might also intentionally create force but recklessly apply that force against an object (*e.g.,* practicing a kick in the air, but recklessly hitting a piece of furniture). Or a person could recklessly create force that results in damage, such as the car crash example.

The question before us is what mental state suffices for a "use of physical force" against a family member. In my view, a "use of physical force" most naturally refers to cases where a person intentionally creates force and intentionally applies that force against a family member. It also includes (at least some) cases where a person intentionally creates force but recklessly applies it to a family member. But I part ways with the majority's conclusion that purely reckless conduct —meaning, where a person recklessly creates force—constitutes a "use of physical force." In my view, it does not, and therefore, the "use of physical force" is narrower than most state assault statutes, which punish anyone who recklessly causes physical injury.

A

To identify the scope of the "use of physical force," consider three different types of intentional and reckless force resulting in physical injury.

1

The paradigmatic case of battery: A person intentionally unleashes force and intends that the force will harm a particular person. This might include, for example, punching or kicking someone. Both the majority and I agree that these cases constitute a "use of physical force" under § 921(a)(33)(A)(ii).

This first category includes all cases where a person intentionally creates force and desires or knows with a practical certainty that that force will cause harm. This is because the law traditionally treats conduct as intended in two circumstances. First, conduct is intentional when the actor desires to produce a specific result. 1 W. LaFave, Substantive Criminal Law § 5.2(a), pp. 340–342 (2d ed. 2003). But conduct is also traditionally deemed intentional when a person acts "knowingly": that is, he knows with practical certainty that a result will follow from his conduct. *Ibid.* ; see also Restatement (Second) of Torts § 8A, Comment *b,* at 15 ("If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result").

To illustrate, suppose a person strikes his friend 2286 for the purpose of demonstrating *2286 a karate move. The person has no desire to injure his friend, but he knows that the move is so dangerous that he is practically certain his friend will be injured. Under the common law, the person intended to injure his friend, even though he acted only with knowledge that his friend would be injured rather than the desire to harm him. Thus, even when a person acts knowingly rather than purposefully, this type of conduct is still a "use of physical force."

2

The second category involves a person who intentionally unleashes force that recklessly causes injury. The majority gives two examples:

1. The Angry Plate Thrower: "[A] person throws a plate in anger against the wall near where his wife is standing." *Ante,* at 2279. The plate shatters, and a shard injures her. *Ibid.*

2. The Door Slammer: "[A person] slams the door shut with his girlfriend following close behind" with the effect of "catch[ing] her fingers in the jamb." *Ibid.*

The Angry Plate Thrower and the Door Slammer both intentionally unleashed physical force, but they did not intend to direct that force at those whom they harmed. Thus, they *intentionally* employed force, but *recklessly* caused physical injury with that force. The majority believes that these cases also constitute a "use of physical force," and I agree. The Angry Plate Thrower has used force against the plate, and the Door Slammer has used force against the door.

The more difficult question is whether this "use of physical force" comes within § 921(a)(33)(A)(ii), which requires that the "use of physical force" be committed by someone having a familial relationship with the victim. The natural reading of that provision is that the use of physical force must be against a family member. In some cases, the law readily transfers the intent to use force from the object to the actual victim. Take the Angry Plate Thrower: If a husband throws a plate at the wall near his wife to scare her, that is assault. If the plate breaks and cuts her, it becomes a battery, regardless of whether he intended the plate to make contact with her person. See W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser and Keeton on Law of Torts § 9, pp. 39–42 (5th ed. 1984) (Prosser and Keeton). Similarly, "if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal or tortious intent toward the second applies to the third as well." Black's Law Dictionary 1504 (defining transferred-intent doctrine); see also 1 LaFave, *supra,* § 5.2(c)(4), at 349–350. Thus, where a person acts in a violent and patently unjustified manner, the law will often impute that the actor intended to cause the injury resulting from his conduct, even if he actually intended to direct his use of force elsewhere. Because we presume that Congress legislates against the backdrop of the common law, see *Astoria Fed. Sav. & Loan Assn. v. Solimino,* 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991), these cases would qualify as the "use of physical force" against a family member.[4] *2287 3

[4] The Door Slammer might also fit within the "use of physical force," although that is a harder question. The Door Slammer has used force against the door, which has then caused injury to his girlfriend. But traditional principles of law would not generally transfer the actor's intent to use force against the door to the girlfriend because, unlike placing someone in fear of bodily injury, slamming a door is not inherently wrongful and illegal conduct.

Finally, and most problematic for the majority's approach, a person could recklessly unleash force that recklessly causes injury. Consider two examples:

1. The Text–Messaging Dad: Knowing that he should not be texting and driving, a father sends a text message to his wife. The distraction causes the father to rear end the car in front of him. His son, who is a passenger, is injured.

2. The Reckless Policeman: A police officer speeds to a crime scene without activating his emergency lights and siren and careens into another car in an intersection. That accident causes the police officer's car to strike another police officer, who was standing at the intersection. See *Seaton v. State,* 385 S.W.3d 85, 88 (Tex.App.2012).

In these cases, both the unleashing of the "force" (the car crash) and the resulting harm (the physical injury) were reckless. Under the majority's reading of § 921(a)(33)(A)(ii), the husband "use[d] ... physical force" against his son, and the police officer "use[d] ... physical force" against the other officer.

But this category is where the majority and I part company. These examples do not involve the "use of physical force" under any conventional understanding of "use" because they do not involve an active employment of something for a particular purpose. See *supra,* at 2283 – 2284. In the second category, the actors intentionally use violence against property; this is why the majority can plausibly argue that they have "used" force, even though that force was not intended to harm their family members. See *supra,* at 2286 – 2287 (discussing transferred intent). But when an individual does not engage in any violence against persons or property—that is, when physical injuries result from purely reckless conduct—there is no "use" of physical force.

* * *

The "use of physical force" against a family member includes cases where a person intentionally commits a violent act against a family member. And the term includes at least some cases where a person engages in a violent act that results in an unintended injury to a family member. But the term does not include nonviolent, reckless acts that cause physical injury or an offensive touching. Accordingly, the majority's definition is overbroad.

B

In reaching its contrary conclusion, the majority confuses various concepts. First, and as discussed, the majority decides that a person who acts recklessly has used physical force against another. *Ante,* at 2285 – 2286. But that fails to appreciate the distinction between intentional and reckless conduct. A "use" of physical force requires the intent to cause harm, and the law will impute that intent where the actor knows with a practical certainty that it will cause harm. But the law will not impute that intent from merely reckless conduct. Second, and perhaps to rein in its overly broad conception of a use of force, the majority concludes that only "volitional" acts constitute uses of force, *ante,* at 2285, and that mere "accident[s]" do not, *ante,* at 2285. These portions of the majority's analysis conflate "volitional" conduct with "intentional" *mens rea* and misapprehends the relevant meaning of an "accident."

1

The majority blurs the distinction between recklessness and intentional wrongdoing by overlooking the difference between the *mens rea* for force and the *mens rea* for causing harm with that force. The majority says that " 'use' does not 2288 demand *2288 that the person applying force have the purpose or practical certainty that it will cause harm" (namely, knowledge), "as compared with the understanding that it is [a substantial and unjustifiable risk that it will] do so" (the standard for recklessness).[5] *Ante,* at 2285. Put in the language of *mens rea,* the majority is saying that purposeful, knowing, and reckless applications of force are all equally "uses" of force.

[5] The majority's equation of recklessness with "the understanding" that one's actions are "substantially likely" to cause harm, *ante,* at 2285, misstates the standard for recklessness in States that follow the Model Penal Code. Recklessness only requires a "substantial and unjustifiable risk." ALI, Model Penal Code § 2.02(2)(c) (1980). A "substantial" risk can include very small risks when there is no justification for taking the risk. See *id.,* § 2.02, Comment 1, at 237, n. 14. Thus, it would be reckless to play Russian roulette with a revolver having 1,000 chambers, even though there is a 99.9% chance that no one will be injured.

But the majority fails to explain why mere recklessness in creating force—as opposed to recklessness in causing harm with intentional force—is sufficient. The majority gives the Angry Plate Thrower and the Door Slammer as examples of reckless conduct that are "uses" of physical force, but those examples involve persons who *intentionally* use force that *recklessly* causes injuries. *Ibid.* Reckless assault, however, extends well beyond intentional force that recklessly causes injury. In States where the Model Penal Code has influence, reckless assault includes any recklessly caused physical injury. See ALI, Model Penal Code § 211.1(1)(a) (1980). This means that the Reckless Policeman and the Text–Messaging Dad are as guilty of assault as the Angry Plate Thrower. See, *e.g., Seaton,* 385 S.W.3d, at 89–90 ; see also *People v. Grenier,* 250 App.Div.2d 874, 874–875, 672 N.Y.S.2d 499, 500–501 (1998) (upholding an assault conviction where a drunk driver injured his passengers in a car accident).

The majority's examples are only those in which a person has intentionally used force, meaning that the person acts with purpose or knowledge that force is involved. *Ante,* at 2285. As a result, the majority overlooks the critical distinction between conduct that is intended to cause harm and conduct that is not intended to cause harm. Violently throwing a plate against a wall is a use of force. Speeding on a roadway is not. That reflects the fundamental difference between intentional and reckless wrongdoing. An intentional wrong is designed to inflict harm. See Restatement (Second) of Torts § 8A, at 15. A reckless wrong is not: "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." *Id.,* § 500, Comment *f,* at 590.

All that remains of the majority's analysis is its unsupported conclusion that recklessness looks enough like knowledge, so that the former suffices for a use of force just as the latter does. *Ante,* at 2285. That overlooks a crucial distinction between a "practical certainty" and a substantial risk. When a person acts with practical certainty, he intentionally produces a result. As explained above, *supra,* at 2285, when a person acts with knowledge that certain consequences will result, the law imputes to that person the intent to cause those consequences. And the requirement of a "practical" certainty reflects that, in ordinary life, people rarely have perfect certitude of the facts that they "know." But as the probability decreases, "the actor's conduct loses the character of intent, and becomes mere recklessness." Restatement (Second) of Torts § 8A, Comment *b,* at 15. And 2289 the *2289 distinction between intentional and reckless conduct is key for defining "use." When a person acts with a practical certainty that he will employ force, he intends to cause harm; he has actively employed force for an instrumental purpose, and that is why we can fairly say he "uses" force. In the case of reckless wrongdoing, however, the injury the actor has caused is just an accidental byproduct of inappropriately risky behavior; he has not actively employed force.

In sum, "use" requires the intent to employ the thing being used. And in law, that intent will be imputed when a person acts with practical certainty that he will actively employ that thing. Merely disregarding a risk that a harm will result, however, does not supply the requisite intent.

2

To limit its definition of "use," the majority adds two additional requirements. The conduct must be "volitional," and it cannot be merely "accident[al]." *Ante,* at 2284 – 2286. These additional requirements will cause confusion, and neither will limit the breadth of the majority's adopted understanding of a "use of physical force."

First, the majority requires that the use of force must be "volitional," so that "an involuntary motion, even a powerful one, is not naturally described as an active employment of force." *Ante,* at 2284 – 2285. The majority provides two examples:

1. The Soapy–Handed Husband: "[A] person with soapy hands loses his grip on a plate, which then shatters and cuts his wife." *Ante,* at 2279.

2. The Chivalrous Door Holder: "[A] person lets slip a door that he is trying to hold open for his girlfriend." *Ibid.*

In the majority's view, a husband who loses his grip on a plate or a boyfriend who lets the door slip has not engaged in a volitional act creating force. *Ibid.* The majority distinguishes this "volitional" act requirement from the "mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Ibid.* The Angry Plate Thrower—unlike the Soapy–Handed Husband or Chivalrous Door Holder—has engaged in a volitional act, even if he did not intend to hurl the plate at his wife. *Ibid.*

The majority's use of "volitional" is inconsistent with its traditional legal definition. The husband who drops a dish on his wife's foot and the boyfriend who loses his grip while holding the door have acted volitionally. "[A]n 'act,' as that term is ordinarily used, is a voluntary contraction of the muscles, and nothing more." Prosser and Keeton § 8, at 34; see also Model Penal Code § 2.01 (defining the voluntary act requirement). For the plate and door examples not to be volitional acts, they would need to be unwilled muscular movements, such as a person who drops the plate because of a seizure.

In calling the force in these cases nonvolitional, the majority has confounded the minimum *mens rea* generally necessary to trigger criminal liability (recklessness) with the requirement that a person perform a volitional act. Although all involuntary actions are blameless, not all blameless conduct is involuntary.

What the majority means to say is that the men did not *intentionally* employ force, a requirement materially different from a volitional act. And this requirement poses a dilemma for the majority. Recklessly unleashing a force that recklessly causes physical injury—for example, a police officer speeding through the intersection without triggering his lights and siren—is an assault in States that follow the Model Penal Code. See *supra,* at 2287. If the majority's rule is to include
2290 *all* *2290 reckless assault, then the majority must accept that the Text–Messaging Dad is as guilty of using force against his son as the husband who angrily throws a plate toward his wife—an implausible result. Alternatively, the majority must acknowledge that its "volitional" act requirement is actually a requirement that the use of force be intentional, even if that intentional act of violence results in a recklessly caused, but unintended, injury. The majority, of course, refuses to do so because that approach would remove many assault convictions, especially in the many States that have adopted the Model Penal Code, from the sweep of the federal statute. Thus, the majority is left misapplying basic principles of criminal law to rationalize why all "assault" under the Model Penal Code constitutes the "use of physical force" under § 921(a)(33)(A)(ii).

Second and relatedly, the majority asserts that a use of force cannot be merely accidental. But this gloss on what constitutes a use of force provides no further clarity. The majority's attempt to distinguish "recklessness" from an "accident," *ante,* at 2285, is an equivocation on the meaning of "accident." An accident can mean that someone was blameless—for example, a driver who accidentally strikes a deer that darts into a roadway. But an accident can also refer to the fact that the result was unintended: A car accident is no less an "accident" just because a driver acted negligently or recklessly. Neither labeling an act "volitional" nor labeling it a mere "accident" will rein in the majority's overly broad understanding of a "use of physical force."

* * *

If Congress wanted to sweep in all reckless conduct, it could have written § 921(a)(33)(A)(ii) in different language. Congress might have prohibited the possession of firearms by anyone convicted under a state law prohibiting assault or battery. Congress could also have used language tracking the Model Penal Code by saying that a conviction must have, as an element, "the intentional, knowing, or reckless causation of physical injury." But Congress instead defined a "misdemeanor crime of domestic violence" by requiring that the offense have "the use of physical force." And a "use of physical force" has a well-understood meaning applying only to intentional acts designed to cause harm.

III

Even assuming any doubt remains over the reading of "use of physical force," the majority errs by reading the statute in a way that creates serious constitutional problems. The doctrine of constitutional avoidance "command[s] courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 213, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (THOMAS, J., concurring in judgment in part and dissenting in part) (internal quotation marks omitted). Section 922(g)(9) is already very broad. It imposes a lifetime ban on gun ownership for a single intentional nonconsensual touching of a family member. A mother who slaps her 18–year–old son for talking back to her—an intentional use of force—could lose her right to bear arms forever if she is cited by the police under a local ordinance. The majority seeks to expand that already broad rule to any reckless physical injury or nonconsensual touch. I would not extend the statute into that constitutionally problematic territory.

The Second Amendment protects "the right of the people to keep and bear Arms." In *District of Columbia v. Heller,* 554 U.S. 570, 624, 627, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), the Court held that the Amendment protects the right of all law-abiding citizens to keep and bear arms that are in common use for traditionally lawful purposes, including self-defense. And in *McDonald v. Chicago,* 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the Court held that the right to keep and bear arms is a fundamental right. See *id.,* at 767–778, 130 S.Ct. 3020 ; *id.,* at 806, 130 S.Ct. 3020 (THOMAS, J., concurring in part and concurring in judgment).

The protections enumerated in the Second Amendment, no less than those enumerated in the First, are not absolute prohibitions against government regulation. *Heller,* 554 U.S., at 595, 626–627, 128 S.Ct. 2783. Traditionally, States have imposed narrow limitations on an individual's exercise of his right to keep and bear arms, such as prohibiting the carrying of weapons in a concealed manner or in sensitive locations, such as government buildings. *Id.,* at 626–627, 128 S.Ct. 2783 ; see, *e.g., State v. Kerner,* 181 N.C. 574, 578–579, 107 S.E. 222, 225 (1921). But these narrow restrictions neither prohibit nor broadly frustrate any individual from generally exercising his right to bear arms.

Some laws, however, broadly divest an individual of his Second Amendment rights. *Heller* approved, in dicta, laws that prohibit dangerous persons, including felons and the mentally ill, from having arms. 554 U.S., at 626, 128 S.Ct. 2783. These laws are not narrow restrictions on the right because they prohibit certain individuals from exercising their Second Amendment rights at all times and in all places. To be constitutional, therefore, a law that broadly frustrates an individual's right to keep and bear arms must target individuals who are beyond the scope of the "People" protected by the Second Amendment.

Section 922(g)(9) does far more than "close [a] dangerous loophole" by prohibiting individuals who had committed felony domestic violence from possessing guns simply because they pleaded

guilty to misdemeanors. *Ante,* at 2282 (internal quotation marks omitted). It imposes a lifetime ban on possessing a gun for *all* nonfelony domestic offenses, including so-called infractions or summary offenses. §§ 921(a)(33)(A)(ii), 922(g)(9) ; 27 CFR § 478.11 (2015) (defining a misdemeanor crime of domestic violence to include crimes punishable only by a fine). These infractions, like traffic tickets, are so minor that individuals do not have a right to trial by jury. See *Lewis v. United States,* 518 U.S. 322, 325–326, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996).

Today the majority expands § 922(g)(9)'s sweep into patently unconstitutional territory. Under the majority's reading, a single conviction under a state assault statute for recklessly causing an injury to a family member—such as by texting while driving—can now trigger a lifetime ban on gun ownership. And while it may be true that such incidents are rarely prosecuted, this decision leaves the right to keep and bear arms up to the discretion of federal, state, and local prosecutors.

We treat no other constitutional right so cavalierly. At oral argument the Government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction for an infraction punishable only by a fine. Tr. of Oral Arg. 36–40. Compare the First Amendment. Plenty of States still criminalize libel. See, *e.g.,* Ala. Code. § 13A–11–160 (2015) ; Fla. Stat. § 836.01 (2015) ; La. Rev. Stat. Ann. § 14:47 (West 2016) ; Mass. Gen. Laws, ch. 94, § 98C (2014); Minn. Stat. § 609.765 (2014) ; N.H. 2292 Rev. Stat. Ann. § 644:11 (2007) ; *2292 Va. Code Ann. § 18.2–209 (2014) ; Wis. Stat. § 942.01 (2005). I have little doubt that the majority would strike down an absolute ban on publishing by a person previously convicted of misdemeanor libel.

In construing the statute before us expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to "relegat[e] the Second Amendment to a second-class right." *Friedman v. Highland Park,* 577 U.S. ——, ——, 136 S.Ct. 447, 450, 193 L.Ed.2d 483 (2015) (THOMAS, J., dissenting from denial of certiorari).

* * *

In enacting § 922(g)(9), Congress was not worried about a husband dropping a plate on his wife's foot or a parent injuring her child by texting while driving. Congress was worried that family members were abusing other family members through acts of violence and keeping their guns by pleading down to misdemeanors. Prohibiting those convicted of intentional and knowing batteries from possessing guns—but not those convicted of reckless batteries—amply carries out Congress' objective.

Instead, under the majority's approach, a parent who has a car accident because he sent a text message while driving can lose his right to bear arms forever if his wife or child suffers the slightest injury from the crash. This is obviously not the correct reading of § 922(g)(9). The "use of physical force" does not include crimes involving purely reckless conduct. Because Maine's statute punishes such conduct, it sweeps more broadly than the "use of physical force." I respectfully dissent.