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## Psychologically Bound: Why Expert Evidence Regarding Battered Woman Syndrome Should Be Admissible

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# PSYCHOLOGICALLY BOUND: WHY EXPERT EVIDENCE REGARDING BATTERED WOMAN SYNDROME SHOULD BE ADMISSIBLE

Christa Bunce\*

## ABSTRACT

*The affirmative defense of duress was created to protect a person coerced into committing a violent physical crime. Alongside duress, battered woman syndrome (BWS) is a psychological theory created to explain why women choose to kill abusive partners rather than leave them. Although BWS is a well-known and supported legal theory, historically, courts have been reluctant to allow expert evidence regarding the syndrome into testimony to help explain a battered woman's behavior. Battered women have been so subjected to abuse and violence that their psychological perception is altered. In cases where expert evidence has been admitted, it profoundly affected jurors' perception of battered women. The admitted expert evidence allows the jury to see her actions as her only available choice to protect herself. Thus, all courts should move to permit the admission of expert evidence regarding BWS to allow these women a fair trial and the potential opportunity to avoid a life behind bars.*

*This Comment seeks to understand the implications of BWS and the substantial impact expert testimony can have when attempting to prove a duress defense. It purports to familiarize the reader with BWS and duress generally before critically analyzing the psychological repercussions of BWS, which can be conveyed to a jury through the admission of expert evidence. This Comment looks to the current circuit split regarding the admissibility of such evidence and outlines each court's reasoning. Ultimately, this Comment advocates for the admission of expert evidence and attempts to urge undecided jurisdictions on the matter using legal arguments, recent federal and state court decisions, statistical evidence stressing the widespread nature of the matter, and the societal effects, both recent and historical.*

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## I. INTRODUCTION

NATIONWIDE, one in four women experiences “severe intimate partner physical violence, intimate partner sexual violence, and/or intimate partner stalking” within her lifetime.<sup>1</sup> Physical, mental, and reproductive health effects, as well as increased risk of addiction, have been linked to intimate partner violence.<sup>2</sup> As the single largest cause of injury for women nationwide, domestic violence presents a “perilous situation for women.”<sup>3</sup> Specifically, up to fifty percent of women in the United States will be subject to battering at some point in their lifetime.<sup>4</sup> The family unit is a “fertile ground for often lethal aggression,” most frequently aimed at a woman.<sup>5</sup> A woman is more likely to die at the hands of her partner than by a stranger.<sup>6</sup> Vulnerable women who respond to their abuser’s coercion with violence—either at the abuser’s command

1. *Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> [<https://perma.cc/PMV8-CX4V>].

2. *Id.*

3. Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 300 (1995) (“Domestic violence results in more injury to women than all automobile accidents, robberies, and rapes combined.”).

4. Meredith Blake, *Coerced into Crime: The Application of Battered Woman Syndrome to the Defense of Duress*, 9 WIS. WOMEN’S L.J. 67, 67 (1994).

5. India De Carmine, *Battered-Woman-Syndrome Testimony and the Jury: The Question of Admissibility*, 32 N.Y.L. SCH. L. REV. 79, 86 (1987) (quoting LENORE E. WALKER, *THE BATTERED WOMAN* 42 (1979)).

6. See Moore, *supra* note 3, at 300.

or in self-defense against the abuser—have been coined “battered women.”<sup>7</sup>

Eighty-year-old Lavetta Langdon will likely spend the rest of her life in prison for killing her husband.<sup>8</sup> In a statement to police, Langdon affirmed that she had been a victim of domestic violence for thirty years.<sup>9</sup> On the day of the shooting, Langdon’s husband “hit her with a balled-up fist on both sides of her face.”<sup>10</sup> After a period of contemplation, Langdon returned to the room where her husband was sleeping and shot him in the chest.<sup>11</sup> Her reports of consistent abuse throughout their relationship, sometimes so severe that medical attention was necessary, along with verbal threats, did not meet the necessary criteria to prove her action was one of self-defense.<sup>12</sup> The period of contemplation between the abuse and the shooting prevented the judge from interpreting Langdon’s actions as a response to immediate threat.<sup>13</sup> The type of violence Lavetta Langdon suffered is typical of battered women across the United States, but, shockingly, rarely provides a successful defense for the battered woman’s response. Like so many other women in this situation, Langdon will spend the rest of her life behind bars, even though her actions were necessary to save her own life.

The primary aim of this Comment is three-fold: (1) to draw much-needed attention to the sheer number of battered women across the nation; (2) to evaluate the differing treatment of expert testimony regarding battered woman syndrome (BWS) among the circuit courts; and (3) to illustrate why expert testimony of BWS should be admissible to prevent battered women from a lifetime of incarceration.

To successfully achieve the aim of this Comment, Part II presents a background on the duress defense and BWS, including its historical roots and evolution in the legal system. Part III then introduces the psychological impact of BWS, including how a battered woman’s brain is severely altered by constant abuse and thus impacts her decision-making. Next, Part IV introduces the implications and debate concerning the admissibility of expert testimony regarding BWS and how this evidence affects a woman in an abusive situation. Part V addresses the current circuit split in the United States concerning the admissibility of expert testimony regarding BWS to prove a duress defense. This Part follows cohesively from

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7. See generally WALKER, *supra* note 5 at xv.

8. See *McCook Woman Sentenced to 8 to 10 Years on Manslaughter Charge Related to Husband’s Death*, NTV NEWS (July 12, 2021), <https://nebraska.tv/newsletter-daily/mccook-woman-sentenced-to-8-to-10-years-on-manslaughter-charge-related-to-husbands-death> [<https://perma.cc/UEX8-ER9V>].

9. *Id.*

10. *Id.*

11. *Id.*

12. See *id.*; Marresa Burke, *80-year-old Woman Sentenced 8 to 10 Years for Husband’s Murder*, WMBF NEWS (July 14, 2021, 9:31 PM), <https://www.wmbfnews.com/2021/07/15/80-year-old-woman-sentenced-8-10-years-husbands-murder> [<https://perma.cc/RWE3-ZPEV>].

13. See Burke, *supra* note 12 (quoting the judge as recognizing Langdon’s status as a battered woman but stating, “The bottom line, you killed a man in cold blood.”).

the competing arguments presented in Part IV while highlighting the specific cases making up the split and their reasoning. Finally, Part VI looks forward to the benefits for both battered women and society at large if the circuit split is resolved in favor of admitting BWS expert testimony.

## II. BACKGROUND

### A. DEFINING DURESS

Duress is a common law defense that excuses criminal conduct only if the accused was “unlawfully threatened by another person with death or serious bodily injury.”<sup>14</sup> To establish duress, one must prove: (1) “an immediate threat of serious bodily injury,” (2) “a well-grounded belief that the threat will be carried out,” and (3) “no reasonable opportunity to escape or otherwise frustrate the threat.”<sup>15</sup> Coercion is the key element that dictates whether the defense will excuse a crime.<sup>16</sup> The rationale of the duress defense is that, although the defendant has committed a crime, “it is justified because by doing so she has ‘avoided a harm of greater magnitude.’”<sup>17</sup> Under this defense, the defendant’s only burden is “to produce sufficient evidence to support a finding of duress.”<sup>18</sup> Once such evidence has been produced, the burden shifts and the government must prove “beyond a reasonable doubt that the defendant’s actions were not the product of coercion or duress.”<sup>19</sup> It must be noted that this Comment occasionally touches upon self-defense instead of duress, as the two are virtually identical in the context of determining whether expert testimony regarding BWS should be admissible.<sup>20</sup> The differences reside in the circumstances in which they apply,<sup>21</sup> which is not relevant to the focus of this Comment; thus, self-defense and duress can be used interchangeably here.

### B. DEFINING BATTERED WOMAN SYNDROME

A battered woman is one “who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.”<sup>22</sup> BWS is not a separate affirmative defense from self-defense or duress but rather a psychological term coined to “rationalize behavior that would otherwise be difficult for jurors to understand.”<sup>23</sup>

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14. L.I. Reiser, Annotation, *Coercion, Compulsion, or Duress as a Defense to Criminal Prosecution*, 40 A.L.R.2d 908 (1955) (quoting *United States v. Vazquez*, 724 F.3d 15, 27 (1st Cir. 2013)).

15. *Id.* (quoting *United States v. Bravo*, 489 F.3d 1, 10 (1st Cir. 2007)).

16. Blake, *supra* note 4, at 80.

17. *Id.* at 78 (quoting WIS. STAT. ANN. § 939.46(1) (1993)).

18. *United States v. Marengi*, 893 F.Supp. 85, 92 (D. Me. 1995).

19. *Id.*

20. See Blake, *supra* note 4, at 79.

21. *Id.*

22. WALKER, *supra* note 5, at xv.

23. Lauren Champaign, *Battered Woman Syndrome*, 11 GEO. J. GENDER & L. 59, 60 (2010).

A woman is beaten every eighteen seconds in the United States.<sup>24</sup> Although more than 1,400 women die at the hands of their partners every year, this pattern of violence against women has occurred since the beginning of human society.<sup>25</sup> In 1824, the Mississippi Supreme Court was the first court to declare “moderate wife beating” permissible.<sup>26</sup> It took nearly fifty years before this ruling was challenged—in *Fulgham v. State*, the Alabama Supreme Court held that “the wife is entitled to the same protection of the law that the husband can invoke for himself.”<sup>27</sup> Throughout history and continuing into the modern day, interspousal violence has continued to be prominent with far-reaching effects.

In the late 1970s, Dr. Lenore Walker intricately studied the issue of spousal abuse, finding that many women were in prison for killing their abusers.<sup>28</sup> These battered women’s reasons for killing stemmed from the “psychological and emotional disabilities women suffer from being physically and emotionally abused over a period of time.”<sup>29</sup> This abuse rendered women so helpless, they truly believed their only option was to kill their abuser.<sup>30</sup>

Through her dedicated research, Dr. Walker unearthed a three-phase pattern of violence correlated to battered woman syndrome: (1) a period of tension building, (2) an acute battering incident, and (3) a period of loving-contrition or absence of tension.<sup>31</sup> The “tension-building stage” is comprised of “minor battering incidents” and verbal altercations, and plants the seed of fear in the woman, causing her to act submissive in an effort to avoid harsher violence.<sup>32</sup> As both the battered woman and batterer “sense the escalating tension,” it becomes more difficult to stave off the violence.<sup>33</sup> The next phase—the “acute battering incident”—is triggered when the tension becomes intolerable and the batterer discharges his uncontrollable rage.<sup>34</sup> This phase is characterized by a lack of both control and predictability, which incites major destructiveness.<sup>35</sup> Phase three, the honeymoon phase, is replete with cries for forgiveness, manifestations of love, and promises from the abuser that he will never hit her again.<sup>36</sup> However, it is only a matter of time until his contrition fades and the tension is renewed.<sup>37</sup> At this point, the woman has been so psycholog-

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24. Moore, *supra* note 3, at 304.

25. *Id.*

26. *Id.* at 305 (citing *Bradley v. State*, 1 Miss. 156, 157–58 (Miss. 1824)).

27. *Id.* (quoting *Fulgham v. State*, 46 Ala. 143, 147 (1871)).

28. *Id.* at 307 (citing WALKER, *supra* note 5).

29. *Id.*

30. *Id.*

31. WALKER, *supra* note 5, at 55.

32. *Id.* at 56–58.

33. *Id.* at 59.

34. *Id.* at 59–60.

35. *Id.* at 59–61.

36. *Id.* at 65–66.

37. *Id.* at 69 (“Most women report that before they know it, the calm, loving behavior gives way to little battering incidents again. The phase-one tension building recurs, a new cycle of battering begins.”).

ically altered by the abuse that she does not leave the “symbiotic” relationship, clinging to his promises of reformation and essentially becoming “an accomplice to her own battering.”<sup>38</sup> This cycle must occur twice to classify a woman as battered.<sup>39</sup>

This cycle of violence lends itself to the theory of “learned helplessness,” also developed by Dr. Walker, which sheds light on the victimization process of the battered woman.<sup>40</sup> The repetitive beatings diminish her motivation to respond, leaving her with a precarious emotional state and the perception that her actions cannot affect any positive outcome.<sup>41</sup> This theory is comprised of three basic elements: “information about what will happen; thinking or cognitive representation about what will happen . . . ; and behavior toward what does happen.”<sup>42</sup> In her studies, Dr. Walker determined seven factors that predict the development of learned helplessness in an adult abusive relationship:

- (1) violence occurring in a pattern which included escalation over time and the cycle of violence, (2) sexual abuse within the context of the relationship, (3) power and control variables such as the batterers’ intrusiveness, over-possessiveness, isolation, and jealousy, (4) threats to kill the woman and/or others, (5) psychological torture including inducing debility through waking her during the middle of the night or not letting her sleep by forcing her to listen to long harangues, verbal degradation, humiliation and put-downs, monopolization of her perceptions and isolation, attempts at mind control, and occasional indulgences, (6) violence correlates such as abuse against other people, abuse against children, abuse against pets and violence against objects, and (7) abuse of alcohol and drugs.<sup>43</sup>

Accordingly, the more women are exposed to behaviors such as these, the more the theory of learned helplessness is reinforced and harder to break. Under this theory, the cycle of violence is well underway when the woman becomes susceptible to learned helplessness. By that time, she is already deep within her abusive partner’s controlling grasp.<sup>44</sup>

### C. THE HISTORICAL EVOLUTION OF BATTERED WOMAN SYNDROME IN THE LEGAL SYSTEM

The use of BWS to support a duress defense developed fairly recently, but the idea that women may be excused due to male coercion ties back

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38. *Id.* at 68–69. (“The couple who love in such a violent relationship become a symbiotic pair—each so dependent on the other that when one attempts to leave, both lives become drastically affected.”).

39. *Id.* at xv.

40. *See id.* at 47.

41. *Id.* at 49–50.

42. *Id.* at 47.

43. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L., ETHICS & PUB. POL’Y 321, 331 (1992).

44. *See generally* WALKER, *supra* note 5, at 47–48.

to the eighth century.<sup>45</sup> This common law notion labeled “‘marital coercion’ granted married women a complete defense to all but a few very serious crimes if the wife acted at the ‘command’ of her husband.”<sup>46</sup> This differed from duress, as “only a command or request by a husband to his unwilling wife” was required, rather than actual coercion.<sup>47</sup> Although this doctrine was abolished, it laid the groundwork for the idea of BWS contributing to a duress defense.<sup>48</sup>

BWS has continued to develop and evolve in the legal system, becoming more and more relevant. It is relevant to intimate partner violence cases for three purposes:

- (1) to support a defendant’s credibility by assisting the jury in objectively analyzing the defendant’s claim of self-defense by dispelling many of the commonly held misconceptions about battered women;
- (2) to prove the defendant honestly believed she needed to defend against imminent death or great bodily injury; and
- (3) to show the reasonableness of the behavior.<sup>49</sup>

The evolution of this syndrome in the legal world remains pertinent as the admissibility of expert testimony in the BWS context has been debated—this will be fully explained in Part IV below.

### III. PSYCHOLOGICAL IMPACT

#### A. INSIDE THE MIND OF A BATTERED WOMAN

Without understanding the true psychological implications of BWS, it might be difficult to understand why evidence of the syndrome should be admitted to allow a woman who kills her partner to potentially walk free. It is easy to understand the kind of violence that results in physical injury; the confusion occurs when the “violence produces less acute and less visible results.”<sup>50</sup> It is vital to understand the psychological impact of constant battering on a woman and the implications that follow. From the perspective of those who have not been abused by their partner, the actions of these battered women may seem strange.<sup>51</sup> These women “may stay with their abusers for long periods of time while hiding the abuse, they may file complaints and then recant,” or they may change their previous testimony when testifying at trial.<sup>52</sup> It is inaccurate to label these women as merely submissive or weak because this ignores the emotional

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45. Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO STATE L.J. 665, 696 (1995).

46. *Id.* (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1021–22 (3d ed. 1982)).

47. *Id.*

48. *See id.* at 696–97.

49. Jessica Savage, *Battered Woman Syndrome*, 7 GEO. J. GENDER & L. 761, 763 (2006).

50. WALKER, *supra* note 5, at 71.

51. *See* Champaign, *supra* note 22, at 59.

52. *Id.*



complexities that form inside these abusive relationships.<sup>53</sup> A battered woman has been so subjected to abuse—mental, physical, and emotional—that she has lost her logical reasoning and ability to make sound decisions. She is a victim of the most extreme form of manipulation.

One question commonly asked by those outside an abusive relationship is, “Why didn’t she leave?”<sup>54</sup> There is no one answer, but many factors make leaving an abusive relationship exceedingly difficult.<sup>55</sup> Economic factors are at play, as a battered woman is usually reliant on her abusive partner for money—the control he exerts over her does not allow her to keep anything for herself.<sup>56</sup> Lacking “money, transportation, shelter, child care, and a source of income,” a woman has no plausible option to leave without dire consequences resulting.<sup>57</sup> Women may also be kept from terminating abusive relationships due to “separation abuse”: retaliation suffered for her effort to end the relationship.<sup>58</sup> Not only is her own safety at stake, so is the safety of her family members and close friends; “when the batterer is unable to attain access to the battered woman, he may turn to other important people in her life.”<sup>59</sup> A battered woman’s main fear may stem from the possibility that her children may be taken from her.<sup>60</sup> Oddly enough, “batterers seek custody at higher rates and are awarded custody no less often than nonbatterers.”<sup>61</sup> Additionally, emotional attachment plays a role in a battered woman’s reluctance to leave.<sup>62</sup> Despite all the violence, some battered women hope the abuse will end.<sup>63</sup> They cling to their partner’s admissions during the honeymoon phase, believing his concessions that he will seek professional help and never hurt her again.<sup>64</sup> Lastly, she may be emotionally attached through the concept of traumatic bonding: a battered woman comes to see her batterer as “all-powerful, on the one hand, and to believe that she cannot survive without him, on the other.”<sup>65</sup>

The psyche of a battered woman is multifaceted and complex, comprised of feelings of anxiety, self-blame, embarrassment, loneliness, and “above all, fear that . . . leaves them prey to a psychological paralysis,” thwarting their possibility of escape to freedom.<sup>66</sup>

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53. *See id.* at 60.

54. *E.g.*, Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1226 (1993).

55. U.S. DEP’T OF JUST., NCJ 160972, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 14 (1996).

56. *See id.*

57. *Id.*

58. *Id.* (citing Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 1–94 (1991)).

59. *Id.*

60. *See id.*

61. *Id.* at 14–15.

62. *Id.* at 15.

63. *Id.*

64. *Id.*

65. *Id.*

66. *State v. Kelly*, 478 A.2d 364, 373 (N.J. 1984).

## B. UNDERSTANDING THE ELEMENTS OF DURESS

Some key terms must be defined to thoroughly explain the duress defense as applied to a battered woman: reasonable perception, imminent danger, and reasonable force. First, many states consider a reasonable person's perception of danger when evaluating whether the battered woman's perception was reasonable.<sup>67</sup> However, it is quite difficult for a battered woman's perception to be seen as reasonable by a person not in her shoes, even when her perspective is considered subjectively.<sup>68</sup> The crux of BWS is the lack of a reasonable standard, as there is "no one typical way for them to act."<sup>69</sup> "Rather, each woman's thinking, feeling, and acting must be explained in the context of her life," coupled with the way the battering has specifically altered her mental state.<sup>70</sup> Although a reasonable person is not likely to fear for her life during a verbal confrontation, a woman who has suffered continuous beating and belittling will likely fear severe bodily injury or even death.<sup>71</sup>

Next, psychology attempts to transcend the mind of a battered woman through the standard of imminent danger.<sup>72</sup> Most states define "imminent" as "being on the brink of or about to happen," as compared to immediate.<sup>73</sup> This is a crucial distinction, as women subject to abuse are "hypervigilant to cues of impending danger" and, more often than not, are able to perceive violence earlier than the average woman.<sup>74</sup> This hypervigilance can cause battered women to strike preemptively, which either gets them into legal trouble or aggravates their assaulter, escalating the violence.<sup>75</sup> A prime example of a battered woman's perception of imminence concerns a woman whose violent, abusive husband told her he would kill her while she slept.<sup>76</sup> She ultimately stabbed her husband, believing her own death was imminent and thus physical force was necessary to protect herself.<sup>77</sup> Additionally, it is critical to understand that "most batterers stalk and find their woman when she tries to leave," rendering escape impossible.<sup>78</sup> Because of this reality, a battered woman is likely to see her only chance of escape as killing her batterer—the possibility of safety for the woman is nil while her abuser is alive.

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67. Walker, *supra* note 43, at 323.

68. *See id.*

69. *Id.* at 324.

70. *Id.*

71. *United States v. Dingwall*, 6 F.4th 744, 754 (7th Cir. 2021); Stephanie M. Wildman & Dolores A. Donovan, *Is the Reasonable Man Obsolete?: A Critical Perspective on Self-Defense and Provocation*, 14 *LOY. L.A. L. REV.* 435, 445–46 (1981) ("[A] woman who has been repeatedly beaten and once choked into unconsciousness by her husband is likely to fear death or great bodily injury when he advances towards her during a quarrel.").

72. *See* Walker, *supra* note 43, at 324.

73. *Id.*

74. *Id.*

75. *Id.*

76. Shreyas Gupta, *The Right to Kill: The Case of the Battered Women*, 3 *NIRMA U. L.J.* 59, 63 (2014).

77. *Id.*

78. Walker, *supra* note 43, at 325.

Lastly, defining what constitutes reasonable or equal force is important to understanding the psychological standard of a battered woman. Without existing in an abusive situation, it is difficult to comprehend how a woman can be scared of a sleeping or unarmed man and feel that fatal physical retaliation is necessary to protect herself.<sup>79</sup> A battered woman has been trained to know that a “certain look in his eyes, a certain litany of words, a certain pattern of pushes, shoves, and slaps means that worse is yet to come.”<sup>80</sup> Thus, for a battered woman, the use of deadly force might be necessary after merely receiving a glance from her partner, while the same would likely not be warranted for a woman who has not been incident to previous battering experiences.<sup>81</sup> Exerting lethal force is reasonable for a battered woman in the sense that if she does not exert this force on him first, he will likely exert the same, or worse, against her.

### C. THE LOSS OF INDIVIDUAL AUTONOMY

Based on these explanations, it is not surprising to learn that BWS is a sub-category of Post-Traumatic Stress Disorder (PTSD), falling under the umbrella category of mental disorders.<sup>82</sup> PTSD is defined as “a collection of thoughts, feelings, and actions that logically follow a frightening experience that one expects could be repeated.”<sup>83</sup> To accurately determine whether a person subjected to trauma has developed PTSD, three symptomatic categories are evaluated: (1) “cognitive disturbances,” (2) “high arousal symptoms,” and (3) “high avoidance symptoms.”<sup>84</sup> Cognitive disturbances stem from “repetitive, intrusive memories,” which are distorted in a victim’s memory by neurochemical changes in brain pathways.<sup>85</sup> Battered women are likely to confuse previous abuse experiences with their current situation, which “cause[s] them to reexperience fragments of previous abusive incidents[,] increasing their perception of danger.”<sup>86</sup> The second category, high arousal symptoms, constitutes a woman’s readiness to retaliate based on her hyperawareness of any potential danger and signal of an impending attack.<sup>87</sup> Lastly, the battered woman uses avoidance techniques, such as repression, minimization, and denial, to avoid thoughts of her dangerous situation.<sup>88</sup> The key here is that these methods result in the woman’s isolation “as the batterer exerts his power and control needs over her.”<sup>89</sup> Isolation increases the danger of her situation, as she loses any relationships she once had with others who could poten-

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79. *Id.*

80. *Id.* at 326.

81. *See id.*

82. *Id.* at 327.

83. *Id.*

84. *Id.*

85. *Id.* (citing Bessel A. van der Kolk, *The Psychological Consequences of Overwhelming Life Experiences*, in *PSYCHOLOGICAL TRAUMA* 1–30 (1987)).

86. *Id.* at 327–28.

87. *Id.* at 328.

88. *Id.*

89. *Id.*

tially help her.<sup>90</sup> With her batterer as her sole relationship, the abuse becomes normalized, and the woman loses any sense of a life outside her battering situation.<sup>91</sup>

Criminal law recognizes that an accused should not be convicted if the crime was conducted in the absence of free will.<sup>92</sup> The psychological injury of battering “can constructively be defined as an extreme and extended (in time) impairment of one’s psychological functioning, that invariably diminishes . . . the physical existence of an individual.”<sup>93</sup> A person’s physical existence is a separate camp from a person’s psychological existence and must be treated as such.<sup>94</sup> For a woman subjected to constant battering and abuse, her psychological soundness and integrity as an individual are so damaged and diminished that “the capacity to function autonomously is completely impaired.”<sup>95</sup> She is no longer an individual with the basic human capacity to make decisions for herself; rather, she is essentially imprisoned in the hands of her batterer.

#### IV. ADMISSIBILITY OF EXPERT EVIDENCE

##### A. THE STANDARD OF ADMISSIBILITY

Courts have long been presented with questions about whether expert testimony should be admitted, whether it is relevant, and whether it satisfies evidentiary standards.<sup>96</sup> Historically, courts applied one of two tests to determine whether evidence is admissible: the relevancy test or the Frye test.<sup>97</sup> The relevancy test asks whether “the proffered evidence will assist the jury in evaluating the facts,” relying on the discretion of the trial judge to make that determination.<sup>98</sup> In the Frye test, otherwise known as the general acceptance test, a relevant principle is admitted only once it is generally accepted in the field of study to which it belongs.<sup>99</sup> Although neither test is controlling, the decisional factor of admissibility is “whether the evidence helps the jury to understand the facts at issue and whether the researcher correctly employed a valid methodology.”<sup>100</sup> Requirements regarding the sufficiency of the witness, the sufficiency of the testimony, and the reasonableness of the evidence must be met, although the exact standards for each differ from state to state.<sup>101</sup>

Aside from formal admissibility standards, expert testimony may still be excluded “if its probative value is substantially outweighed by its prej-

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90. *See id.*

91. *See id.*

92. Gupta, *supra* note 76, at 64.

93. *Id.* at 66.

94. *See id.* at 66–67.

95. *Id.*

96. *See* Moore, *supra* note 3, at 314.

97. *Id.* at 315.

98. *Id.*

99. *Id.* at 315–16.

100. *Id.* at 317.

101. *See* De Carmine, *supra* note 5, at 91–93.

udicial effect.”<sup>102</sup> To be admissible in support of a duress defense, expert evidence on BWS must also be relevant.<sup>103</sup> The way the evidence is presented can have a significant effect on the outcome of the case—myths about battered women might run rampant and can ultimately control the thinking of the jury.<sup>104</sup> It is a slippery slope, yet an extremely important one, as a woman’s freedom is at stake. Without the admission of expert testimony, a system of “self-perpetuating erosion of justice only serves to further victimize battered women.”<sup>105</sup>

#### B. WHY EXPERT EVIDENCE SHOULD BE ADMISSIBLE

Commonly, as the violence in a situation escalates, the probability increases that a battered woman will either be killed by her violent partner or will take action and kill him first.<sup>106</sup> Based on the difficulty of successfully pleading self-defense in this instance, expert testimony helps the jury assess such a situation.<sup>107</sup> The power an expert witness can have on a jury is unmatched. The expert has the “power ‘to draw inferences from the facts that a jury would not be competent to draw.’”<sup>108</sup>

Unsurprisingly, studies have shown that the presentation of battering evidence has a profound effect on the jury in favor of the battered defendant.<sup>109</sup> This evidence “disavows jurors . . . of their skepticism that abused women feel imminent fear as a result of their battering relationship.”<sup>110</sup> The introduction of expert testimony helps jurors understand why women turn to violence as opposed to leaving their batterer or seeking help.<sup>111</sup> Expert testimony on BWS furthers the general goal of expert testimony twofold: “First, the expert explains what BWS is and its effects. . . . Second, the expert explains how few options a battered woman has in today’s society.”<sup>112</sup> As explained in Part III, many factors play into a battered woman’s decision not to terminate the abusive relationship, leaving her stranded at the mercy of a violent abuser with nowhere to turn.

As the question of admissibility has been hotly debated for decades, a few highly pertinent cases stand out. In both *Ibn-Tamas v. United*

102. Moore, *supra* note 3, at 321.

103. See *United States v. Nwoye*, 824 F.3d 1129, 1135–36 (D.C. Cir. 2016).

104. See Moore, *supra* note 3, at 321–22.

105. Blake, *supra* note 4, at 69.

106. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AMER. J. PUB. HEALTH 1089, 1089 (2003) (“The majority (67%–80%) of intimate partner homicides involve physical abuse of the female by the male before the murder, regardless of which partner is killed.”).

107. See De Carmine, *supra* note 5, at 90–92.

108. *Id.* at 91 (quoting C. MCCORMICK, MCCORMICK ON EVIDENCE § 13 (Edward W. Cleary ed., 3d ed. 1984)).

109. See Colin P. Holloway & Richard L. Wiener, *Abuse History and Culpability Judgments: Implications for Battered Spouse Syndrome*, 24 PSYCH. PUB. POL’Y & L. 279, 281 (2018).

110. *Id.*

111. *Id.*

112. Blake, *supra* note 4, at 73.

*States*<sup>113</sup> and *State v. Anaya*,<sup>114</sup> the court recognized the importance of allowing expert testimony to respond to the prosecution using “standard ‘why- didn’t-she-leave-him?’ tactics.”<sup>115</sup> This inquiry not only disavows the woman’s credibility, but also calls her very lifestyle into question.<sup>116</sup> A thorough explanation of BWS can purport to explain the complicated circumstances a battered woman faces, circumstances typically outside the realm of knowledge of an average juror.<sup>117</sup> Both the circumstances at trial and at the time of the killing must be taken into consideration.<sup>118</sup> Testimony regarding the syndrome can “help a jury see that a battered woman’s perceptions, while sensitive to her mate’s moods, are entirely reasonable for a person in her situation.”<sup>119</sup> In *State v. Kelly*,<sup>120</sup> the court acknowledged that expert testimony is essential to rebut myths about battered women, regardless of the tactic used by the prosecution.<sup>121</sup> The expert testimony directly refuted the most popular myth of the era: that such battered women “are masochistic and enjoy the abuse they receive.”<sup>122</sup> This decision was a major win for advocates of BWS, as the court held that evidence of BWS is highly relevant in any situation.<sup>123</sup> Additionally, in *People v. Torres*,<sup>124</sup> the New York State Supreme Court held that the theory of BWS had survived the experimental state and had “gained sufficient scientific acceptance to warrant admission.”<sup>125</sup> Testimony on BWS constitutes a valuable aid to a battered woman’s case and should be admitted when it is used to “bolster a battered woman’s credibility, to dispel common myths” surrounding the battered woman’s situation, and to impart a more complete understanding on the jury.<sup>126</sup> Thus, it should be admitted at all times.

One interesting argument put forth is that the admissibility of expert testimony should promote social change.<sup>127</sup> The current standard of allowing this evidence is rather narrow and excludes many women who fall into the category of battered but cannot meet the standard of admissibility.<sup>128</sup> To expand the construct of the syndrome overall would help women worldwide, turning society away from the stigma of battered women

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113. *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

114. *State v. Anaya*, 438 A.2d 892 (Me. 1981).

115. De Carmine, *supra* note 5, at 99 (first citing *Ibn-Tamas*, 407 A.2d at 639, and then citing *Anaya*, 438 A.2d at 894).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 101.

120. *State v. Kelly*, 478 A.2d 364 (N.J. 1984).

121. De Carmine, *supra* note 5, at 101 (citing *Kelly*, 478 A.2d at 375–78).

122. *Kelly*, 478 A.2d at 373.

123. De Carmine, *supra* note 5, at 101–02 (citing *Kelly*, 478 A.2d at 376–78).

124. *People v. Torres*, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985).

125. De Carmine, *supra* note 5, at 103 (citing *Torres*, 488 N.Y.S.2d at 363).

126. *Id.*

127. See generally Kathleen J. Ferraro, *The Words Change, But the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women*, 9 VIOLENCE AGAINST WOMEN 110, 126–27 (2003).

128. *Id.* at 111.

as helpless; the definition of feminism promoted by the syndrome “not only excludes assertive, outgoing, strong, competent women, it also reinforces a notion of female sexual passivity.”<sup>129</sup> It is imperative that social action is evaluated by its larger effect on social relations and issues and not just the smaller immediate result.<sup>130</sup> Allowing expert evidence could bring awareness and understanding to those lucky enough not to be privy to the intimacies of BWS. In sum, “[a]cademic and advocacy work to change perceptions of the effects of battering must occur in tandem with efforts to transform the social, cultural, and economic processes that support the rampant violence against women.”<sup>131</sup>

### C. OVERCOMING CRITICISM: THE OPPOSITION TO ADMISSION OF EXPERT EVIDENCE

There is overwhelming criticism of the admission of evidence of BWS for many different reasons. Although many of these critics simply do not understand the syndrome and its effects, there are also critics—particularly female critics—who believe the presence of the syndrome plays too large a role in gender norming and effectively subordinates women as a class in society.

One critique argues that the admission of BWS evidence actually works against the goals of expert testimony.<sup>132</sup> In 1996, a report by the U.S. Department of Justice, U.S. Department of Health and Human Services, National Institute of Justice, and the National Institute of Mental Health expressed that BWS is “inadequate at capturing the complexity of the nature and dynamics of domestic violence.”<sup>133</sup> Rather than providing a reasonable explanation for a battered woman’s actions, expert testimony may “persuade jurors to interpret the woman’s actions within the context of her ‘psychological (dys)functioning.’”<sup>134</sup> Studies have shown that evidence concerning BWS comports with the notion that the battered woman has diminished capacity.<sup>135</sup> Additionally, categorizing BWS as a subheading under PTSD has led jurors to perceive the woman as “‘more mentally unstable’ and ‘out of her mind’ at the time of the killing.”<sup>136</sup>

The majority of these findings arose from simulated trials with a mock

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129. *Id.* at 120.

130. *Id.* at 124.

131. *Id.* at 127.

132. See Cheryl A. Terrance, Karyn M. Plumm & Katlin J. Rhyner, *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 923 (2012).

133. *Id.* at 941.

134. *Id.* at 942 (citing Julie Stubbs, *The (Un)Reasonable Battered Woman? A Response to Eastreal*, in 3 CURRENT ISSUES IN CRIM. JUST. 359, 360 (1992)).

135. *Id.*

136. *Id.* at 943 (quoting Cheryl Terrance & Kimberly Matheson, *Undermining Reasonableness: Expert Testimony in a Case Involving a Battered Woman Who Kills*, 27 PSYCH. WOMEN Q. 37, 43 (2003)).

jury.<sup>137</sup> Although this does not completely discount the findings, it is difficult to use these results as hard and fast facts. Additionally, even if accurate in some respects, this particular critique can be extinguished by the sheer number of successful cases in which evidence of BWS has helped battered women and allowed them their freedom.

Another critique offered is that the use of the syndrome actually hurts a woman's asserted defense and decreases her credibility.<sup>138</sup> Proponents of this view seek to explain that the elements that comprise the syndrome are similar to disorders experienced by the general population and thus do not set the battered woman aside as deserving of special treatment.<sup>139</sup> In this situation, a "nonpathognomonic [BWS] might provide less support for the probability that this particular defendant's suffering is attributable to battering rather than to some alternative etiology" such as depression or anxiety.<sup>140</sup>

This idea can be disputed by the introduction of expert testimony.<sup>141</sup> Jurors who are unaccustomed to the prolonged abuse and extremely violent situations a battered woman is subject to might discredit her account as unbelievable or far-fetched.<sup>142</sup> The inclusion of outside evidence can provide support for the woman's testimony by enabling the jurors to understand why this woman behaved the way she did.<sup>143</sup> An expert's explanation of "learned helplessness supports the credibility of these [battered women] defendants by rendering plausible their testimony."<sup>144</sup>

There are two types of affirmative defenses one can put forth when accused of a crime in the United States: justification defenses and excuse defenses.<sup>145</sup> Plainly put, "a justification defense 'is one in which the defendant claims she did the right thing or took the most appropriate action under the circumstances,' while an excuse defense focuses 'on the individual defendant and whether [s]he is blameworthy or culpable.'"<sup>146</sup> A justification defense is seen as more acceptable, hence the defendant was *justified* in her actions. Critiques of BWS state that it gives "an excuse where there ought not be one."<sup>147</sup> The rebuttal to this stems from the basic idea of the syndrome itself: a woman suffering from the syndrome who hurts her partner was *justified* in doing so. The psychological effects

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137. *See id.* at 942.

138. *See* Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 89 (1994).

139. *Id.*

140. *Id.*

141. *See id.* at 52.

142. *See id.* at 52–53.

143. *See id.*

144. *Id.* at 53.

145. Abigail Finkelman, *Kill or Be Killed: Why New York's Justification Defense Is Not Enough for the Reasonable Battered Woman, and How to Fix It*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 267, 283 (2019).

146. *Id.* (quoting CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 588–89 (West, 2d ed. 2009)).

147. *Id.* at 284 (citing feminist critiques of BWS).



felt by a battered woman do not excuse her criminal behavior; rather, they justify her actions because she fears for her life.

Another critique of BWS and admission of its evidence arose in the Ohio Supreme Court case *State v. Goff*.<sup>148</sup> The court addressed three relevant issues: the appropriateness of psychiatric testimony on battered woman syndrome, whether a defendant raising this syndrome as a defense could be subjected to a state psychiatric evaluation, and whether the expert could testify regarding inconsistencies in the defendant's testimony.<sup>149</sup> The concern lies with the third issue under which the state's expert is limited to testifying only about the characteristics of BWS and whether the defendant was suffering from the syndrome.<sup>150</sup> As a result, "when an expert is unable to form an opinion with reasonable medical certainty because of inconsistencies in reporting and collateral evidence, the expert is not allowed to testify."<sup>151</sup> One can level the critique that this results in an unfair trial as the defendant's expert was allowed to testify while the state's expert was not. However, if this limitation were not made by allowing the state's expert to testify while inconsistencies are pending, the expert would essentially become another cross-examiner, resulting in an unfair trial.<sup>152</sup> Thus, the limitation on state experts is not only reasonable but necessary.

Marina Angel takes a strong stand against the admission of expert testimony, purporting that it does nothing to help the case of a battered woman.<sup>153</sup> Rather, the law must "expand its vision to allow evidence of a long-term history of abuse and . . . evidence of the abuser's prior bad acts."<sup>154</sup> She emphasizes that this expansion would allow both jurors and society to understand that the women in these situations acted reasonably.<sup>155</sup> Rather than focusing on the immediacy right before an attack, reviewing a longer period of time would allow jurors a better visual of the women's lives and grant context to their actions.<sup>156</sup> Angel's theory has potential for success, yet it seems to gain more ground if coupled with expert testimony. Expert testimony lends support and credibility to a defendant, while a lengthened time period to assess abuse provides insight to jurors. Both are potentially powerful tools for a battered woman, especially when used in combination.

Additionally, it has been argued that the presence of battering does not negate the *mens rea* of an offense.<sup>157</sup> Although battered offenders may be

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148. *State v. Goff*, 942 N.E.2d 1075 (Ohio 2010).

149. Susan Kimmel & Susan Hatters Friedman, *Limitations of Expert Testimony on Battered Woman Syndrome*, 39 J. AM. ACAD. PSYCHIATRY & L. 585, 585.

150. *Id.* at 586.

151. *Id.*

152. *Id.* at 586–87.

153. See Marina Angel, *The Myth of Battered Woman Syndrome*, 24 TEMP. POL. & C.R. L. REV. 301, 307 (2015).

154. *Id.*

155. *Id.*

156. *Id.*

157. See Dore, *supra* note 45, at 740.

forced to make exceedingly difficult and limited choices, they “possess free will, know they are committing a crime, and act voluntarily.”<sup>158</sup> This statement is simply wrong. As explained in Part III above, a woman truly suffering from BWS has lost her free will—her actions are not her own. Under a duress defense, a battered woman is a victim of the most extreme version of coercion and must harm her partner as the only means available to save herself.<sup>159</sup>

As shown, there are many objections and oppositions to the admission of expert testimony on BWS and to the syndrome generally. Along with those set out above are countless others: the perpetuation of a male bias, that there should not be an available defense to someone who kills, moral critiques, and more.<sup>160</sup> A goal of this Comment is not only to refute these arguments but to allow the reader to come to the same conclusion based on the stated legal arguments.

## V. THE CURRENT CIRCUIT SPLIT

### A. *UNITED STATES V. DINGWALL*

There is currently a split in the federal circuit courts regarding whether the immediate physical presence of a threat is always essential to a duress defense and whether expert evidence of battering and its effects may be permitted to support a duress defense. In the case of *United States v. Dingwall*, the Seventh Circuit wholeheartedly joined the Ninth Circuit, District of Columbia, and Sixth Circuit, concluding that the immediate presence of a threat is not always essential and that expert evidence may be permissible to support a duress defense.<sup>161</sup>

In this case, defendant Marjory Dingwall met her partner, Aaron Stanley, at a treatment center for alcohol abuse.<sup>162</sup> After Dingwall and her daughter moved in with Stanley, he began to use crack cocaine, becoming both physically and emotionally abusive.<sup>163</sup> His beatings ranged from “hitting and strangling, to dragging Dingwall down the stairs, breaking her nose, and boxing her ear.”<sup>164</sup> His behavior began to follow the normal pattern of an abusive partner: extreme beating followed by a profuse apology, and then the cycle would repeat.<sup>165</sup> Stanley’s violence began to escalate after he bought a gun; he once shot it into the mattress where she

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158. *Id.* at 741.

159. See Gupta, *supra* note 76, at 63–64.

160. See, e.g., Meredith C. Doyle, Gender Inequality in the Law: Deficiencies of Battered Woman Syndrome and a New Solution to Closing the Gender Gap in Self-Defense Law 4 (April 25, 2011) (Senior thesis, Claremont McKenna College) (on file online with Scholarship@Claremont) (noting that BWS testimony “increases gender stereotypes in the law”); Finkelman, *supra* note 145 at 284 & n.91 (noting that many courts are reluctant to find preemptive killing an act of self-defense and citing various feminist critiques).

161. *United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021).

162. *Id.* at 747.

163. *Id.* at 748.

164. *Id.*

165. *Id.*

was sleeping, he often threatened her with it, and on one occasion, he “literally pistol-whipped her.”<sup>166</sup> Soon after, Stanley began robbing stores for drug money, and he accused Dingwall of owing him money.<sup>167</sup> On January 6, 2019, Stanley drove Dingwall to a gas station, “said it was her ‘turn,’ and put his gun in her hand.”<sup>168</sup> Dingwall’s compliance earned her a night of reprieve from the violence, yet it was short-lived, as he demanded more money from her the next day.<sup>169</sup> Subsequently, Dingwall robbed two more gas stations without Stanley present.<sup>170</sup> The day after her third robbery, Stanley strangled her and punched her in the face, despite her pleas for him to stop.<sup>171</sup> A few days later, Dingwall was arrested for robbery.<sup>172</sup>

The defense of duress “may excuse conduct that would otherwise be punishable.”<sup>173</sup> To successfully plead a duress defense, the defendant must prove: (1) she reasonably feared immediate and serious harm unless she committed the offense, and (2) “there was no reasonable opportunity to refuse to commit the offense and to avoid the threatened injury.”<sup>174</sup> Since reasonableness is the touchstone of the duress defense, expert testimony regarding battering and its effects may “give a lay jury useful insights about the situation in which a person of reasonable firmness finds herself.”<sup>175</sup>

In this case, expert Dr. Darald Hanusa evaluated Dingwall for a full day, diagnosing her with both PTSD and BWS as “a victim of what he described as ‘an extraordinarily extreme case of relationship abuse.’”<sup>176</sup> Dr. Hanusa’s findings detailed how battering can transform a victim’s cognition and perception, resulting in a substantially diminished capacity to evaluate options.<sup>177</sup> A battered woman will take any action necessary that has the highest chance of ending the violence against her, “even if—in the long run—it is detrimental to her own wellbeing.”<sup>178</sup> Women such as Dingwall have been so subjected to abuse that it affects their beliefs and outlook on all things, possibly resulting in a skewed perception of reality, consistent with Dr. Walker’s learned helplessness theory. The battered woman cannot be compared to the standard “reasonable person.” Dr. Hanusa concluded:

Marjory has survived a relationship in which her physical and emotional character was subjected to horrific abuse [in her] physical and

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 749.

172. *Id.*

173. *Dixon v. United States*, 548 U.S. 1, 6 (2006).

174. *United States v. Jovic*, 207 F.3d 889, 892 (7th Cir. 2000).

175. *Dingwall*, 6 F.4th at 747.

176. *Id.* at 749.

177. *Id.*

178. *Id.*

psychological relationship with Aaron. Based on the data presented in this case, it is reasonable to conclude that Marjory was not in a position to question Aaron's demands to commit robbery[,] let alone act against them, even though she knew that these activities were illegal.<sup>179</sup>

The admissibility of this evidence is where the circuit split comes into play. As Stanley was not physically present for two of the three robberies and Dingwall used a gun to commit all three, her duress defense has the potential to fail due to the lack of visible immediacy. However, the admission of Dr. Hanusa's evidence might suffice to explain her situation to the jury. Although this admission does not guarantee Dingwall's success in pleading her duress defense, it allows her the opportunity for a fairer trial, as the jury would have the tools to understand why she acted the way she did. For a woman who lives in perpetual fear due to her abusive situation, there is no difference in outcome if she fails to follow her abuser's direction whether he is in close proximity or not; he will find out later. In fact, the second scenario, as depicted in *Dingwall*, may be more frightening as the foreboding question, "What will he do when he realizes I disobeyed?" hangs in the air.

#### B. COURTS IN FAVOR OF THE ADMISSION OF EVIDENCE

The Sixth Circuit has allowed the admission of expert evidence regarding BWS, holding that it "can explain why a reasonable person might resort to such actions given a history of violent abuse and imminent violent threats."<sup>180</sup> The introduction of expert evidence directly correlates to the question of subjective reasonableness—evidence of BWS can bolster the defendant's argument that her actions were in fact reasonable.<sup>181</sup> In the Sixth Circuit's decisive case, *Dando v. Yukins*, the defendant helped her armed boyfriend commit a series of robberies, some without his immediate physical presence.<sup>182</sup> The defendant's experience of abuse from her boyfriend was horrific: he violently and repeatedly beat her, so much so that she required medical attention the morning of the robberies; he continuously threatened and attempted to "sell[ ]" her; and he carried a shotgun he was not shy about brandishing.<sup>183</sup> Given this history of violent abuse and imminent vicious threats, it is understandable that she resorted to such actions. However, without the introduction of evidence regarding BWS, those listening to the events "from the relative comfort of a judge's chambers or a jury box" might not reach the same understanding.<sup>184</sup> Additionally, such evidence works to successfully rebut the prosecution's claim that the defendant should have merely left and avoided the con-

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179. *Id.* at 750.

180. *Dando v. Yukins*, 461 F.3d 791, 801 (6th Cir. 2006).

181. *Id.*

182. *Id.* at 793.

183. *Id.* at 801–02.

184. *Id.* at 801.

frontation.<sup>185</sup> As discussed previously, leaving is not an option for the battered woman trapped in the hands of her violent abuser.<sup>186</sup>

Similarly, the District of Columbia Circuit allowed the admission of expert testimony to support a defendant's duress defense for committing extortion.<sup>187</sup> Simply stated, the duress defense requires a defendant to have acted reasonably, and expert evidence may assist a jury in evaluating whether a battered woman's actions were reasonable.<sup>188</sup> Reasonableness is not to be considered in the abstract; rather, the specific circumstances comprising a situation must be taken into account.<sup>189</sup> In *United States v. Nwoye*, the victim's abuser was not physically present—in fact, he was sometimes across the country, but he constantly monitored her movements and communications electronically, even going so far as to force her to wear a Bluetooth earpiece while in class for nursing school.<sup>190</sup> The batterer also exerted complete financial control over the defendant and did not allow her to reveal the location of their home to anyone else, leaving her trapped and isolated.<sup>191</sup> Physically, the relationship between the defendant and her partner was abusive from the very beginning: he would often slap her with both his hand and his shoe, threaten to strangle and kill her, and when she initially refused to take part in the extortion, he “beat her ‘like a drum.’”<sup>192</sup>

In allowing the admission of evidence, the D.C. Circuit concluded that expert testimony on BWS was relevant to all prongs of the duress defense.<sup>193</sup> Remarks that may seem harmless to an average person might warn of imminent and severe violence when presented against a batterer's violent background, as expert testimony can demonstrate.<sup>194</sup> Additionally, such testimony can diminish confusion on why a battered woman did not take advantage of an opportunity to leave her batterer or avoid committing the crime.<sup>195</sup> It is imperative for a jury to understand the implications of a BWS relationship to determine the meaning of reasonableness, and such implications are difficult for a jury to comprehend without the presence of an expert offering insight into the battered woman's psyche.

Additionally, in *United States v. Lopez*, the Ninth Circuit unequivocally agreed with the Sixth and D.C. Circuit that expert testimony is not only admissible but vital for a battered defendant pleading duress.<sup>196</sup> The defendant and her family had been threatened by her partner, a convicted

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185. *Id.* at 802.

186. *See* U.S. DEP'T. OF JUST., *supra* note 55, at 13–15.

187. *See* *United States v. Nwoye*, 824 F.3d 1129, 1139 (D.C. Cir. 2016).

188. *Id.* at 1136.

189. *Id.* at 1137.

190. *Id.* at 1132.

191. *Id.*

192. *Id.*

193. *Id.* at 1138.

194. *Id.* at 1137.

195. *Id.* at 1139.

196. *See* *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019).

felon, on the run from the police, resulting in the defendant's purchase of a gun for him at a pawn shop.<sup>197</sup> The court emphasized the importance of expert testimony on BWS as it helps to dismiss the preconceived notions of women in abusive relationships.<sup>198</sup> Expert testimony can help explain how a woman can perceive herself as trapped and controlled by her abuser at all times, even when there is no immediate threat of violence.<sup>199</sup> Once battered women are subjected to constant abuse, they "behave like hostages and link themselves to their captors," believing that is their only means of survival.<sup>200</sup> Battered women are hypervigilant to violence and thus are able to perceive a potentially catastrophic situation before a person not susceptible to abuse.<sup>201</sup> In fact, in the case of a battered woman, it is often too late to protect herself once a threat of violence is readily apparent.<sup>202</sup> Unfortunately, the survival skill of hypervigilance comes "'at the expense of escape skills.'"<sup>203</sup> Thus, what society perceives as weakness and feebleness in these women are actually attempts to survive an abusive environment where there is no possibility for escape.

The Ninth Circuit further emphasized that "the 'snapshot' of circumstances shown to the jury is not limited to just those circumstances existing immediately prior to the commission of the crime."<sup>204</sup> The defendant's prior experiences are fully relevant when performing the assessment of reasonableness:

If the jury sees the defendant's circumstances immediately prior to commission of the crime and there is no gun held to her head or other markedly extreme duress, the jury may conclude that any fear of imminent death or violence was unreasonable. However, if the defendant is permitted to pull the camera back to provide the broader picture, so to speak, of her circumstances, the jury could learn of a pattern of violence, control, and coercion leading up to the criminal act. Expert testimony could be helpful to explain to the jury how a reasonable person reacts to repeated beatings and emotional abuse.<sup>205</sup>

Here, the defendant had been subject to physical and sexual abuse from her stepfather while growing up.<sup>206</sup> The police would often "take the report and leave," but even after the occasional arrest, the father would come back and harm the family more.<sup>207</sup> Thus, Lopez reasoned that if she called the police on her abuser, they would take no action, and

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197. *Id.* at 811.

198. *Id.* at 825.

199. *Id.* at 820 (quoting *United States v. Marengi*, 893 F.Supp 85, 95 (D. Me. 1995)).

200. *Id.* at 816.

201. *See id.* at 816–17.

202. *See Finkelman, supra* note 145, at 268.

203. *Lopez*, 913 F.3d at 817 (quoting LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 33 (1984)).

204. *Id.* at 822 (quoting *Marengi*, 893 F.Supp. at 94).

205. *Marengi*, 893 F.Supp. at 94–95 (citations omitted).

206. *Lopez*, 913 F.3d at 824.

207. *Id.*

he would carry out his threats to kill her family if he found out she reported him.<sup>208</sup> Including the expert's finding that this past trauma may have influenced the defendant's decision not to seek help would aid the jury in assessing the reasonableness of her action.

The Sixth, D.C., Ninth, and now Seventh Circuit's approach to the admission of expert testimony on battering and its effects is not only the correct approach but is also the dominant approach across state and federal courts. Courts in Iowa, Puerto Rico, Maine, Massachusetts, Delaware, and Washington have all allowed the admission of expert testimony to show how severe, ongoing abuse can affect a defendant's perceptions and alter her reactions.<sup>209</sup> The prevalence of this approach should not be understated.

### C. COURTS OPPOSING THE ADMISSION OF EVIDENCE

On the other side of the split lie the Tenth and Fifth Circuits, excluding expert testimony about BWS because it relates to the defendant's subjective mindset while "duress is determined by applying an objective lens."<sup>210</sup> In *United States v. Dixon*, the defendant committed embezzlement at her place of work for over two months by voiding out cash sales and pocketing the money at the end of her shift.<sup>211</sup> After indictment, two doctors conducted psychological examinations on the defendant and diagnosed her with PTSD and Dissociative Disorder.<sup>212</sup> Dr. Nation, a licensed counselor, sociologist, and criminologist, concluded that the defendant's mental health issues resulted from her history of sexual abuse and, as she felt she had no alternative to embezzlement, this act allowed her to "secure some momentary peace and safety."<sup>213</sup>

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208. *Id.*

209. See generally *United States v. Ramirez*, No. 10-344, 2012 WL 733973, at \*3 (D.P.R. Mar. 6, 2012) (holding that expert testimony is fundamental to explain why women who have been subjected to battering and violence do not act in the same way as women who have not been treated in such ways); *United States v. Ceballos*, 593 F. Supp.2d 1054, 1063 (S.D. Iowa 2009) (After hearing and admitting expert testimony, "the Court finds that Defendant has made a prima facie case that it was not negligent or reckless for her to be in an abusive relationship where the abuser would later try to force her to commit a crime."); *Marenghi*, 893 F.Supp. at 95-96 (holding expert testimony regarding battered woman syndrome can help explain to the jury how a reasonable person reacts to constant abuse, and can also help dispel myths about battered women); *Commonwealth v. Asenjo*, 82 N.E. 3d 966, 973 (Mass. 2017) (holding that where a defense of duress is asserted, a defendant shall be permitted to introduce "evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse," or "evidence by expert testimony regarding the common pattern in abusive relationships"); *Wonnum v. State*, 942 A.2d 569, 573 (Del. 2007) (admitting expert testimony that could possibly explain why the defendant legitimately perceived her abuser to be a threat if she did not follow his demands and why she believed that ignoring the demands was not an option); *State v. Williams*, 937 P.2d 1052, 1055 (Wash. 1997) (allowing the admission of expert testimony stating that the battered woman's failure to report her partner's income was not volitional and also that a "batterer need not be present to exert control over his victim").

210. *United States v. Dixon*, 901 F.3d 1170, 1181 (10th Cir. 2018).

211. *Id.* at 1173.

212. *Id.* at 1174.

213. *Id.*

With the expert diagnoses as testimony, the defendant asked the court to consider her defense of duress, claiming embezzlement was the only available option to escape the imminent threat of sexual assault from her stepfather.<sup>214</sup> The Tenth Circuit denied her duress defense, asserting she could not meet the second prong, as she had *reasonable* alternatives available rather than commit the crime.<sup>215</sup> Further, the court held that even if the defendant felt that reporting the abuse to the police was futile (as she had stated in her affidavit), she needed to assert specific proof that such an alternative would be ineffective to meet her burden.<sup>216</sup> The court explained that although consideration of the defendant's objective reasonableness included external, concrete factors unique to her, that analysis did not involve consideration of "non-tangible psychological conditions that ostensibly alter the defendant's subjective beliefs or perceptions," and thus the expert evidence was inadmissible to her defense.<sup>217</sup>

The entire premise the Tenth Circuit bases its holding on directly defies the touchstone of BWS. All factors regarding a defendant must be considered, including her mental and psychological notions, as this evidence changes the standard with which reasonableness in the duress context must be viewed.<sup>218</sup> The "questions of reasonableness posed by the duress defense are not asked and answered in the abstract."<sup>219</sup> The Tenth Circuit emphasized the district court's findings that even if reporting the abuse was ineffective, the defendant had numerous "reasonable alternatives" available, such as leaving home, seeking out friends or coworkers to move in with, moving in with a family member, or acquiring a loan.<sup>220</sup> As explained in Part III, these are not viable options for a battered woman, as her trauma and abuse have rendered it impossible for her to leave.<sup>221</sup> In Dixon's case, if she had left, who would have physically and financially take care of her disabled mother? If she left, would her abusive stepfather begin harming her mother? The admission of Dr. Nation's expert testimony would have given an understanding of the defendant's mental capacities and shed light on the reasonableness of her actions, given her situation. The Tenth Circuit's standard of reasonableness fails to consider how a *reasonable battered woman* would perceive danger as compared to a *reasonable non-battered woman*.<sup>222</sup> It is key to distinguish between "expert evidence of battering and its effects to determine how a reasonable person who has been battered may have perceived a situation (objective and permissible), and expert evidence of how the defendant herself personally perceived the situation (subjective and not permissible)."<sup>223</sup>

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214. *Id.* at 1175.

215. *Id.* at 1179.

216. *Id.*

217. *Id.* at 1183.

218. *See* United States v. Dingwall, 6 F.4th 744, 755 (7th Cir. 2021).

219. *Id.* at 754.

220. *Dixon*, 901 F.3d at 1180.

221. *See* U.S. DEP'T. OF JUST., *supra* note 55, at 14–15.

222. *See generally* Walker, *supra* note 43, at 323.

223. *Dingwall*, 6 F.4th at 755.



Similarly, the Fifth Circuit held expert evidence regarding BWS as “inherently subjective” and thus not relevant to a duress defense.<sup>224</sup> The test is an objective one: the coercive force of the threat must be such that a person of “ordinary firmness would succumb,” and there must be no reasonable alternative to the crime.<sup>225</sup> In *United States v. Willis*, the defendant allowed her partner, a convicted felon, to put his gun in her purse during an attempted drug transaction.<sup>226</sup> At trial, she raised the defense of duress, asserting she greatly feared her partner because of his abusive history and that if she protested the placing of the gun in her possession, he would have beaten her immediately.<sup>227</sup> Clinical psychologist Dr. James Harrison testified that the defendant’s abuse started at a young age from her alcoholic parents, continued into two abusive marriages, and finally peaked in her violent relationship with the convicted felon.<sup>228</sup> Additionally, Dr. Harrison concluded that the defendant fell into the category of a battered woman based on her mental state: signs of anxiety and depression, extreme emotional turmoil, and a constant cycle of wanting to be loved versus fear of being harmed in a relationship.<sup>229</sup> Despite this evidence, the court concluded that its admission would turn the test of duress into a subjective one, and thus, it was forbidden.<sup>230</sup> The court conceded its sympathy to the hardships of a battered woman but concluded that the syndrome is not relevant in determining duress.<sup>231</sup>

Like the Tenth Circuit, the Fifth Circuit failed to understand the implications of BWS. Dr. Harrison’s assessment in *Willis* directly correlated to the cycle of violence in BWS and thus the theory of learned helplessness.<sup>232</sup> After a battering incident and the fear that corresponds, the victim enters the honeymoon phase and seeks to be loved.<sup>233</sup> It is easy to infer how this occurred in the *Willis* defendant’s situation—her mom and stepdad would drink too much and beat her, then the next morning, during a period of sobriety, they would effusively love and coddle her.<sup>234</sup> This pattern repeated itself with the next stepfather, then with the defendant’s first husband, then her second, and by the time she reached her relationship with the batterer at issue here, she was completely susceptible to learned helplessness.<sup>235</sup> Thus, the court’s exclusion of expert evidence regarding the syndrome disallows the opportunity to establish that

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224. *United States v. Willis*, 38 F.3d 170, 175, 177 (5th Cir. 1994).

225. *Id.* at 176.

226. *Id.* at 173.

227. *Id.* at 174.

228. *Id.*

229. *Id.*

230. *Id.* at 176–77.

231. *Id.* at 177 (“Accordingly, while evidence that a defendant is suffering from [BWS] provokes our sympathy, it is not relevant, for purposes of determining criminal responsibility, to whether the defendant acted under duress.”).

232. See *supra* Section II.B.

233. WALKER, *supra* note 5, at 65.

234. See *Willis*, 38 F.3d at 174; Christine Emerson, *United States v. Willis: No Room for the Battered Woman Syndrome in the Fifth Circuit*, 48 BAYLOR L. REV. 317, 330 (1996).

235. See Emerson, *supra* note 234, at 330.

“because of her psychological condition, the defendant is unusually susceptible to the coercion,” and thus her actions are attributable to duress.<sup>236</sup>

#### D. SHIFTING APPROACHES TO EXPERT EVIDENCE

Consistency is important in the legal context, especially in the judicial system. In multiple cases cited, the government shifted its approach regarding the admissibility of expert evidence of BWS, creating a pattern of instability and suspicion. The admission of such evidence can prove a woman convicted of a crime acted out of coercion, enabling the jury to evaluate the defendant’s credibility on an unfamiliar issue.<sup>237</sup> In *United States v. Young*, the government introduced expert testimony of a professor in nursing who specialized in treating crime victims to explain why the victim recanted her account of violence when testifying against the defendant at trial.<sup>238</sup> Similarly, the government has often introduced expert evidence in human trafficking cases and cases involving the sexual abuse of minors.<sup>239</sup> The government has even introduced expert witness testimony regarding BWS to explain why a victim recanted her account of abuse against the defendant.<sup>240</sup> As the government overtly demonstrates in these situations, “there may be significant value in the evidence [a party] seeks to introduce.”<sup>241</sup>

This directly contradicts the government’s opposition to the admission of expert testimony when it pertains to the victim as the defendant in cases such as *Dixon*<sup>242</sup> and *Willis*.<sup>243</sup> The government cannot pursue this double standard—admitting the evidence when it purports to bolster the witness’s credibility but excluding it when it helps to explain the behavior of an accused defendant.<sup>244</sup> By shifting its approach based on the battered woman’s role in a case, the government is not only creating a pattern of inconsistency, it is also losing credibility by fighting the admission of expert evidence in cases such as *Dingwall*. Evidence of BWS should always be admissible, no matter if the battered woman is the witness testi-

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236. *Willis*, 38 F.3d at 175.

237. *See United States v. Jackson*, 535 F. Supp. 3d 809, 817 (N.D. Ind. 2021).

238. *See United States v. Young*, 316 F.3d 649, 655–59 (7th Cir. 2002).

239. *See United States v. Young*, 955 F.3d 608, 615 (7th Cir. 2020); *Jackson*, 535 F. Supp. 3d at 817; *United States v. Romero*, 189 F.3d 576, 582 (7th Cir. 1999); *United States v. Alzanki*, 54 F.3d 994, 1006 (1st Cir. 1995).

240. *See Arcoren v. United States*, 929 F.2d 1235, 1238–39 (8th Cir. 1991) (allowing expert testimony to justify how the particular facts at issue may not seem significant until the implications of battered woman syndrome are explained and lend credibility to the defendant).

241. *United States v. Dingwall*, 6 F.4th 744, 754 (7th Cir. 2021); *see also Arcoren*, 929 F.2d at 1239 (“Your Honor, there are certain facts which the jury has before it from the testimony which we contend will go unnoticed by a lay jury unless put into perspective by an expert.”).

242. *See United States v. Dixon*, 901 F.3d 1170, 1179 (10th Cir. 2018).

243. *See United States v. Willis*, 38 F.3d 170, 176–77 (5th Cir. 1994).

244. *See Dingwall*, 6 F.4th at 754.

fyng against her abuser–defendant or if the battered woman is the criminal defendant herself.

#### VI. CONCLUSION: THE FUTURE IMPLICATIONS ON ADMISSIBILITY

As demonstrated, the admissibility of expert testimony to prove a battered woman's duress defense is vital. Although it does not guarantee a successful trial, it allows the accused to showcase the big picture of her situation and gives her the opportunity to have her actions understood instead of condemned. With the use of BWS evidence, many more women are receiving a fair trial, as "[o]ften they are found not guilty by a jury who listens to what [they] have to say, and the testimony of a psychologist who helps put the information into the context about what we know about the psychological effects of battering on the women's state of mind."<sup>245</sup>

If more and more courts begin following the Sixth, D.C., Ninth, and now Seventh Circuit in allowing expert evidence, society will benefit overall. More women who do not deserve to be behind bars will be acquitted, and the stigma behind battered women might begin to fade. The more society views these women as strong, independent women who took necessary action to save themselves and often their children, the more this belief will spread. Additionally, if more attention is brought to battered women in general, there is the possibility and hope that the amount of abusing partners might decrease. Of course, a shift this large does not happen overnight or even in a decade, but it must begin with one small change. Jurors who understand the implications of battered woman syndrome are more likely to see these women not as killers but as battered women who have run out of options.

Ultimately, the importance of recognizing the profound effect expert evidence may have on a battered woman pleading duress cannot be overstated. The touchstones of the United States judicial system are impartiality and individual rights, so it would seem anomalous to forbid this testimony from trials. The number of battered women nationwide is shockingly high and will continue to increase without change. That change has the opportunity to blossom within our court system if more courts follow in the Seventh Circuit's footsteps.

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245. Walker, *supra* note 43, at 334.