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## Revealing Realities Hidden Behind the Curtain of Subjective Syndromes: The Seventh Circuit Changes the Narrative Around Expert Evidence on Battered Woman Syndrome in *United States v. Dingwall*

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## Notes

REVEALING REALITIES HIDDEN BEHIND THE CURTAIN OF  
SUBJECTIVE SYNDROMES: THE SEVENTH CIRCUIT  
CHANGES THE NARRATIVE AROUND EXPERT  
EVIDENCE ON BATTERED WOMAN  
SYNDROME IN *UNITED STATES v. DINGWALL*

KEANE BRAZDA\*

### I. INTRODUCING THE REALITY OF DOMESTIC VIOLENCE

On December 4, 2020, Kivi Ellis shot his partner Shelby Mathis at point-blank range while she stood in the front yard of their home holding the couple's three-month-old son.<sup>1</sup> As Shelby fell to the ground, Kivi fatally shot his son in the head and discarded the infant's body near a dog kennel in the backyard.<sup>2</sup> Kivi returned to the front of the house and continued shooting at Shelby.<sup>3</sup> When the police questioned Kivi, he remorsefully confessed to the murders and asked to call Shelby's parents to apologize.<sup>4</sup> Shelby was the mother of their three young children.<sup>5</sup> The other two children hid under a bed inside the house while their father murdered their mother and brother.<sup>6</sup> This horrific incident was not the first violent act Kivi committed against Shelby.<sup>7</sup> In 2014, police arrested Kivi for beating Shelby where she sustained a lacerated liver, fractured ribs, gashes, and swelling to the face, arms, legs, and torso.<sup>8</sup> One can only imagine the cycles of violence and apologies Shelby experienced over the course of the relationship.<sup>9</sup>

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\* J.D. Candidate, 2024, Villanova University Charles Widger School of Law; B.A., 2017, Bucknell University. I wrote this Note in recognition of the beautiful life of my childhood friend and teammate, Shelby, who always brought joy, laughter, and comfort to all those around her. Thank you to the selfless members of the *Villanova Law Review* who provided invaluable guidance throughout the editing process.

1. Sarah Nelson, *Man Charged in Gainesville Double Homicide*, GAINESVILLE SUN (Dec. 5, 2020), <https://www.gainesville.com/story/news/2020/12/05/gainesville-man-charged-woman-and-infant-deaths/3840215001/> [<https://perma.cc/SE6V-27HJ>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. For a discussion on research around "cycles of violence," see *infra* Part II.

Intimate partner violence (IPV) is a serious—even fatal—issue affecting millions of women<sup>10</sup> across the United States.<sup>11</sup> Domestic violence is broadly defined as “a pattern of emotional, physical, sexual, psychological, or economic abuse perpetuated by one household member against another,” and IPV describes domestic violence “perpetuated by someone who is or wants to be in an intimate relationship with another person.”<sup>12</sup> Nearly half of all women in the United States will experience psychological aggression by an intimate partner in their lifetime, and more than 1 in 3 women will experience physical abuse at the hands of an intimate partner.<sup>13</sup>

IPV, particularly repeated incidents of violence, can lead to Battered Woman Syndrome (BWS).<sup>14</sup> In 1979, psychologist Lenore Walker introduced the theory of BWS to explain patterns of behavior demonstrated by women who have been physically, sexually, or psychologically abused in an

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10. This Note primarily focuses on defendants categorized in the criminal justice system as women or female and violence towards women in heterosexual relationships. For a discussion on the limiting implications of this language and efforts to recognize all IPV victims, see *infra* Part V and Part VI.

11. See *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> [<https://perma.cc/WA7C-BMA4>] (last visited May 16, 2023) (noting that from 1994 to 2010, approximately 4 in 5 victims of IPV were women); 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, 922 (2012) (stating “an estimated 1.3 million American women are victims of male-perpetrated [IPV]”); Michaela Dunn, Note, *Subjective Vulnerabilities or Individualized Realities: The Merits of Including Evidence of Past Abuse to Support a Duress Defense*, 54 SUFFOLK U. L. REV. 347, 347 n.3 (2021) (providing statistic that “more than three women . . . are murdered by their intimate partner every day” in the United States); *Fast Facts: Preventing Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (Oct. 11, 2022), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html> [<https://perma.cc/63YG-TCB3>] (calling IPV a “significant public health issue” that can lead to death). On average, 75% of female IPV victims experience injury and “over half of female homicide victims in the United States are killed by a current or former male intimate partner.” *Id.*

12. Alaina Richert, Note, *Failed Interventions: Domestic Violence, Human Trafficking, and the Commercialization of Survival*, 120 MICH. L. REV. 315, 317 (2021); see also Jessica R. Holliday, Dale E. McNiel, Nathaniel P. Morris, David L. Faigman & Renee L. Binder, *The Use of Battered Woman Syndrome in U.S. Criminal Courts*, 50 J. AM. ACAD. PSYCHIATRY L. 373, 373 (2022) (describing IPV as “physical, sexual, or psychological violence between romantic or sexual partners”).

13. See *Domestic Violence Statistics*, *supra* note 11 (explaining physical abuse includes rape, physical violence, and stalking, and most female victims of IPV experience abuse by the same offender).

14. See Dunn, *supra* note 11, at 347 (detailing how repeated abuse can lead to BWS); Samantha M. Musick, Comment, *Explaining the Whys: Allowing Battered Woman Syndrome in Aid of a Duress Defense*, 17 SEVENTH CIR. REV. 60, 62 (2021) (noting how the consequences of violence can manifest as BWS); *Domestic Violence Statistics*, *supra* note 11 (“81% percent of women who experienced rape, stalking, or physical violence from an intimate partner reported significant impacts (short-term or long-term) like injuries or symptoms of post-traumatic stress disorder.”); see also *Fast Facts: Preventing Intimate Partner Violence*, *supra* note 11 (detailing the negative health outcomes associated with IPV including “conditions affecting the heart,

intimate relationship.<sup>15</sup> As applied to the criminal justice system, defendants historically introduced BWS as evidence to establish the defense of self-defense when a woman killed her batterer.<sup>16</sup> As awareness grew about the number of incarcerated women who were victims<sup>17</sup> of battering and committed crimes to avoid abuse, defendants increasingly offered evidence of BWS to establish a duress defense for crimes committed against a third party.<sup>18</sup>

Today, federal courts are divided over the admissibility of expert testimony about BWS to support a duress defense.<sup>19</sup> The circuit split centers on whether BWS testimony changes the reasonable person standard from

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muscles and bones, and digestive, reproductive, and nervous systems” and increased risk of engaging in “smoking, binge drinking, and sexual risk activity”).

15. See Musick, *supra* note 14, at 62 (explaining the behavior occurs “when the partner . . . exerted power and control over the woman to coerce her into doing whatever he wanted” (alteration in original) (quoting JOAN C. McCLENNEN, AMANDA M. KEYS & MICHELE L. DUGAN-DAY, SOCIAL WORK AND FAMILY VIOLENCE: THEORIES, ASSESSMENT, AND INTERVENTION 184 (2017))); Dunn, *supra* note 11, at 348 (describing how BWS theory explored effects of cyclical violence). The theory aimed to explain how victims of repeated domestic abuse are not able to identify opportunities to leave the abusive environment. *Id.*

16. See Susan D. Appel, *Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*, 1994 U. ILL. L. REV. 955, 957; Dunn, *supra* note 10, at 358 (explaining that while BWS testimony has been widely accepted with respect to a self-defense claim, courts are reluctant to allow similar evidence to support a duress defense).

17. This Note uses the term “victim” because of the benefits the term has in the criminal justice system but respectfully acknowledges that those who experience any form of domestic violence have every right to use the term victim, survivor, or any other term of their choice. See generally SEXUAL ASSAULT KIT INITIATIVE, RAPE, ABUSE & INCEST NAT’L NETWORK, NATASHA ALEXENKO, JORDAN SATINSKY & MARYA SIMMONS, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf> [<https://perma.cc/ZCW8-5H47>] (last visited May 16, 2023) (providing a discussion of considerations relevant to using terminology related to sexual assault).

18. See Appel, *supra* note 16, at 957–58 (explaining “[f]orging checks to pay his bills, stealing food or other items that he denied the children, selling drugs to keep his supply filled, [and] hurting someone else so he didn’t hurt her were all acts committed under control of the batterer’s threat of, or actual, violence” and providing a myriad of cases where defendants offered evidence of BWS to support duress defense for crimes committed against third parties (quoting LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 137 (1984))); Paulina Lucio Maymon, Comment, *Judging Women Who Kill Their Batterers in the United States: A Violation of Their Right to Equality Before the Law Under the ICCPR*, 37 AM. U. INT’L L. REV. 97, 100 (2022) (noting awareness of incarcerated women who experienced IPV grew after reports indicated 70–80% of incarcerated women in the United States experienced IPV).

19. See Maryssa Ziegler, *Battered Women’s Syndrome: How Can Courts Act in the Pursuit of Justice When a Robber Is Also a Victim?*, EMORY L. SCHOOL SUP. CT. ADVOC. PROGRAM: SUNDAY SPLITS (July 24, 2022), <https://www.sundaysplits.com/blog/ziegler/07-24-22/battered-womens-syndrome> [<https://perma.cc/BZN6-8EYA>] (explaining the Sixth, Seventh, Ninth, and D.C. Circuits allow the use of expert testimony on BWS to support a duress defense while the Fifth and Tenth Circuits do not).

objective to subjective.<sup>20</sup> Most recently, the Seventh Circuit added to the growing split in *United States v. Dingwall*<sup>21</sup> by joining the Sixth, Ninth, and D.C. Circuits in allowing the use of expert testimony on BWS to support a duress defense.<sup>22</sup> Shifting away from less inclusive BWS language, the *Dingwall* court reasoned that expert testimony on battering and its effects is objective information that could help a jury assess the actions of a defendant facing circumstances potentially unfamiliar to the typical juror.<sup>23</sup> Conversely, the Fifth and Tenth Circuits do not allow expert testimony on BWS to support a duress defense.<sup>24</sup>

This Note argues that all circuits should adopt the Seventh Circuit's reasoning—and holding—from *Dingwall*. Moreover, the framework used by the *Dingwall* court broadens the scope of the duress defense to allow use by all victims of IPV and plays a vital role in the de-stigmatization of abuse. Part II of this Note discusses the development and critiques of BWS and its use as an evidentiary tool in duress claims. Part II also summarizes the circuit split. Part III provides the facts and procedural history of *Dingwall*. Part IV examines the Seventh Circuit's reasoning. Part V critically analyzes the Seventh Circuit's decision and explains why the court's reasoning provides an adaptable and impactful framework. Part VI discusses the timeliness and positive implications of the court's decision.

## II. HISTORY OF BWS

Psychologist Lenore Walker created the theory of BWS in the late 1970s to “explain the apparent passivity of women in abusive situations.”<sup>25</sup> Walker aggregated the common attributes of domestic violence victims to

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20. For a full discussion about the current circuit split, see *infra* Section II.B.

21. 6 F.4th 744 (7th Cir. 2021).

22. See *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006); *United States v. Lopez*, 913 F.3d 807 (9th Cir. 2019); *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016).

23. *Dingwall*, 6 F.4th at 754. For a full discussion about the Seventh Circuit's decision, see *infra* Part IV.

24. See *United States v. Dixon*, 901 F.3d 1170, 1184 (10th Cir. 2018); *United States v. Willis*, 38 F.3d 170, 176 (5th Cir. 1994); see also *United States v. Sixty Acres in Etowah Cnty.*, 930 F.2d 857, 860 (11th Cir. 1991); Recent Case, *Criminal Law—Excuses—Seventh Circuit Holds That Evidence of Battering and Its Effects May Support a Duress Defense*.—*United States v. Dingwall*, 6 F.4th 744 (7th Cir. 2021), 135 HARV. L. REV. 1937, 1937 n.5 (2022) (“The Eleventh Circuit has suggested that it agrees with the Fifth and Tenth Circuits, but it may not have categorically rejected evidence of battering in this context.”).

25. See Terrance, Plumm & Rhyner, *supra* note 11, at 935 (noting BWS theory initially stemmed from Walker's work with battered women and interviews with over 400 battered women). Walker hypothesized that the “unpredictability of repeated beatings leave women feeling that they have no control over what will happen to them”. *Id.* at 936 (citing LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1994)).

define a battered woman and explain the impact of abuse on her behavior.<sup>26</sup> The theory initially aimed to describe how cycles of violence against a woman lead to a shift in her behavior and psychological processes.<sup>27</sup>

The “cycle of violence” theory involves three distinct stages.<sup>28</sup> First, the tension building phase begins with verbal arguments and lower-level physical and emotional abuse between the batterer and the woman.<sup>29</sup> Next, the acute battering phase follows which is characterized by “the batterer’s uncontrollable explosions of violence.”<sup>30</sup> Finally, the loving contrition phase occurs where the “batterer calms, demonstrates his love, pleads for forgiveness, and promises never to hit again.”<sup>31</sup> The final contrition stage of the cycle is “said to weaken the battered woman’s resolve to terminate the abusive relationship and reinforce her beliefs that the situation will change.”<sup>32</sup> Eventually, tensions begin to build and the cycle repeats itself.<sup>33</sup>

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26. See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 220–21 (2002). In her 1979 book, Walker defined battered woman broadly as “a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man to coerce her to do something he wants her to do without concern for her rights.” *Id.* at 220 n.24 (quoting WALKER, *supra* note 25, at xv). Battered women include “wives or women in any form of intimate relationships with men,” and under Walker’s definition, if a woman experiences abuse more than once, and “she remains in the situation, she is defined as a battered woman.” *Id.* (quoting WALKER, *supra* note 25, at xv); see also Dunn, *supra* note 11, at 354 (noting how “an individual who appears normal would otherwise lose the ability to predict that her actions, or lack thereof, would negatively impact her personal safety”). The stress of the abuse “makes victims particularly sensitive to perceiving an imminent threat at the hands of their abuser, even when such a threat is not present.” *Id.* at 348.

27. See Jessica Savage, *Battered Woman Syndrome*, 7 GEO. J. GENDER & L. 761, 761–62 (2006) (explaining how the cycles of violence described by Walker lead to changes in a woman’s behavior and create a sense of “learned helplessness” (quoting Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN’S L.J. 99, 103 (1997))).

28. See Burke, *supra* note 26, at 222.

29. *Id.*; see also Savage, *supra* note 27, at 762 (explaining how during this first phase, a woman “tends to minimize the significance of the events and to mollify her attacker”).

30. Burke, *supra* note 26, at 222; see also David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 72 (1997) (explaining the cycle theory shows how “the battered woman is reduced to a state of fear and anxiety during the first two phases of the cycle, and her perception of danger extends beyond the battering episodes themselves” (footnote omitted)).

31. Burke, *supra* note 26, at 222; see also Savage, *supra* note 27, at 762 (noting how during this phase the batterer attempts to convince the woman the abuse is over and might take actions to indicate he is willing to change).

32. Burke, *supra* note 26, at 222–23.

33. See *id.* at 223; Terrance, Plumm & Rhyner, *supra* note 11, at 937 (explaining how the cycle creates an “intermittent reinforcement schedule that is critical in maintaining the battering relationship”).

Ultimately, the cycle of violence creates a sense of learned helplessness in the woman.<sup>34</sup> The learned helplessness theory explains a victim's belief that any efforts to leave the abusive situation would prove useless and her loss of motivation to proactively leave her abuser.<sup>35</sup> The theory rationalizes how an average individual could lose the ability to predict the negative consequences of remaining in the abusive relationship.<sup>36</sup> Together, the cycle of violence and learned helplessness theories intended to explain why a woman does not leave a battering relationship.<sup>37</sup>

In 1992, Walker again expanded her definition of the battered woman to encompass women who experienced emotional abuse in addition to, or instead of, physical abuse.<sup>38</sup> To standardize the criteria for BWS, Walker later revised the definition of BWS to appear synonymous with Post-Traumatic Stress Disorder (PTSD).<sup>39</sup> Currently, BWS is understood as a sub-category of PTSD, not a clinical diagnosis.<sup>40</sup> In considering a di-

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34. See Dunn, *supra* note 11, at 352–53; Burke, *supra* note 26, at 223 (explaining Walker used the learned helplessness theory to “answer the question of why a battered woman remains in an abusive relationship”); MARY ANN DUTTON, UPDATE OF THE “BATTERED WOMAN SYNDROME” CRITIQUE 1 (2009), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_BWSCritique.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf) [<https://perma.cc/3FT2-BUHQ>] (describing how psychologists originally used the term “learned helplessness” to explain dogs’ inability to leave a punitive environment when given the chance, then later used to explain depression). See generally Musick, *supra* note 14, at 69–70 (providing additional information about learned helplessness).

35. See Dunn, *supra* note 11, at 352–53 (explaining how the victim is unable to predict how her behavior will change the continuous abuse, so she changes her response to cope with the situation).

36. See *id.* at 353–54 (discussing how the theory explains why individuals might appear normal but fail to take actions when their personal safety is negatively affected); Burke, *supra* note 26, at 224 (noting in many cases, a battered woman suffers from a diminished cognitive ability to conceptualize alternatives to the abusive relationship).

37. See Dunn, *supra* note 11, at 354 (noting how experts use these two theories to explain the victim’s inability to leave the abusive situation); Faigman & Wright, *supra* note 28, at 75 (explaining how a “woman suffers the paralysis of learned helplessness due to the uncontrollable beating, and, additionally is lured into staying by that hope that things will be different in the future”).

38. See Burke, *supra* note 26, at 220 n.24 (noting Walker described a battered woman as one “subjected repeatedly to coercive behavior (physical, sexual, and/or psychological) by a man attempting to force her to do what he wants her to do” (quoting LENORE E. WALKER, TERRIFYING LOVE 102 (1989))).

39. See DUTTON, *supra* note 34, at 2 (explaining how PTSD is a “a psychological condition which results from exposure to a traumatic event”). The BWS definition now includes the three main symptom categories of PTSD: “re-experiencing, numbing of responsiveness, [and] hyperarousal.” *Id.* at 3. Later, in 2006, Walker added three additional criteria to BWS: “disrupted interpersonal relationships, difficulties with body image/somatic concerns, and sexual and intimacy problems,” which are associated features of PTSD. *Id.*; see also Holliday, McNiel, Morris, Faigman & Binder, *supra* note 12, at 374 (noting that no edition of the Diagnostic and Statistical Manual of Mental Disorders has recognized BWS).

40. See Dunn, *supra* note 11, at 354–55 (comparing the symptoms of a PTSD diagnosis with the symptoms and effects of abuse); Holliday, McNiel, Morris, Faigman & Binder, *supra* note 12, at 378 (explaining that the “validity and reliabil-

agnosis for use in the criminal context, PTSD is arguably a more useful diagnosis because the psychological impacts of BWS are not easily streamlined to create one psychological profile.<sup>41</sup>

Additionally, legal and academic scholars criticize BWS for Walker's research methods and the theory's limited usefulness for defendants.<sup>42</sup> Many scholars have argued that Walker's research lacks strong empirical support for the cycle of violence and learned helplessness theories.<sup>43</sup> The cycle of violence theory is only supported by "conclusions drawn from a series of interviews with battered women" where interviewers used leading questions.<sup>44</sup> Additionally, the theory of learned helplessness focuses on "women's seeming lack of effort to leave or escape an abusive relationship," yet does not acknowledge that these actions may actually minimize the risk of violence.<sup>45</sup>

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ity of BWS as a clinical diagnosis (as opposed to a legal construct) remains controversial"); Terrance, Plumm & Rhyner, *supra* note 11, at 937 (discussing the relationship between BWS and PTSD).

41. See Holliday, McNeil, Morris, Faigman & Binder, *supra* note 12, at 378 (noting PTSD is an established psychological condition supported by extensive research). PTSD, compared to BWS, could explain how a woman develops trauma responses after a single episode of abuse, justify behavior based on prior incidents of battering, and "consider[ ] a range of possible responses and allow[ ] for the acknowledgement that not all traumatic events may result in relevant impairments in functioning." *Id.*; see also Terrance, Plumm & Rhyner, *supra* note 11, at 937 (explaining that BWS is not a clinical diagnosis rather "the syndrome is currently one of the traumatic experiences subsumed under the general diagnosis of [PTSD] according to the American Psychiatric Association").

42. See Terrance, Plumm & Rhyner, *supra* note 11, at 938 (noting that while BWS is used in the legal field, the application of BWS to battered women faces much criticism); Faigman & Wright, *supra* note 28, at 76–77 (discussing five main flaws of Walker's methodology: (1) researchers allowed the subjects to "easily guess" the responses anticipated by Walker's hypotheses; (2) researchers only recorded their interpretation of the interviews instead of the subjects' actual responses; (3) cycle theory does not include any guidance on how to measure time in order to indicate the time elapsed between cycles; (4) the cycle theory does not "empirically relate" to the fear experienced by victims during the "interim period between the batterer's attack and her response"; and (5) the data collected through research and studies of subjects "does not support the cycle theory").

43. See Terrance, Plumm & Rhyner, *supra* note 11, at 938 (discussing the methodological and interpretive flaws in Walker's research); DUTTON, *supra* note 34, at 6 (noting BWS "lacks both a standard definition and evidence of scientific validity for many of the purposes for which it is used"); Burke, *supra* note 26, at 236–41 (explaining the flawed empirical evidence used to support BWS).

44. Terrance, Plumm & Rhyner, *supra* note 11, at 938–39 (explaining how participants are suspected of hypothesis guessing). Walker gathered her evidence for the tension building and loving contrition phases from the interviewers' interpretations of responses instead of the direct responses. See *id.* at 939; Burke, *supra* note 26, at 238 n.122 (explaining "subjects were asked whether their abusers acted 'nice, loving, [and] contrite after battering incidents'" (alterations in original) (quoting WALKER, *supra* note 25, at 96)); Faigman & Wright, *supra* note 28, at 77 (noting the interviewers knew the "correct" outcome whereas most social scientists generally use interviewers who are not aware of the hypotheses being tested).

45. DUTTON, *supra* note 34, at 2; see also Musick, *supra* note 14, at 70 (describing concern that juries will understand BWS to mean the defendant "possesses a



One author noted that three decades of empirical research shows major limitations of BWS.<sup>46</sup> Others argued that BWS creates a stereotypical battered woman—seemingly passive and helpless—which risks excluding battered women that do not fit this stereotype.<sup>47</sup> Relatedly, as concern grew around the use of “syndrome-based terminology to advance a pathological characterization of battered women,” most clinicians stopped using the term BWS.<sup>48</sup> While most practitioners today use the phrase “battering and its effects,” the term BWS remains prevalent in the legal field.<sup>49</sup>

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diminished capacity or lack of responsibility for the act” (quoting Michelle Strucke & Kate Hajjar, *Battered Woman Syndrome*, CORNELL L. SCHOOL: SOC. SCIENCE AND L., [https://courses2.cit.cornell.edu/sociallaw/student\\_projects/BatteredWomanSyndrome.htm](https://courses2.cit.cornell.edu/sociallaw/student_projects/BatteredWomanSyndrome.htm) [<https://perma.cc/9S36-CVTU>] (last visited May 17, 2023))). Musick cites critiques that argue that BWS testimony makes women appear irrational and incapable of controlling themselves which creates a gendered power dynamic where men are seen as needing to control their incapable partners. *See id.* at 71–72; Burke, *supra* note 26, at 216 (explaining how BWS “depicts battered women as cognitively impaired and irrational”); Terrance, Plumm & Rhyner, *supra* note 11, at 939 (arguing that “learned helplessness is antithetical to the notion that a woman would use lethal force”); Faigman & Wright, *supra* note 28, at 78 (noting “learned helplessness” is not well received by commentators, and “[m]ost scholars reject the concept out of concern that it belittles the women themselves”).

46. *See* DUTTON, *supra* note 34, at 1 (arguing that the use of BWS to describe the experiences of women who are victims of IPV is “both misleading and potentially harmful”); Terrance, Plum & Rhyner, *supra* note 11, at 941 (noting studies conducted on the use of BWS concluded that the term is “inadequate at capturing the complexity of the nature and dynamics of domestic violence”).

47. *See* Musick, *supra* note 14, at 70–71 (noting that women who defend themselves from an abuser “will be barred from utilizing BWS as evidence should the need ever arise”); Burke, *supra* note 26, at 216 (arguing BWS treats battered women as homogenous); Terrance, Plumm & Rhyner, *supra* note 11, at 941–44 (explaining how BWS places all battered women under a single construct and risks excluding the experiences of women who do not perfectly fit within the BWS parameters); Savage, *supra* note 27, at 767 (arguing that BWS creates a one-dimensional image of a battered women which causes difficulties for women who appear in court and do not match the stereotypical helpless victim).

48. *See* Terrance, Plumm & Rhyner, *supra* note 11, at 941 (noting how the use of BWS arguably purported a belief that “battered women suffer from a mental deficit”); DUTTON, *supra* note 34, at 3 (explaining how BWS sounded scientific and initially served as a useful term to describe the situations of women who experienced domestic violence).

49. DUTTON, *supra* note 34, at 3 (quoting Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and Its Effects in CURRENT CONTROVERSIES ON FAMILY VIOLENCE* 225 (Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh eds., 2005)) (explaining how practitioners shifted away from using BWS as the problems and limitations of the theory become apparent); Terrance, Plumm & Rhyner, *supra* note 11, at 941 (noting the continued use of BWS in the courtroom).

A. *Context Matters: BWS in the Legal Framework*

Parties to a wide range of criminal and civil cases introduce expert evidence about BWS.<sup>50</sup> In the criminal context, the evidence is often implicated in cases involving battered women to bolster a defense, support mitigating factors in charging and sentencing, prosecute domestic violence perpetrators, or explain misconceptions about domestic violence.<sup>51</sup> Focusing on defenses, BWS does not exist as a separate defense, so expert testimony about BWS is a useful tool to support existing legal defenses—such as self-defense and duress—when the defendant is a woman who experienced domestic violence.<sup>52</sup>

Prior to using BWS evidence in support of a duress defense, female defendants typically offered such evidence when claiming self-defense after killing their abusers.<sup>53</sup> Self-defense requires a defendant to show she (1) was in “imminent danger of unlawful bodily harm” at the time of the act, (2) used a reasonable amount of force in response to the danger, (3) was not the aggressor, and (4) had no opportunity to retreat.<sup>54</sup> In many

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50. See DUTTON, *supra* note 34, at 3 (explaining how BWS is most commonly introduced by women who killed their batterer). The prosecution in criminal cases also uses the evidence to explain why a victim of abuse is unwilling to testify or “to explain other behaviors that might be difficult for jurors to understand.” *Id.* BWS is also used in civil cases, “such as child custody cases, marital dissolution, tort, or personal injury cases.” *Id.*; see also, U.S. DEP’T OF JUST. & U.S. DEP’T HEALTH & HUM. SERVS., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS 1–4 (1996), <https://www.ojp.gov/pdffiles/batter.pdf> [<https://perma.cc/9Q86-QZES>] [hereinafter VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING] (providing a list of instances where the dynamics and effects of battering are used in the criminal cases).

51. See VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING, *supra* note 50, at 1–4 (explaining how the evidence of battering and its effects is used by various parties in criminal cases). See generally DUTTON, *supra* note 34, at 3–4 (outlining how BWS is utilized in criminal cases); *United States v. Young*, 316 F.3d 649, 657–59 (7th Cir. 2002); *United States v. Young*, 955 F.3d 608, 615 (7th Cir. 2020); *United States v. Alzanki*, 54 F.3d 994 (1st Cir. 1995); *United States v. Romero*, 189 F.3d 576 (7th Cir. 1999) (providing examples of instances where the prosecution used expert evidence on BWS to support its case).

52. See DUTTON, *supra* note 34, at 4 (noting BWS evidence helps create context for the factfinder to better understand a defendant’s actions); Dunn, *supra* note 11, at 349 (explaining how BWS evidence includes expert descriptions of the syndrome, tendencies of domestic violence victims, psychological reactions of domestic violence victims, basic nature of domestic violence, explanation of behavior that may seem unexplainable to a fact finder, and background information regarding behaviors that lay people may not interpret as typical of an abuse victim).

53. See Dunn, *supra* note 11, at 348; Terrance, Plumm & Rhyner, *supra* note 11, at 923 n.5 (explaining how “every jurisdiction accepts expert testimony on BWS to support claims of self-defense, and several states have codified its use” (quoting Lauren Champaign, *Criminal Law Chapter: Battered Woman Syndrome*, 11 GEO. J. GENDER & L. 59, 59–60 (2010))).

54. See Faigman & Wright, *supra* note 28, at 79–80 (noting that jurisdictions vary in their analysis of self-defense but focus on the four traditional requirements of the defense). Jurisdictions vary on the duty to retreat requirement with the majority not imposing the duty to retreat when the aggressor uses deadly force. *Id.* at 80 n.77. In cases where an individual is attacked inside their home, jurisdictions

cases, battered women kill their batterers “during a lull in the violence and, sometimes, when the batterer[s] [are] sleeping.”<sup>55</sup> The testimony helps explain the reasonableness of a defendant’s belief that serious harm was imminent and helps jurors determine if the belief was objectively reasonable.<sup>56</sup>

Despite the widespread use of BWS testimony in self-defense cases, courts are not always willing to accept BWS testimony in support of a duress defense.<sup>57</sup> The skepticism stems from a belief that syndrome-based arguments turn the objective standards used to assess the reasonableness of a defendant’s actions into a subjective inquiry.<sup>58</sup> Based on the elements of duress, however, some scholars argue BWS testimony is better suited for duress than self-defense.<sup>59</sup>

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are split on whether the individual had a duty to retreat when the attacker is a co-occupant of the home. *Id.* (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 396 n.36 (1972)).

55. *Id.* at 81 (explaining a battered woman may have used a weapon even though the batterer was unarmed).

56. *See* Burke, *supra* note 26, at 229–30 (explaining how jurors “intuitions about domestic violence victims” may lead jurors to “disbelieve [a] victim’s account of prior abuse or . . . conclude that the woman participated in or even enjoyed the abuse”); Faigman & Wright, *supra* note 28, at 81 (noting how the woman’s act towards her batterer “usually follows a long history and pattern of violence in the relationship” which might raise skepticism about the woman’s decision to stay in the relationship).

57. *See* Dunn, *supra* note 11, at 350 (noting that courts are especially unwilling to accept BWS testimony where the testimony includes evidence of abuse from people other than the person coercing the criminal action because they find it affects the objective requirements of a duress defense).

58. *See id.* at 358 (explaining how some courts believe the shift from an objective standard to a subjective standard risks taking into account the defendant’s unique psychological condition that conflicts with the reasonable-person standard); Faigman & Wright, *supra* note 28, at 95 (noting that some courts view BWS evidence “relevant to the defendant’s subjective state of mind or mental disability, rather than to the objective reasonableness of her decision to comply with a threat of imminent harm”).

59. *See* Dunn, *supra* note 11, at 364–65 (arguing BWS is better suited for a duress defense than self-defense because it better explains why the victim is submitting to her abuser’s demand rather than using force against the abuser). Further, Dunn contends that “BWS testimony can help the jury understand the defendant’s criminal acts resulting from the pressure to comply and avoid violence, just as it explains independent attacks on the abuser.” *Id.* at 365; *see also* Terrance, Plum & Rhyner, *supra* note 11, at 937–38 (explaining how “the PTSD category with reference to BWS provides a context from which a woman’s violent response to physical abuse may be understood”). The authors note that Walker argues that the PTSD criteria chart is a useful tool when presenting BWS to a judge or jury and explains the psychology of battered women. *Id.* at 937. The cycle of violence concept demonstrates the continuous fear and danger experienced by a battered woman, while learned helplessness explains a woman’s rationale for staying with the batterer. *Id.* The description of these BWS concepts along with the traditional PTSD factors establishes the reasonableness of a women’s actions despite the lack of physical presence or direct threat from her abuser at the time of the crime. *Id.*

1. *The Duress Defense*

In the criminal justice system, the defense of duress is generally viewed as an excuse rather than as a justification.<sup>60</sup> Defendants may use the defense to excuse “crimes against innocent [third] parties at the command of their batterers.”<sup>61</sup> While jurisdictions approach the duress defense in different ways, the general approach common law courts use involves a three-prong test requiring the defendant to prove each prong by a preponderance of the evidence.<sup>62</sup> The first prong requires a showing that the defendant was “under an immediate threat of death or serious bodily injury.”<sup>63</sup> Second, the defendant had “a reasonable, well-grounded fear that the threat would be effectuated.”<sup>64</sup> Finally, that the defendant had “no reasonable opportunity to escape her abuser.”<sup>65</sup> Similarly, the Model Penal Code (MPC) recognizes a duress defense where the defendant engaged in the conduct “because he was coerced to do so by the use of, or threat to use, unlawful force against his person . . . that a person of reasonable firmness in his situation would have been unable to resist.”<sup>66</sup> When evaluating a duress defense, courts and juries apply an objective, reasonable person standard to determine whether the defendant had a reasonable fear of the threat being effectuated.<sup>67</sup>

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60. See Burke, *supra* note 26, at 242–43 (explaining that “[j]ustification defenses operate when the defendant’s act is the morally preferred option”). Justification defenses involve “objectively preferable” acts, so the “psychological, subjective peculiarities of the defendant are generally irrelevant to the application of the justification defense.” *Id.* at 243. Alternatively, excuse defenses look at circumstances about the actor that “relieves her of moral culpability for the wrongful act.” *Id.*

61. *Id.* at 220.

62. *Id.* at 252–53. See Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 732–33 (1995) (providing an in-depth discussion of the jurisdictional differences in the duress defense).

63. Dunn, *supra* note 11, at 350.

64. *Id.*

65. *Id.*

66. MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1985); see also *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994) (noting the common law elements are in “harmony” with the duress analysis under the MPC).

67. See *United States v. Lopez*, 913 F.3d 807, 815 (9th Cir. 2019) (providing the elements and history of the duress defense); Dunn, *supra* note 11, at 356–58 (explaining that “a reasonable person would also not be able to resist such conduct” and that subjective fear alone is not enough to establish duress so the defendant must show they had a reasonable, objective fear that the threat would occur). See generally Burke, *supra* note 26, at 253 (discussing common duress factors).

## 2. *Expert Testimony*

As an evidentiary matter, courts must first determine whether expert testimony about BWS is even admissible.<sup>68</sup> Federal courts require that expert testimony is both reliable and relevant.<sup>69</sup> In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>70</sup> the Supreme Court established rules regarding the admissibility of expert testimony in the form of a non-exhaustive, multifactor list.<sup>71</sup> The *Daubert* Court intended to create a more flexible standard in line with the Federal Rules of Evidence and “their ‘general approach of relaxing the traditional barriers to “opinion” testimony.’”<sup>72</sup> Trial judges possess considerable discretion to decide whether particular expert testimony is reliable.<sup>73</sup> Additionally, expert testimony on BWS must be relevant to proving duress—a requirement currently causing disagreement among federal courts.<sup>74</sup>

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68. See Burke, *supra* note 26, at 234–35 .

69. See FED. R. EVID. 702. The rules regarding testimony by expert witness call for:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

*Id.*

70. 509 U.S. 579 (1993).

71. See *id.* at 593–94 (stating that the factors to consider in admitting expert testimony include: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory or technique finds “general acceptance” in the relevant scientific community); Burke, *supra* note 26, at 232 (explaining that before the Court announced *Daubert*, the admissibility rules on scientific evidence came from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which applied a “general acceptance” test, meaning the popularity of BWS among social scientists alone would permit the introduction of expert testimony into evidence). The *Daubert* Court rejected the “general acceptance” test. *Id.* at 232–33.

72. Burke, *supra* note 26, at 233 (quoting *Daubert*, 509 U.S. at 588).

73. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148–52 (1999) (“[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”).

74. See Musick, *supra* note 14, at 75 (discussing the circuit split with respect to the relevancy of BWS testimony in establishing a duress defense). For a discussion of the circuit split, see *infra* Section II.B.

B. *Judging Admissibility: BWS and the Courts*

Federal courts disagree on whether BWS testimony is objective and therefore relevant to assessing the defendant's duress claim under the objective reasonableness standard promulgated by the defense.<sup>75</sup> Some circuits take a more subjective approach and argue expert testimony on BWS is crucial for a jury to evaluate whether victims of BWS acted reasonably.<sup>76</sup> Alternatively, other circuits believe BWS evidence relates to a defendant's individual circumstances and therefore cuts against the defense's objective standard.<sup>77</sup>

1. *Courts Allowing BWS Testimony*

The circuits allowing BWS testimony assert that the evidence helps a jury determine whether a victim of BWS truly believed that no other options were available to avoid abuse other than committing the crime.<sup>78</sup> In *Dando v. Yukins*,<sup>79</sup> the defendant committed a series of armed robberies with her boyfriend.<sup>80</sup> Following her arrest, she told her attorney that she experienced a long history of sexual and physical abuse in the relationship and that her boyfriend beat and threatened to kill her right before the robbing spree.<sup>81</sup> The attorney, however, did not seek a duress defense or investigate the possibility of assessing whether the defendant suffered from BWS.<sup>82</sup> After receiving a ten- to thirty-year sentence, the defendant obtained new counsel and appealed the decision based on ineffective counsel.<sup>83</sup>

On appeal, the Sixth Circuit found no direct precedent addressing the relevance of BWS to a duress defense under Michigan law, so the court turned to a prior case where the Michigan Court of Appeals allowed BWS evidence for self-defense claims.<sup>84</sup> In the Michigan appellate case, the court determined BWS evidence was relevant to help assess whether the

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75. See Muscik, *supra* note 14, at 75. For an analysis of the disagreement between courts, see *infra* notes 76–116 and accompanying text.

76. See Musick, *supra* note 14, at 74. For a discussion on the courts allowing BWS evidence, see *infra* notes 78–100 and accompanying text.

77. See Musick, *supra* note 14, at 67. For a discussion on the courts allowing BWS evidence, see *infra* notes 101–116 and accompanying text.

78. Musick, *supra* note 14, at 67.

79. 461 F.3d 791 (6th Cir. 2006).

80. *Id.* at 793–94.

81. *Id.* at 794.

82. *Id.* at 794, 799–800.

83. *Id.* at 794–95. Dando initially motioned the Michigan circuit court to appoint an expert on BWS in order “to assess whether Dando should move to withdraw her no contest plea.” The circuit court subsequently “construed the request as one for an expert to assist with an ineffective assistance of counsel claim.” *Id.* at 795.

84. See *id.* at 801 (noting how the Michigan Court of Appeals allowed the use of BWS evidence “to explain how a battered spouse reacts to the batterer, to explain the reasonableness of the battered spouse’s perception that danger or great bodily harm is imminent, and also to rebut the prosecution’s inference that the

defendant “*reasonably* believed her life was in danger.”<sup>85</sup> The Sixth Circuit explained that a history of violent abuse and imminent threats could lead a reasonable person to act in a manner similar to the defendant.<sup>86</sup> The Sixth Circuit took a more subjective approach by looking at the defendant’s history of abuse to conclude BWS evidence could present a compelling duress defense in light of the defendant’s individual circumstances.<sup>87</sup> While the Sixth Circuit asserted that BWS is consistent with the reasonableness requirement of duress, the court did not explicitly address how the evidence impacts the objectivity of the requirement.<sup>88</sup>

Ten years later, in *United States v. Nwoye*,<sup>89</sup> the defendant and her boyfriend were convicted of conspiring to extort money from a doctor.<sup>90</sup> At trial, the defendant testified that her boyfriend coerced her into committing the extortion, frequently beat her during the course of their relationship, and psychologically controlled her.<sup>91</sup> The defendant’s counsel, however, did not introduce expert testimony on BWS and instead based

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defendant could have left rather than [commit the crime]” (quoting *People v. Wilson*, 487 N.W.2d 822, 824 (Mich. Ct. App. 1992))).

85. *Id.* at 801 (quoting *Wilson*, 487 N.W.2d at 824).

86. *See id.* at 801 (explaining that the fact evidence of BWS related to the issue of whether a defendant reasonably believed her life was in danger in self-defense cases “makes clear that the theory of [BWS] is not at odds with the reasonableness requirement—if anything, evidence of [BWS] can potentially bolster an argument that a defendant’s actions were in fact reasonable”). The Sixth Circuit explained that those unfamiliar with the reality of constant violence and sitting from the “relative comfort of a judge’s chambers or a jury box” might question the defendant’s decision to commit various crimes. *Id.* Therefore, evidence of BWS “can explain why a reasonable person might resort to such actions given a history of violent abuse and the imminent violent threats,” and “is relevant to show why a defendant did not leave the company of her abuser.” *Id.*

87. *See id.* (recounting the defendant’s history of “shocking” abuse from a young age and concluding her history would “present a potentially compelling duress defense based on BWS”); Musick, *supra* note 14, at 77 (arguing the Sixth Circuit uses a more subjective approach than the Fifth Circuit).

88. *See Dando*, 461 F.3d at 801. *But see id.* at 804–05 (Guy Jr., J., dissenting) (noting the district court’s decision that evidence a defendant suffered from BWS is not relevant to a duress defense because duress requires objective reasonableness).

89. 824 F.3d 1129 (D.C. Cir. 2016).

90. *See id.* at 1131 (noting the defendant previously had an affair with the doctor).

91. *Id.* at 1132. The defendant further testified that her boyfriend forced her to provide her ATM card and PIN number. *Id.* In addition, she stated that her boyfriend would often threaten to kill her and bury her inside their house. *Id.* She felt afraid to report him to the police because he had told her that he was a former FBI agent. *Id.* The defendant’s testimony also showed her boyfriend “did not have direct physical control over [her] at all times” because she attended nursing school and worked at a hospital. *Id.* However, the boyfriend demanded she always keep her phone with her and wear a Bluetooth earpiece during classes at school. *Id.*

the duress defense solely on the defendant's own trial testimony.<sup>92</sup> On appeal, the D.C. Circuit reversed the trial court's decision and held that expert testimony on BWS may be admissible to prove a duress defense.<sup>93</sup> The court determined expert testimony on BWS is reliable and relevant to both prongs of the duress defense and helps a jury assess whether a battered woman's actions were reasonable under the circumstances.<sup>94</sup>

A few years later, in *United States v. Lopez*,<sup>95</sup> the defendant bought a firearm using false identification and was convicted on three federal charges.<sup>96</sup> Prior to trial, the defendant advised the district court of her intent to introduce testimony from an expert "on issues of trauma, domestic violence, and victim behaviors."<sup>97</sup> The Ninth Circuit reversed the district court's decision and held that expert testimony on BWS is admissible

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92. *Id.* at 1133 (noting how the trial court determined the defendant did not present sufficient evidence to support a duress defense and declined to instruct the jury on the defense).

93. *Id.* at 1140 (finding expert testimony on BWS would have strengthened the credibility of the defendant's testimony about her boyfriend's abuse). The D.C. Circuit explained that jurors may doubt the testimony of a battered woman because "they do not believe that a woman subject to such abuse would stay with her abuser without alerting police or others." *Id.* Therefore, expert testimony on BWS can "dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time." *Id.* (quoting *People v. Humphrey*, 921 P.2d 1, 9 (Cal. 1996)).

94. *Id.* at 1137–38 (explaining the actions of the abusers may seem harmless to the jury but may present a warning of imminent and severe violence to the battered women familiar with this behavior); Musick, *supra* note 14, at 77 (arguing that the D.C. Circuit expanded the Sixth Circuit's approach by "emphasizing the importance of allowing BWS as evidence accompanied by expert testimony for duress cases").

95. 913 F.3d 807 (9th Cir. 2019).

96. *Id.* at 811. Prior to the purchase, the defendant's ex-boyfriend, a convicted felon on the run from the police, showed up at the defendant's house. *Id.* at 812. Over the next week, the ex-boyfriend continually asked the defendant to purchase a gun for him. *Id.* When the defendant did not initially comply, the ex-boyfriend continually showed up to her house making harmful threats against her and her family members and physically abusing the defendant. *Id.*

97. *Id.* at 813. The Ninth Circuit summarized the defendant's arguments in support of introducing this expert testimony as follows:

Lopez asserted that Dr. Karp's testimony would assist the jury "in understanding the evidence because . . . the trial [would] involve evidence as to coercion and threats of violence leading up to the day [her ex-boyfriend] took her from her home and forced her to purchase a firearm for him." Lopez further contended that Dr. Karp's testimony regarding "behaviors of victims of domestic violence" would "help provide context" to her duress defense, including whether her fear of [her ex-boyfriend] was "well-grounded" and whether she had a "reasonable opportunity" to escape from him. Finally, Lopez asserted that Dr. Karp's testimony would "liken to that of standard government expert testimony in a domestic violence case where there is the counter-argument that the victim's behavior was not consistent or credible victim behavior."

*Id.* at 813–14 (omission and first alteration in original).



to support a duress defense.<sup>98</sup> In reaching this conclusion, the court reasoned that BWS expert testimony “serves an important role in helping dispel many of the misconceptions regarding women in abusive relationships.”<sup>99</sup> The court explained that “expert testimony on how BWS can cause individuals to become hypervigilant to impending harm” is consistent with the duress defense’s objectively reasonable person standard.<sup>100</sup>

## 2. Courts Prohibiting BWS Testimony

Conversely, circuits not allowing BWS testimony contend that the evidence implicates a defendant’s individual circumstances and, therefore, is not consistent with the objective standard required by the duress defense.<sup>101</sup> In *United States v. Willis*,<sup>102</sup> the defendant was convicted of carrying a firearm while drug trafficking.<sup>103</sup> At trial, the defendant raised a duress defense and expressed that she greatly feared her boyfriend because of the beatings she received from him in the past.<sup>104</sup> In addition, a clinical psychologist testified about the effects of BWS.<sup>105</sup> Following an objection from the prosecution, the trial court prevented the psychologist from concluding his testimony on BWS, and the trial court instructed the jury on the duress defense without the complete testimony.<sup>106</sup>

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98. *Id.* at 825–26. The district court did not allow the defendant to introduce expert testimony on intimate partner abuse, explaining the duress defense required an objective standard of reasonableness and the expert testimony offered was subjective. *Id.* at 814.

99. *Id.* at 825.

100. *Id.* at 821–22. According to the court, “reasonableness . . . ‘is not assessed in the abstract’” and a defendant’s actions must be assessed in light of the defendant’s particular situation. *Id.* at 819–20 (quoting *United States v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016)).

101. Musick, *supra* note 14, at 67; see also Burke, *supra* note 26, at 258 (noting how consideration of BWS evidence in applying the duress standards would “turn the objective inquiry that duress has always required into a subjective one that focuses instead on whether the individual defendant’s unique psychological condition prevented her from resisting coercion”).

102. 38 F.3d 170 (5th Cir. 1994).

103. *Id.* at 173. The defendant testified that her boyfriend put a gun in her purse shortly before the arrest. *Id.*

104. *Id.* at 174.

105. *Id.* The psychologist stated that the defendant experienced a long history of familiar abuse resulting in a great deal of emotional turmoil and showed signs of anxiety and depression. *Id.* Moreover, she was constantly experiencing tension due to a strong desire to be loved and a very intense fear that she might be harmed or humiliated in a relationship. *Id.* Accordingly, “Dr. Harrison testified that Willis’ [s] relationships fell into a very clear sort of classical pattern of [BWS] and an abusive relationship.” *Id.*

106. *Id.* In finding the defendant guilty, the jury rejected the duress defense and consequently, the district court sentenced the defendant to the mandatory sentence of five years imprisonment followed by two years of supervised release. *Id.*

On appeal, the Fifth Circuit analyzed the “objective formulation” of the duress defense that considers the impact of a threat on a reasonable person.<sup>107</sup> The court noted the defendant’s fear of death or serious bodily injury must be “well-grounded,” and “[t]here must be no ‘reasonable’ alternative to violating the law.”<sup>108</sup> Ultimately, the court held that evidence a defendant is suffering from BWS is not relevant to determine whether the defendant acted under duress because the evidence is inherently subjective.<sup>109</sup> Thus, the Fifth Circuit concluded that BWS evidence would effectively turn the objective inquiry required under duress into a subjective one.<sup>110</sup>

Over two decades later in *United States v. Dixon*,<sup>111</sup> the defendant was convicted of embezzlement and theft.<sup>112</sup> During an interview with medical examiner, the defendant revealed years of sexual abuse and manipulation at the hands of her stepfather.<sup>113</sup> The defendant raised a duress defense, and the trial court denied her the use of BWS testimony to support the defense.<sup>114</sup> In affirming the trial court’s decision, the Tenth Circuit determined the plain text of the pattern jury instructions for duress clearly state that the circumstances surrounding a defendant’s actions are

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107. *Id.* at 175.

108. *Id.* The Fifth Circuit asserted “[t]his objective formulation is in harmony with the analysis of duress in the *Model Penal Code* which recognizes duress as a defense if the threat of the use of unlawful force is such ‘that a person of reasonable firmness in his [or her] situation would have been unable to resist.’” *Id.* (quoting MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1985)).

109. *Id.* at 175–77. The court explained that BWS evidence does not address “whether a person of reasonable firmness would have succumbed to the level of coercion present in a given set of circumstances,” as required by the defense. *Id.* at 175. The court found the evidence is generally introduced “to explain why this particular defendant succumbed when a reasonable person without a background of being battered might not have.” *Id.* Consequently, the court determined BWS evidence aims to establish that “the defendant is unusually susceptible to the coercion” because of her psychological condition. *Id.*

110. *Id.* at 176 (finding the question would incorrectly look at whether the individual woman could have acted differently “in light of the psychological condition from which she suffers”); *see also* Dunn, *supra* note 11, at 361 (explaining how the Fifth Circuit felt that “BWS evidence is ‘inherently subjective’ and thus incompatible with the duress defense’s objective, reasonable-person standard and ultimately irrelevant” (quoting *Willis*, 38 F.3d at 175)); Bailey Wharton, *Circuit Split: Is Evidence of Battered Woman Syndrome Relevant to Proving a Duress Defense?*, UNIV. CINCINNATI L. REV. (Dec. 17, 2021), [https://uclawreview.org/2021/12/17/circuit-split-is-evidence-of-battered-woman-syndrome-relevant-to-proving-a-duress-defense/#\\_ftn1](https://uclawreview.org/2021/12/17/circuit-split-is-evidence-of-battered-woman-syndrome-relevant-to-proving-a-duress-defense/#_ftn1) [<https://perma.cc/3FPX-TG6M>] (explaining that after the Fifth Circuit’s ruling there was an “explosion of literature” written in opposition of the decision).

111. 901 F.3d 1170 (10th Cir. 2018).

112. *Id.* at 1173.

113. *Id.* at 1174–75.

114. *Id.* at 1173.

assessed using an objective lens.<sup>115</sup> As a result, evidence of a mental condition that affects the defendant's ability to perceive threats of harm and seek legal alternatives is subjective and inadmissible.<sup>116</sup>

### III. MORE TO THE STORY: THE ROAD TO *DINGWALL*

Marjory Dingwall met Aaron Stanley in Wisconsin while she lived in a treatment center for alcohol abuse.<sup>117</sup> Stanley, a former resident of the treatment center, worked as a driver for the center when he and Dingwall met.<sup>118</sup> After Dingwall and Stanley started a relationship, Dingwall relapsed and was not allowed to continue living at the treatment center.<sup>119</sup> Initially, Dingwall and her daughter stayed at various homeless shelters, but eventually they moved in with Stanley.<sup>120</sup> During the first week of the living arrangement, Dingwall moved back to the homeless shelter because she was worried about Stanley's behavior towards her, but she moved back in with him after a week.<sup>121</sup>

Stanley began using crack cocaine and started emotionally and physically abusing Dingwall.<sup>122</sup> Abusive episodes included hitting and strangling her, dragging her down the stairs, breaking her nose, and punching her ears.<sup>123</sup> Following an abusive episode, Stanley apologized profusely, and the relationship remained stable until he spiraled into another violent rage.<sup>124</sup> After Stanley bought a gun, the beatings and controlling behavior towards Dingwall became more severe.<sup>125</sup> He walked around the house carrying the gun and, on one occasion, shot the mattress on the side where Dingwall slept.<sup>126</sup> Stanley frequently looked through

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115. *Id.* at 1180–81 (“[T]he legal propriety of a defendant’s assessment of, and response to, the circumstances that allegedly have subjected her to duress is determined by applying an objective lens—that is, a defendant’s subjective beliefs or perspectives are only relevant insofar as they are objectively reasonable.”).

116. *Id.* at 1184 (“[T]he guidepost of our pattern instruction is not what is reasonable only through the PTSD-distorted lens of [the defendant] but, rather, what is objectively reasonable.”).

117. *See* *United States v. Dingwall*, 6 F.4th 744, 747 (7th Cir. 2021) (noting how the court accepted Dingwall’s account of the facts because the court is reviewing a rejection of her duress defense).

118. *Id.*

119. *Id.*

120. *Id.* at 748. Dingwall and her daughter rented a room for a few weeks but moved out after Dingwall woke up one night to find the landlord sitting on her bed. *Id.* The homeless shelters were crowded and often times did not have space for Dingwall and her daughter. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* (noting how a “pattern soon became apparent”).

125. *Id.*

126. *Id.*

Dingwall's phone and prevented her from buying food by taking her food-stamps.<sup>127</sup> Although Dingwall hoped to leave the relationship, she felt she did not have any alternative options.<sup>128</sup>

Stanley started robbing stores for drug money and insisting Dingwall owed him money.<sup>129</sup> After Dingwall unsuccessfully begged her parents for money, Stanley grew angry and "literally pistol-whipped her."<sup>130</sup> The following day, January 6, 2019, Stanley drove Dingwall to a gas station, placed the gun in her hand, and told her to rob the store.<sup>131</sup> Dingwall took \$80 in cash from the store clerk after revealing the gun.<sup>132</sup> Consequently, Stanley did not physically abuse Dingwall that evening.<sup>133</sup> Stanley, however, started sending threatening text messages to Dingwall the next morning insisting she still owed him money.<sup>134</sup> Later that day, Dingwall committed a second robbery with the gun while Stanley was at work.<sup>135</sup> Stanley was nice to Dingwall that evening but demanded she have "degrading sex" with him.<sup>136</sup>

The next day, Stanley called Dingwall from work, demanding more money and suggesting that Dingwall rob a Mobil gas station for additional funds.<sup>137</sup> Soon after, Dingwall entered the gas station with the gun and committed the third robbery.<sup>138</sup> The following morning, Stanley strangled and punched Dingwall in the face.<sup>139</sup> Dingwall later text messaged Stanley, expressing her severe pain from the beatings and asking that he "please try to be nice" in the future.<sup>140</sup> Police arrested Dingwall a few days later, and a federal grand jury charged her with three counts of robbery and three counts of brandishing a firearm during a violent crime.<sup>141</sup>

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* (noting Stanley's actions "sen[t] the message [to Dingwall] that committing the crime as ordered was a way to avoid his abuse").

134. *Id.* The texts persisted all day and included: "NEED THE REST OF THE MONEY THIS IS BS," "U and ur mother need 2 figure this S\*\*\* OUT," and "I see NO reason ur mom can't deposit this f\*\*\*ing money." *Id.* at 748 n.4. Dingwall's responses included a text saying "Just F\*\*\*in' Kill me already." *Id.*

135. *Id.* at 748 (explaining that Dingwall did not inform Stanley that she received the money from a robbery but rather said her mother provided the money).

136. *Id.*

137. *Id.*

138. *Id.* at 748–49.

139. *Id.* at 749.

140. *Id.* (noting Dingwall expressed that she had "never been hit so hard in all [her] life").

141. *Id.* ("A federal grand jury charged Dingwall with three counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and three counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).").

Dingwall filed a pretrial motion in limine requesting a ruling on evidence about battering and its effects to support her duress defense.<sup>142</sup> In addition to her own statements, emails, and text messages, Dingwall sought to introduce an expert report from Dr. Darald Hanusa, a licensed substance abuse counselor from the Midwest Domestic Violence Resource Center.<sup>143</sup> He diagnosed Dingwall with PTSD and BWS and described her as a victim of “an extraordinarily extreme case of severe relationship abuse.”<sup>144</sup> The report included research showing how “battering can transform a victim’s cognition and perception” and create a sense of hopelessness in the victim that leads to “increased tolerance for abuse from the partner and rationalization of such abuse.”<sup>145</sup> The report explained that battered women “are typically fearful” and attempt to stop the abuse by “cajoling the abuser, engaging in self-destructive [behaviors] including self-blame, criminal[,] or illegal behaviors,” or any other activity the victim believes may help her.<sup>146</sup> Dr. Hanusa concluded the report with his views on the duress defense:

Marjory has survived a relationship in which her physical and emotional character was subjected to horrific abuse [in her] physical and psychological relationship with Aaron. Based on the data presented in this case, it is reasonable to conclude that Mar-

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142. *Id.* The Seventh Circuit deliberately uses the term “‘battering and its effects’ because it is more inclusive and less prone to stereotyping of victims” than BWS. *Id.* at 747 n.2.

143. *Id.* at 749. Dr. Hanusa’s interactions with Dingwall included spending a full day with her and “evaluating her mental state through over a dozen standardized measures applying questionnaires and checklists.” *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (first alteration in original). The report additionally stated:

As with victims of terrorism or those held hostage, a battered woman’s perception of her situation and reality in general is changed and substantially altered. When this occurs, her capacity to evaluate options is diminished substantially. As a mechanism related to “learned helplessness[,]” she will take whatever action that has the highest predictability stopping the violence against her, even if—in the long run—it is detrimental to her own wellbeing. As Marjory shared in this report, the only thing that would predictably stop Aaron’s abuse of her was to do exactly what he said, even committing robbery.

. . . [B]attered women, such as Marjory, have experienced trauma and consequently have had their basic beliefs about the world and themselves challenged and changed. These changes have a great impact on a battered woman’s perceptions of her options, on not just the relationships she forms, and choices she makes in her life but the consequences of these choices and her desire to avoid further violence from her partner.

. . . According to Dutton (1993), the battered woman’s *perception of viable options for stopping the violence and abuse by any means* is not only shaped by her own prior experience with violence, but also influences her future actions in response to violence. The perception or understanding of whether there are options available that would end the violence is based largely on what has actually been learned through experience.

*Id.* at 749–50 (alterations in original).

jury 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>147</sup>

The United States District Court for the Western District of Wisconsin denied the motion because Dingwall's evidence did not meet the duress requirements of "imminence" and "no legal alternatives" under existing Seventh Circuit precedent.<sup>148</sup> Dingwall thus pled guilty to three counts of robbery and one count of brandishing a firearm but reserved her right to appeal the denial of her motion in limine.<sup>149</sup> The district court, in sentencing Dingwall to thirty months and one day in prison and three years of supervised release, described the evidence of severe abuse as "extraordinarily mitigating."<sup>150</sup> Dingwall appealed the denial of her motion in limine to the Seventh Circuit.<sup>151</sup>

#### IV. SHIFTING FOCUS: THE SEVENTH CIRCUIT'S DECISION IN *DINGWALL*

On appeal, the Seventh Circuit reviewed the case *de novo*.<sup>152</sup> Prior to its review, the Seventh Circuit discussed the central issues of Dingwall's duress defense, namely the fact that Stanley was not physically present for the three robberies and that Dingwall possessed a gun.<sup>153</sup> The court also noted Dingwall's arguments "that a reasonable person *in her situation* . . . could fear imminent death or serious injury if she did not commit the robberies and could not see other reasonable alternatives to the crimes."<sup>154</sup> To support her arguments, Dingwall requested that the court find expert testimony from Dr. Hanusa admissible to explain her situation to a jury, including "how abuse affects victims' perceptions, choices, and

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147. *See id.* at 750 (first alteration in original).

148. *Id.* ("The judge denied Dingwall's motion in an oral ruling, observing the absence of circuit precedent on the issue and looking 'forward to seeing what the Seventh Circuit says about it.'").

149. *Id.*

150. *Id.* At the sentencing hearing, the district court suggested that the Seventh Circuit reconsider its legal position on the duress defense, stating "abuse . . . can have the effect of being so dominating in [the victims'] mind that it really undermines their complete responsibility for what they do." *Id.*

151. *Id.*

152. *Id.* The Seventh Circuit focused on the district court's finding that Dingwall, as a matter of law, failed to introduce sufficient evidence to support a duress defense. *Id.*

153. *Id.* at 750. The court noted that a jury might determine that a reasonable person in Dingwall's situation did not reasonably fear imminent violence and had reasonable alternatives based on these facts. *Id.* at 750–51.

154. *Id.* at 751.

behavior.”<sup>155</sup> The Seventh Circuit prefaced its analysis by observing that the court had not previously decided the issue of the admissibility of expert evidence on battering and its effects.<sup>156</sup>

A. *Use of Expert Testimony on Battering and Its Effects*

First, the Seventh Circuit analyzed other circuits’ approaches to expert testimony on battering and its effects in cases where the individual posing the threat was not physically present when the defendant committed the crime.<sup>157</sup> After review, the Seventh Circuit sided with the *Lopez*, *Nwoye*, and *Dando* courts and described the expert testimony as objective.<sup>158</sup> The Seventh Circuit explained that a defendant’s situation—and the reasonableness of the defendant’s actions—must be “considered in light of what is known about the objective effects of such violent and psychological abuse, not on the particular defendant but more generally.”<sup>159</sup>

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155. *Id.*

156. *Id.* For a discussion of the Seventh Circuit’s decision to use “battering and its effects” over BWS, see *supra* note 142 and accompanying text.

157. *Id.* at 751–53. The court noted the Sixth Circuit’s assertion in *Dando* that “the theory of [BWS] is not at odds with a reasonableness requirement,” and BWS evidence “can potentially bolster an argument that a defendant’s actions were in fact reasonable.” *Id.* at 751 (quoting *Dando v. Yukins*, 461 F.3d 791, 801 (6th Cir. 2006)). The *Nwoye* court took a similar approach to *Dando* and reasoned that “the duress defense requires a defendant to have acted reasonably under the circumstances, and expert testimony can help a jury assess whether a battered woman’s actions were reasonable” *Id.* (quoting *United States v. Nwoye*, 824 F.3d 1129, 1136 (D.C. Cir. 2016)). The Seventh Circuit found the District Court’s reasoning that “[a]lthough a jury might not find the appearances sufficient to provoke a reasonable person’s fear, they might conclude otherwise as to a reasonable person’s perception of the reality when enlightened by expert testimony on the concept of hypervigilance” particularly relevant to the case. *Id.* at 751–52 (quoting *Nwoye*, 824 F.3d at 1137). On the other hand, the Fifth and Tenth Circuits have affirmed the exclusion of such expert testimony because it does not address the objective reasonableness of the defendant’s behavior. *Id.* at 752.

158. *Id.* at 754 (“[E]xpert testimony on battering and its effects may be offered in support of a duress defense because it may help a jury understand the objective reasonableness of a defendant’s actions in the situation she faced, which included the history of violent and psychological abuse.”).

159. *Id.* (noting that questions of reasonableness posed by the duress defense are not asked and answered in the abstract). To illustrate its point, the Seventh Circuit provided a narrative example:

A reasonable man is not likely to fear death or great bodily injury when a person advances towards him during a verbal altercation. However, 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.

*Id.* (quoting 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)).

Next, the Seventh Circuit analyzed how the government previously used expert evidence on battering and its effects to bolster its case when prosecuting human trafficking and sexual abuse crimes.<sup>160</sup> The Seventh Circuit noted how the government commonly uses expert evidence for support but sought to prevent Dingwall from using the same type of evidence in the case at issue.<sup>161</sup> Ultimately, the Seventh Circuit concluded that “[t]he government cannot have it both ways.”<sup>162</sup>

Then, the Seventh Circuit assessed how expert testimony can serve as evidence of a mental condition under objective standards.<sup>163</sup> The court compared evidence of battering and its effects to similar evidence regarding personal circumstances that courts previously admitted under the objective reasonableness standard.<sup>164</sup> The findings showed that in all of

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160. *Id.* at 753 (noting that the government introduced expert evidence of battering and its effects to explain why a victim of abuse, serving as a witness, “recanted her account of the violence, threats, and kidnapping” in *United States v. Young*, 316 F.3d 649, 657–59 (7th Cir. 2002)). The court found that “expert testimony about battering and its effects was ‘both reliable and helpful in a case such as this one’ because the ‘testimony was highly probative as to why [the witness] recanted on the stand.’” *Id.* (alteration in original) (quoting *Young*, 316 F.3d at 658–59). “In prosecuting human trafficking cases, the government often introduces expert evidence to explain how traffickers systematically and intentionally coerce their victims by inflicting psychological control and fear.” *Id.*; *see also, e.g.*, *United States v. Young*, 955 F.3d 608, 615 (7th Cir. 2020); *United States v. Alzanki*, 54 F.3d 994, 1006, 1009 (1st Cir. 1995). “Similarly, in prosecutions for sexual abuse of minors, courts frequently admit expert evidence about ‘grooming’ to help the jury understand how child sex abusers develop an emotional relationship with a minor before initiating sexual activity.” *Dingwall*, 6 F.4th at 754; *see also, e.g.*, *United States v. Romero*, 189 F.3d 576, 582 (7th Cir. 1999) (allowing “expert testimony explaining a child molester’s methods to attract and abuse children to help [the] jury understand how some child molesters operate”).

161. *Dingwall*, 6 F.4th at 754.

162. *Id.* (noting how the government cannot admit evidence on battering and its effects “to explain its own witnesses’ behavior but exclud[e] the evidence when it is helpful to an accused defendant”). The court explained that as the government’s positions in these similar contexts demonstrate, “there may be significant value in the evidence Dingwall seeks to introduce.” *Id.* “Expert evidence of battering and its effects can help to explain to a jury, likely unfamiliar with the topic, how victims of battering may respond to their circumstances.” *Id.*

163. *Id.* at 754–55. The Seventh Circuit discussed how the government argued for the court to apply “a narrower standard for objective reasonableness” similar to the Tenth Circuit in *Dixon*. *Id.* at 754. The court agreed with the government that “the mental processes themselves are a subjective factor; the inquiry could not consider the particular defendant’s own value judgments and prudential calculations of the information she perceives.” *Id.* at 755 (quoting *United States v. Dixon*, 901 F.3d 1170, 1183 (10th Cir. 2018)). The court explained that “the factual existence of a mental condition is an ‘external, concrete factor’ that may be demonstrated with evidence, and that objective condition carries with it relevant factors that can assist in the reasonable person inquiry.” *Id.* The court ultimately stated that “[e]vidence of the existence of a mental condition should be admissible to help the factfinder consider how a reasonable person with that condition may have responded to the situation.” *Id.*

164. *Id.* (assessing to the government’s example of conditions that would warrant expert testimony: colorblindness and a photographic memory). In the case of



these types of cases, expert testimony may inform a jury about the objective reasonableness of a person's actions, especially to circumstances unfamiliar to a typical juror.<sup>165</sup> The court further explained that expert evidence on battering and its effects used to assess "how a reasonable person who has been battered may have perceived a situation" is objective and admissible.<sup>166</sup> In contrast, expert evidence explaining how a defendant "actually perceived the situation" is subjective and inadmissible.<sup>167</sup>

### B. *Dingwall's Duress Defense*

Next, the court acknowledged that under Seventh Circuit precedent, the duress defense required Dingwall to produce evidence that "(1) she reasonably feared immediate death or serious bodily harm unless she committed the offense; and (2) there was no reasonable opportunity to refuse to commit the offense and avoid the threatened injury."<sup>168</sup> The Seventh Circuit acknowledged that the MPC phrases the defense slightly differently but concluded that reasonableness is the touchstone of the defense under both common law and the MPC.<sup>169</sup>

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colorblindness, a court may consider "what a reasonable person who is unaware of certain color-related facts might do." *Id.* (quoting *Dixon*, 901 F.3d at 1183). Similarly, in the case of a photographic memory, a court may use expert testimony "to consider what a reasonable person with access to such knowledge might do." *Id.* (quoting *Dixon*, 901 F.3d at 1183).

165. *Id.* at 756–57 (noting how a jury may not be familiar with the circumstances Dingwall faced which most people have likely not experienced). The court noted that it often considers personal circumstances under objective standards, such as in human trafficking and sexual abuse cases. *Id.* at 755–57; *see also* Recent Case, *supra* note 24, at 1939 (explaining that most on point are cases against police officers for excessive force, "both sides routinely offer expert opinions" as to whether "actions were objectively reasonable *under the circumstances*" (quoting *Dingwall*, 6 F.4th at 756); DUTTON, *supra* note 34, at 4 (arguing that it is necessary in criminal cases involving a woman who suffered from domestic violence for the jury to "understand *why* the defendant did what she did"); Burke, *supra* note 26, at 223 (explaining how lay people commonly believe battered women enjoy the beatings or could leave the relationship if they really wanted).

166. *See Dingwall*, 6 F.4th at 755 (explaining how the "influence of mental conditions on objective reasonableness and subjective perceptions does not lend itself well to bright lines"). The Seventh Circuit reasoned that courts are capable of distinguishing between the objective and subjective evidence pertaining to battering and its effects. *Id.*

167. *Id.*

168. *Id.* at 757 (quoting *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009)). Additionally, the court analyzed the Seventh Circuit Pattern Criminal Jury Instructions regarding duress, which state "[the] defendant must prove 'fear of immediate death or serious injury if she did not commit the offense, and had no reasonable opportunity to refuse to commit the offense.'" *Id.* at 746 n.1 (alteration in original) (citing SEVENTH CIR. PATTERN CRIM. JURY INSTR. § 6.08 (2020)).

169. *Id.* at 747 (noting the duress defense uses "reasonable" twice). The court explained that the MPC similarly focuses on reasonableness. *Id.* For an extensive discussion about the duress defense under both common law and MPC and other circuits' focus on a distinction between the two standards, *see supra* Part II.

Focusing on the reasonableness requirement, the court explained that “reasonableness . . . is not assessed in the abstract” and an analysis of reasonableness must consider a “defendant’s particular circumstances.”<sup>170</sup> Next, the Seventh Circuit discussed how expert evidence is useful when analyzing both prongs of the duress defense.<sup>171</sup>

Turning to the imminence requirement, the court acknowledged that violence may occur at any time in the context of an abusive relationship.<sup>172</sup> Therefore, “[w]hether a battered person in Dingwall’s shoes could have reasonably interpreted Stanley’s continuous, predictable violence” as a form of “‘imminent violence’ is exactly why expert evidence on battering and its effects could be helpful to the jury.”<sup>173</sup> Consequently, the Seventh Circuit rejected the government’s argument that violence was not imminent because Stanley was not present during the robberies.<sup>174</sup>

The court then assessed whether Dingwall faced “imminent violence unless she committed the offenses.”<sup>175</sup> Ultimately, the court determined that Stanley’s pattern of withholding violent abuse after Dingwall obeyed his demands “showed a level of manipulation and a style of communication that could lead a reasonable person in [Dingwall’s] situation to have interpreted Stanley’s demands and behavior as a threat of imminent violence unless she committed each robbery.”<sup>176</sup> The Seventh Circuit concluded that evidence of the abusive and cyclical patterns coupled with expert testimony explaining the effects of battering would be helpful to a jury when assessing the imminence prong of the defense.<sup>177</sup>

Moving to the “reasonable alternative” prong of duress, the court considered the government’s argument that Dingwall could have sought help or refused to commit each crime when Stanley was not physically pre-

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170. *Id.* at 757 (quoting *United States v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016)).

171. *Id.*

172. *Id.* (explaining how violence is not always an “isolated or explicit threat”).

173. *Id.* The court reasoned that expert evidence on battering and its effects “may be helpful to a jury evaluating whether a reasonable person in Dingwall’s position would have reasonably perceived an immediate threat of death or substantial injury from Stanley.” *Id.* at 758.

174. *Id.* at 757. The court concluded that physical “[p]roximity is not an explicit requirement under the ‘imminence’ element, but because it may appear implicit” to the average juror, expert testimony on battering and its effects provides necessary context. *Id.* The Seventh Circuit agreed with the Sixth, Ninth, and D.C. circuits in “reject[ing] a strict physical proximity test to establish a reasonable fear of imminent violence.” *Id.* See generally Musick, *supra* note 14, at 85 (analyzing how the Seventh Circuit look at both their own and other circuits’ precedent).

175. *Dingwall*, 6 F.4th at 758 (noting that the threat of imminent violence is the second issue Dingwall faced under the imminence requirement).

176. *Id.*; see also Musick, *supra* note 14, at 87 (listing out all the things the court looked at when making this decision).

177. *Dingwall*, 6 F.4th at 757–58; see also Musick, *supra* note 14, at 87 (analyzing the court’s reasoning).

sent.<sup>178</sup> The Seventh Circuit conceded that a reasonable person who has never been battered might have believed there was an alternative to committing each robbery, but the court concluded that the circumstances Dingwall faced must be the focus of the inquiry.<sup>179</sup> Ultimately, the Seventh Circuit held that “expert evidence of battering and its effects may be permitted to support a duress defense because it may inform the jury how an objectively reasonable person under the defendant’s circumstances might behave.”<sup>180</sup> The court reversed the judgment of the district court and remanded the case for further proceedings.<sup>181</sup>

#### V. THE POWER OF NEUTRALITY: CRITICAL ANALYSIS OF *DINGWALL*

This Part provides a critical analysis of the *Dingwall* court’s reasoning that led the court to find evidence of battering and its effects admissible to support a duress defense. Subsection A explains how the Seventh Circuit’s rationale aligns with circuits on both sides of the split. Additionally, subsection B argues that the Seventh Circuit’s decision to use the term “battering and its effects” avoids the historical criticisms associated with BWS and therefore increases the likelihood that other courts will rely on the *Dingwall* decision in the future.

##### A. Common Ground with Other Circuits

The Seventh Circuit took the correct approach in *Dingwall* by framing the rationale for allowing expert testimony on battering and its effects to support a duress defense in a way that explicitly aligns with the objective requirement.<sup>182</sup> Equally important, the court differentiated between objective evidence and a defendant’s individual circumstances.<sup>183</sup> The court

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178. *Dingwall*, 6 F.4th at 758 (acknowledging the government’s focus on the fact that Stanley was not present and Dingwall possessed the gun used to commit the crimes).

179. *Id.* (noting that “[t]he repeated abuse and its impact on an objectively reasonable person are crucial here”). Using language from the MPC’s duress defense, the court noted that “expert evidence on battering and its effects may give a lay jury useful insights about the situation in which a person of reasonable firmness finds herself.” *Id.* at 747.

180. *Dingwall*, 6 F.4th at 746. The decision is consistent with the Sixth Circuit in *Dando*, the Ninth Circuit in *Lopez*, and the D.C. Circuit in *Nwoye*. *Id.* at 761. *But see id.* at 761–62 (Kirsch, J., concurring) (highlighting the limits of the holding and emphasizing the district court’s role to decide in the first instance whether Dingwall’s evidence should be admitted at trial). Judge Kirsch noted the court “go[es] no further than instructing that district courts are not barred by our caselaw from considering testimony of battering and its effects when a criminal defendant attempts to offer a duress defense.” *Id.* at 762.

181. *Id.* at 746 (majority opinion); *see also* Ziegler, *supra* note 19 (explaining that the decision “does not guarantee the success of Dingwall’s duress defense nor that the [BWS] evidence will be admitted in trial. It merely overturned the exclusion of Dingwall’s proffered evidence”).

182. For an analysis of the *Dingwall* court’s approach, see *infra* notes 183–187 and accompanying text.

183. *Dingwall*, 6 F.4th at 754.

explicitly distinguished “the particular defendant’s own value judgements and prudential calculations of the information she perceives,” which is not admissible, from “the factual existence of a condition” that is an “‘external, concrete factor’ that may be demonstrated with evidence,” which is admissible.<sup>184</sup> This clarity is significant because the circuit split revolves around whether the evidence changes the lens from objective to subjective.<sup>185</sup>

The framework deployed by the Seventh Circuit addresses the issues raised by the Fifth and Tenth Circuits yet takes a neutral approach that does not directly attack the opposing circuits.<sup>186</sup> The *Dingwall* court’s description of the evidence as objective effects of psychological abuse, not particular to the defendant, addresses the Fifth Circuit’s argument that such evidence seeks to establish that a defendant is unusually susceptible because of her psychological condition.<sup>187</sup> Additionally, the *Dingwall* court explained that the expert evidence proposed by Dingwall has “significant value” because the average person likely does not have experience with or an understanding of the effects of battering.<sup>188</sup> This touched on the Tenth Circuit’s assertion in *Dixon* that sometimes specific circumstances confronting a defendant may influence the factfinder’s perception—providing the example of a quadriplegic that may have different experiences than a person who is not a quadriplegic.<sup>189</sup> In doing so, the

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184. *Id.* at 755 (quoting *United States v. Dixon*, 901 F.3d 1170, 1183 (10th Cir. 2018)). The Seventh Circuit noted that the presence of a mental condition “carries with it relevant factors that can assist in the reasonable person inquiry.” *Id.*; see also *Dunn*, *supra* note 11, at 366 (explaining that “because the victim has lived through numerous cycles of violence, her heightened perception of danger is significantly better at predicting negative consequences than an equally reasonable person without experiences with abuse”). As a result, victims of abuse take threats seriously because they have first-hand knowledge of the type of harm the abuser may inflict. *Id.*

185. *Musick*, *supra* note 14, at 75. For a full discussion of the circuit split, see *supra* Section II.B.

186. *Dingwall*, 6 F.4th at 752 (noting how the Fifth and Tenth Circuits previously affirmed the exclusion of expert testimony on battering and its effects because the evidence “does not address the objective reasonableness of the defendant’s behavior”). The only other time the *Dingwall* court directly mentioned an opposing circuit, was when it concluded that evidence pertaining to the existence of Dingwall’s mental condition was in fact an objective external factor, even under the narrower standard for objective reasonableness adopted by the Tenth Circuit in *Dixon*. *Id.* at 754–55.

187. See *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994) (stating that evidence of BWS is “usually consulted to explain why [a] particular defendant succumbed when a reasonable person without a background of being battered might not have”).

188. *Dingwall*, 6 F.4th at 754.

189. See *Dixon*, 901 F.3d at 1183 (noting how a quadriplegic would not have the ability to physically run away from an immediate threat of death or injury).

Seventh Circuit addressed the Tenth Circuit's argument that evidence of non-tangible psychological conditions—such as BWS—that alter a defendant's subjective beliefs is not admissible.<sup>190</sup>

Turning to the circuits allowing BWS evidence, the Seventh Circuit strengthened and neutralized the other circuits' reasoning.<sup>191</sup> The Seventh Circuit explicitly described evidence of battering and its effects as both relevant and objective information.<sup>192</sup> Although the Sixth Circuit disagreed with the trial court's determination that the evidence is inherently subjective, the court only stated that the evidence is not at odds with the reasonableness requirement and did not use the word "objective" in the majority opinion.<sup>193</sup> Similarly, the D.C. Circuit asserted that BWS evidence is relevant to a duress defense because it can help assess whether actions were reasonable but also did not mention objectivity.<sup>194</sup>

The Seventh Circuit avoided arguments about subjectivity by describing evidence of battering and its effects as objective information that is separate from the defendant's individual perceptions.<sup>195</sup> Alternatively, the D.C. Circuit noted that the relevance of BWS evidence turns on whether "any aspects of the defendant's 'particular circumstances' . . . can help the jury assess the reasonableness of her actions."<sup>196</sup> The Ninth Circuit later used this "particular circumstances" language from *Nwoye* in its *Lopez* decision.<sup>197</sup>

Additionally, the Seventh Circuit does not distinguish the arguments of any other circuits.<sup>198</sup> The Ninth Circuit, however, explicitly distinguished its rationale from the Fifth Circuit, stating "expert testimony on how BWS can cause individuals to become hypervigilant to impending

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190. *See id.* at 1182 (describing the defendant's evidence of the impact of PTSD as "subjectively distorting").

191. For a discussion of how the Seventh Circuit built on the other circuits' reasoning, see *infra* notes 192–197 and accompanying text.

192. *Dingwall*, 6 F.4th at 755 (analogizing the effects of battering to the existence of a mental condition which is an "objective condition [that] carries with it relevant factors that can assist in the reasonable person inquiry").

193. *See Dando v. Yukins*, 461 F.3d 791, 801 (6th Cir. 2006) (explaining how BWS evidence can potentially bolster a defendant's argument without ever using the word "objective").

194. *See United States v. Nwoye*, 824 F.3d 1129, 1138 (D.C. Cir. 2016) ("[E]xpert testimony on battered woman syndrome may be admissible as a general matter to prove duress because such testimony can be reliable and can be relevant to both prongs of the duress defense.").

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

196. *Nwoye*, 824 F.3d at 1137.

197. *United States v. Lopez*, 913 F.3d 807, 82 (9th Cir. 2019) (citing *Nwoye*, 825 F.3d at 1137).

198. For an explanation of how the *Dingwall* court's reasoning aligned with the opposing circuits' rationales, see *supra* notes 184–188 and accompanying text.

harm does not, as the Fifth Circuit perceives, seek to alter the duress defense's reasonable-person standard."<sup>199</sup> As a result, the Seventh Circuit's approach is consistent with and potentially adoptable by all circuits.<sup>200</sup>

B. *"Battering and Its Effects" Prevails Over BWS*

The Seventh Circuit's use of the term "battering and its effects" plays an important role in the de-stigmatization and de-mystification of abuse, and strengthens the chances that all victims of abuse will obtain—or at least have a fair opportunity to obtain—justice.<sup>201</sup> Expert testimony about the effects of battering is particularly important to combat the misconceptions and biases held by jurors towards victims of abuse.<sup>202</sup> Juries are susceptible to unfairly judging battered women, especially women who did not formally report their abuse.<sup>203</sup> Expert testimony helps the jurors understand a defendant's situation and make informed conclusions about the defendant's actions.<sup>204</sup>

One author argued that if defendants' "behavior[s] [are] not understood in the full context of their lives, important decisions in a legal case can be incorrectly influenced by stereotypes or assumptions about" the behavior of victims of battering.<sup>205</sup> The author further contended that "BWS does a poor job of describing for the court the range of experiences or behaviors of women exposed to domestic violence" in a trial context.<sup>206</sup> BWS does not adequately capture the complexity of domestic violence.<sup>207</sup> The theory incorporates the responses of all battered women under a single construct and creates a stereotypical battered woman, which runs the

199. *Lopez*, 913 F.3d at 821–22 (citing *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994)).

200. For a full discussion of the circuit split, see *supra* Section II.B.

201. Musick, *supra* note 14, at 88. See generally Terrance, Plumm & Rhyner, *supra* note 11, at 925, 942.

202. For a discussion of the misconceptions held by jurors with respect to battered women, see *infra* note 204 and accompanying text.

203. Musick, *supra* note 14, at 73–74.

204. See DUTTON, *supra* note 34, at 4 (explaining how battering and the effects of battering are complex and often not well understood by the lay public). Dutton notes:

When the defendant is a woman who has been battered, what she did (and in some cases, did not do) is not always understandable to the lay individuals on the jury. Judges and jurors can hold myths and misconceptions, which may result from their limited experiences with women who have been battered, and bring these misunderstandings and biases to the bench or jury box. Without information to better understand the defendant's experiences and behaviors, judges and jurors often inaccurately evaluate and unfairly judge the defendant.

*Id.*

205. *Id.* at 8.

206. *Id.* at 9.

207. See Recent Case, *supra* note 24, at 1943 ("BWS's textbook descriptions cover only one type of trauma response, making them limiting to diverse survivors.").

risk of “endorsing a view that battered women suffer from a mental deficit.”<sup>208</sup> Also, “the use of BWS seems to imply a predictable response to battering, even though the experience of IPV may manifest itself from a psychiatric standpoint in different ways among different victims.”<sup>209</sup> Expert testimony on battering and its effects—instead of BWS—includes a wide range of evidence that may be excluded under a duress defense based on a BWS theory.<sup>210</sup>

Moreover, battering and its effects is more inclusive than BWS because it does not prescribe a specific gender.<sup>211</sup> The use of the phrase BWS disregards the experiences of those who do not identify as women and those who endure IPV in non-heterosexual relationships or non-monogamous relationships.<sup>212</sup> As a result, the change in language increases the likelihood that the evidence will be admissible for a larger number of defendants in a wider variety of relationships.<sup>213</sup>

Additionally, BWS has limited use and lacks consistent application.<sup>214</sup> Sometimes the theory is broadly applicable to all women who have experienced domestic violence, but other times “it is used to describe a stereo-

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208. Terrance, Plumm & Rhyner, *supra* note 11, at 941; Holliday, McNiel, Morris, Faigman, & Binder, *supra* note 12, at 374 (“[T]he language of BWS is no longer preferred.”). A 1996 report from the U.S. National Institute of Mental Health and the National Institute of Justice noted that “the term ‘battered woman syndrome’ is no longer useful or appropriate” and recommended transition to the terminology “on battering and its effects.” *Id.* (quoting VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING, *supra* note 50, at vii). The report expressed a number of concerns such as the use of the term syndrome could carry “connotations of pathology or disease, or it may create a false perception that the battered woman ‘suffers from’ a mental defect.” *Id.* (quoting VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING, *supra* note 50, at vii).

209. Holliday, McNiel, Morris, Faigman & Binder, *supra* note 12, at 378.

210. DUTTON, *supra* note 34, at 4. Dutton further explained that:

Expert testimony may cover a wide range of topics, such as domestic violence and abuse, characteristics of abusers, the emotional and physical effects of violence and abuse on women and children exposed to domestic violence, women’s efforts to protect[ ] herself and her children, women’s use of strategies to cope with domestic violence, including the use and responsiveness of community resources, the impact of domestic violence on economic stability, employment, and social and family relationships and the influence of contextual factors (e.g., race and ethnicity, economic status, prior trauma history, alcohol and substance abuse, physical and mental health status) on battering and the effects of battering.

*Id.*; see also VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING, *supra* note 50, at xiii (explaining how the use of battering and its effects “allows for the introduction of relevant scientific and clinical knowledge across various types of criminal cases involving battered women”).

211. See Holliday, McNiel, Morris, Faigman, & Binder, *supra* note 12, at 378.

212. See *id.*

213. See Recent Case, *supra* note 24, at 1943 (explaining effects of *Dingwall* on inclusivity).

214. DUTTON, *supra* note 34, at 5–6 (noting BWS testimony “may not be relevant to the specific issues before the court in a particular case” where expert testimony is needed to “challenge mischaracterizations” about victims of abuse or defend against victim blaming).

typic image of the so-called ‘good’ or ‘sympathetic battered woman’” which is susceptible to assumptions “based on race, culture, ethnicity, social and economic class, and sexual orientation.”<sup>215</sup> Arguably, there could be a large number of people wanting to introduce the testimony who remain silent because they do not fall within the court’s historical understanding of a victim of BWS.<sup>216</sup> Therefore, by shifting to more inclusive language, the Seventh Circuit implicitly invited all victims of battering to present testimony on the effects of battering to a criminal justice system that historically turned a blind eye to the objective effects of battering and abuse more broadly.<sup>217</sup>

## VI. EXPANDING JUSTICE: IMPACT OF *DINGWALL*

The Seventh Circuit’s decision comes at an important time.<sup>218</sup> The COVID-19 pandemic exposed the reality of the domestic violence pandemic that plagued the nation long before people learned the meaning of “social distancing.”<sup>219</sup> Following the lockdowns implemented at the beginning of the pandemic, violence against women increased to record levels.<sup>220</sup> The lockdowns trapped many individuals in situations where

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215. *Id.* at 5; *see also id.* (“[S]ome research using simulated jurors found that testimony utilizing both BWS and PTSD in combination was associated with jurors’ opinions focusing on the women’s deficits . . .”).

216. *See* Terrance, Plumm & Rhyner, *supra* note 11, at 944 (explaining how the “rigid classification” employed by the BWS framework risks excluding “many battered women whose circumstances deviate from the BWS standard”); Dunn, *supra* note 11, at 355 (noting that “victims often actively hide their abuse from others and deny the abuse to themselves”).

217. *See* Recent Case, *supra* note 24, at 1943 (noting power of the logic used by the Seventh Circuit—that “expert testimony may inform a jury about . . . unusual circumstances beyond the scope of a typical juror’s experience” (omission in original) (quoting *United States v. Dingwall*, 6 F.4th 744, 756–57 (7th Cir. 2021))).

218. For a discussion of the timeliness of the *Dingwall* decision, *see infra* Part VI.

219. *See* Liz Mineo, ‘Shadow Pandemic’ of Domestic Violence, HARV. GAZETTE (June 29, 2022), <https://news.harvard.edu/gazette/story/2022/06/shadow-pandemic-of-domestic-violence/> [<https://perma.cc/YQ48-RWTZ>]; Elliot Kozuch, *Report Shows LGBTQ People are More Likely to be Victims of Interpersonal Violence During COVID-19*, HUM. RTS. CAMPAIGN (June 25, 2020), <https://www.hrc.org/press-releases/report-shows-lgbtq-people-are-more-likely-to-be-victims-of-interpersonal-vi> [<https://perma.cc/GM2M-8KM7>] (discussing staggering rates of domestic violence).

220. Mineo, *supra* note 219; *see also* Brad Boserup, Mark McKenney & Adel Elkbuli, *Alarming Trends in US Domestic Violence During the COVID-19 Pandemic*, 38 AM. J. EMERGENCY MED. 2753, 2753 (2020) (arguing that “stay-at-home orders may cause a catastrophic milieu for individuals whose lives are plagued by domestic violence”). The American Journal of Emergency Medicine reported alarming trends in domestic violence in a report noting:

Data from US police departments provide some early insight into the effect COVID-19 has had on [domestic violence] in some regions. For instance, in Portland, Oregon[,] public schools closed March 16, 2020 and on March 23 came stay-at-home orders. Following these events, the Portland Police Bureau recorded a 22% increase in arrests related to [domestic violence] compared to prior weeks. In San Antonio, Texas[,] schools



they were not in a position to safely seek help.<sup>221</sup> Notably, the National Domestic Violence Hotline received more than 74,000 calls, chats, and texts in February 2022, the highest monthly contact volume of its twenty-five-year history.<sup>222</sup> This increased communication was largely attributable to Google's launch of a crisis search engine optimization tool in February 2022 aimed to get critical information to searchers quickly and help victims connect with the National Domestic Violence Hotline's services.<sup>223</sup> Increased demand for domestic violence support resulting from increased awareness of the availability of such support provides "a powerful and somber illustration of how many people are impacted by relationship abuse and need access to 24/7 support."<sup>224</sup>

Additionally, the Seventh Circuit's decision can equal the playing field of justice because IPV does not affect all groups of people in the same way or at identical rates.<sup>225</sup> According to the Centers for Disease Control and Prevention, IPV in the United States disproportionately affects

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closed March 20, 2020 and stay-at-home orders came March 24. The San Antonio Police Department subsequently noted they received an 18% increase in calls pertaining to family violence in March 2020 compared to March 2019. In Jefferson County Alabama, the Sheriff's Office reported a 27% increase in [domestic violence] calls during March 2020 compared to March 2019. In New York City schools closed March 16, 2020 and stay-at-home orders started on March 22, 2020. During the month of March, the New York City Police Department responded to a 10% increase in [domestic violence] reports compared to March 2019.

Boserup, McKenney & Elkbuli, *supra*, at 2753 (footnotes omitted); *see also* Kozuch, *supra* note 219 (noting that rates of intimate partner violence will increase as a result of stay-at-home orders, yet reporting will significantly decline as victims are forced into lockdown situations where they are unable to get help).

221. Mineo, *supra* note 219 (explaining how lockdowns isolated people and decreased access to family and friends for those needing a support system).

222. *Testimony for the H. Appropriations Subcomm. on Labor, Health and Human Services, Education, and Related Agencies*, 117th Cong. (2022) (statement of Katie Ray-Jones, CEO, The National Domestic Violence Hotline). The statement further explained that "[The National Domestic Violence Hotline] believed once life returned to any kind of normalcy from the devastating impact of COVID-19, there would be more survivors needing support who had not felt safe to reach out during the height of the pandemic. Sadly, our instincts were accurate." *Id.* at 1.

223. *See id.* at 2 (explaining that when a user inputs certain search terms related to domestic violence, information about the Hotline's information and direct links to its services pop up).

224. *Id.*

225. *See Fast Facts: Preventing Intimate Partner Violence*, *supra* note 11.

women in minority groups.<sup>226</sup> Additionally, lower income households and people facing food and housing insecurity experience higher rates of IPV victimization.<sup>227</sup>

The risks are also high for Americans who identify as members of the LGBTQ community.<sup>228</sup> This group already faces an increased risk of violence by an intimate partner when compared to non-LGBTQ populations.<sup>229</sup> More than half of transgender and nonbinary people responding to the 2015 U.S. Transgender Survey reported that they experienced some form of IPV.<sup>230</sup> Therefore, the *Dingwall* court's decision and use of inclusive language works towards creating an equal opportunity for all people to obtain justice—both those disproportionately affected by the exclusion of testimony and those affected by the inherently limited and gendered language of BWS.<sup>231</sup>

By expanding the admissibility of evidence regarding battering and its effects, the Seventh Circuit's decision—similar to the Google search function—may bring to light the true number of people facing criminal charges who previously did not attempt to provide evidence of the effects of battering for fear of rejection.<sup>232</sup> Consequently, the *Dingwall* decision can serve as an empowering tool for all victims of battering and provide validation for the lived experience of these victims.<sup>233</sup>

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226. See *An Overview of Intimate Partner Violence in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2010), <https://www.cdc.gov/violenceprevention/pdf/ipv-nisvs-factsheet-v5-a.pdf> [<https://perma.cc/9N2L-E8HM>] (providing statistics that show how Black non-Hispanic women and multiracial non-Hispanic women were significantly more likely to have experienced rape, physical violence, or stalking by an intimate in their lifetime, compared to white non-Hispanic women).

227. See *id.*

228. See Kozuch, *supra* note 219 (noting that 44% of lesbians and 61% of bisexual women report rape, physical violence, or stalking by an intimate partner, compared with 35% of straight women).

229. *Id.*

230. NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 15 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/9HZP-Y5LP>] (reporting 54% of transgender people have experienced severe physical violence by an intimate partner, compared to 18% in the U.S. population).

231. See VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING, *supra* note 50, at xiii–xiv (noting that the use of evidence on battering and its effects has significant impacts on the judiciary, legal matters generally, and the broader community).

232. See Mineo, *supra* note 219 (explaining how domestic violence and IPV are underreported).

233. See VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING, *supra* note 50, at xii (noting that the “introduction of evidence on battering and its effects has increased recognition in the courtroom of the problem of domestic violence, and the use of such testimony has both direct and indirect effects”).

