Subjective Vulnerabilities or Individualized Realities: The Merits of Including Evidence of Past Abuse to Support a Duress Defense

“It is clear that the American home, once assumed to be the cornerstone of our society, is often a violent place.”

“Another specifically American form of ideology asserts the belief in freedom. ‘Women are free to go; why don’t they just leave?’ This definition of freedom ignores the fact that many women have nowhere to go.”

I. INTRODUCTION

In the United States, one in four women experience abuse by an intimate partner during their lifetime. When a person repeatedly experiences abuse at the hands of an intimate partner, they may develop a psychological condition termed Battered Woman Syndrome (BWS). In the late 1970s, psychotherapist Lenore 

Walker developed the theory of BWS to describe a pattern of cyclical violence against women that leads to “measurable psychological changes,” collectively referred to as a sense of “learned helplessness.” Under BWS theory, victims of repeated domestic abuse become incapable of recognizing opportunities for escape or other alternatives to their abusive environment. Moreover, such stress makes victims particularly sensitive to perceiving an imminent threat at the hands of their abuser, even when such a threat is not present.

Scholars observing the prevalence of domestic violence cases in the criminal justice system questioned the propriety of prosecuting victims who attacked their abusers in self-defense, and whether or not such circumstances called for a new, independent defense based on BWS. In particular, courts have undertaken a reevaluation of the relevancy of a defendant’s experience with intimate partner violence in determining that defendant’s overall culpability.


7 See Burke, supra note 6, at 215 (describing victims’ sensitivity perceiving imminent attacks even when none present).


jury’s understanding and assumptions of defendants who experience intimate partner violence.\textsuperscript{10}

In doing so, legal scholars and advocates rely on scientific studies and empirical evidence concerning domestic violence and abuse victims’ responses to that violence.\textsuperscript{11} BWS evidence also includes “expert descriptions of the syndrome and a statement regarding the tendencies of domestic violence victims to act in certain ways.”\textsuperscript{12} Other types of testimony include: the psychological reaction or sequelae of domestic violence victims, the basic nature of domestic violence, an explanation of what may appear to a factfinder as unexplainable behavior from the victim, and background information regarding behaviors that lay people may not interpret as “typical” of an abuse victim.\textsuperscript{13} Depending on the jurisdiction’s self-defense rules, testimony on BWS may be admissible on the issue of

\begin{itemize}
\item \textsuperscript{10} See Walker, supra note 4, at 321 (noting “relatively new acceptance of expert witness testimony” by psychologists trained in understanding “battered women”); see also Strucke & Hajjar, supra note 3 (explaining evidence of intimate partner violence to prove psychological disorder); cf. Holly Magnuson, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals, 140 U. Pa. L. Rev. 379, 384 (questioning stereotypes of women who kill). Courts, domestic violence advocates, and many legal commentators also recognize that expert opinions and evidence regarding BWS can assist a jury in analyzing an abuse victim’s self-defense claim. See Masson, supra note 8, § 2(a) (noting courts’ consistent refusal to adopt independent defense based on BWS); Walker, supra note 4, at 321-22 (describing resulting not-guilty verdicts and convictions of lesser crime). The defense can also use this expert testimony to bolster the credibility of a defendant-victim who recanted or minimized the extent of the violence they experienced. See Walker, supra note 4, at 322; see also Long & Wilsey, supra note 5, at 36 (noting prosecutors’ different uses of BWS evidence). Police officers, prosecutors, parole board officials, and social service providers also learn BWS theory to improve the quality of the justice system’s response to domestic violence. See Burke, supra note 6, at 221 (discussing widespread acceptance of Walker’s theory). In addition, advocates have urged governors to grant clemency for women serving long sentences for killing their abusive partners but who might not have been convicted had they put forth BWS testimony. See Walker, supra note 4, at 322 (discussing various uses of expert testimony). BWS is not its own defense to a crime, but rather a type of evidence relevant to the various requirements of self-defense and the defense of duress. See Long & Wilsey, supra note 5, at 36 (describing confusion over applying BWS expert testimony at trial). Despite questions about the validity of BWS data, as of 2000, thirty-nine states deemed BWS expert testimony admissible. See Long & Wilsey, supra note 5, at 36 (noting confusion about BWS’s application at trial); see also, e.g., Hajjar & Strucke, supra note 3 (providing example of BWS use). In fact, a number of state legislatures have mandated that courts consider BWS evidence admissible under the standards governing expert testimony. See, e.g., CAL. EVID. CODE §1107(a)-(b) (West 2005) (providing BWS scientifically valid and admissible when relevant); MASS. GEN. LAWS ch. 233, §23F (2019) (allowing evidence of BWS subject of expert testimony); OHIO REV. CODE ANN. §2901.06(A)(1)-(2) (West 2020) (describing BWS “matter of commonly accepted scientific knowledge”); see also Burke, supra note 6, at 248 (removing courts’ role of determining admissibility of expert testimony).
\item \textsuperscript{11} See Dutton, supra note 5, at 1194–95 (describing BWS theory’s contribution to forensic psychology).
\item \textsuperscript{12} Cynthia Barnes, Annotation, Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim’s Testimony or Behavior, 57 A.L.R. 5th 315 (1998) (describing victims’ tendency to recant testimony on witness stand). In State v. Searles, for example, the Supreme Court of New Hampshire held that a trial court properly admitted expert testimony regarding “domestic violence syndrome” to assist the jury in evaluating trial testimony of the defendant’s assaulted victims, who downplayed their injuries and the defendant’s conduct. 680 A.2d 612, 616 (N.H. 1996) (holding jury could reasonably find victims minimized their injuries and such minimization likely causes confusion). The court recognized the relevance of the BWS testimony, even though the defendant did not specifically attack the witnesses’ credibility. See id. at 615-16 (determining expert testimony did not strictly discuss minimization).
\item \textsuperscript{13} See Dutton, supra note 5, at 1195 (discussing scope of BWS evidence).
\end{itemize}
credibility, the defendant’s subjective belief of the need to defend themselves, the objective reasonableness of that belief, and the issue of imperfect self-defense.\textsuperscript{14}

Although BWS evidence is permitted in cases where the defendant claims self-defense, courts have been less accepting of BWS testimony where the defendant asserts a defense of duress.\textsuperscript{15} In particular, some courts have been reluctant to extend the use of BWS evidence where the testimony includes evidence of abuse not perpetrated by the same people coercing the defendant’s criminal action because they find it clouds the delineated, objective requirements of a duress defense.\textsuperscript{16} This reluctance is unjustified, however, because the use of BWS testimony in duress claims closely parallels the widely-accepted use of BWS in self-defense cases.\textsuperscript{17} In order to establish the common law duress defense, a defendant must prove by a preponderance of the evidence that she was under an immediate threat of death or serious bodily injury; that she had a reasonable, well-grounded fear that the threat would be effectuated; and that she had no reasonable opportunity to escape her abuser.\textsuperscript{18} 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, similar to the standard used in self-defense cases.\textsuperscript{19} In cases of both self-defense and duress, advocates may proffer BWS evidence to demonstrate how abuse victims reasonably perceive being threatened with imminent danger, particularly when such a perception would not be apparent to the outside observer.\textsuperscript{20}

\textsuperscript{14} See Masson, supra note 8, §§ 2(a), 6(e) (analyzing cases considering BWS evidence for self-defense claim). Imperfect self-defense applies where the defendant acts in good faith but is mistaken in their belief that self-defense is necessary. See Imperfect Self-Defense, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining imperfect self-defense). Imperfect self-defense cannot renounce a charge entirely but may allow for a reduction on the level of the charge and the associated penalties. See id.

\textsuperscript{15} See Burke, supra note 6, at 257-59 (discussing reason for rejecting BWS testimony under duress defense).

\textsuperscript{16} See id. at 249-51 (identifying unsuccessful efforts to expand use of BWS in duress cases).

\textsuperscript{17} See Dunn v. Roberts, 963 F.2d 308, 313 (10th Cir. 1992) (holding BWS evidence relevant to determining whether defendant had specific intent to assist crimes); Monacella, supra note 9, at 700 (comparing courts’ varying stances on BWS evidence). But see State v. Riker, 869 P.2d 43, 51 (Wash. 1994) (en banc) (holding duress requires “immediate” harm while self-defense requires “imminent” harm).

\textsuperscript{18} See United States v. Lopez, 913 F.3d 807, 813 (9th Cir. 2019) (explaining elements and history of duress defense).

\textsuperscript{19} See id. at 815 (describing duress formula meant to address impact of threat of force on reasonable person); Monacella, supra note 9, at 737 (noting objective standard for self-defense). Critics of the psychological components of BWS theory argue that the duress doctrine requires more than sympathy or difficult circumstances to excuse criminal responsibility, and that only conduct lacking reasonable opportunity to avoid acting unlawfully qualifies as duress, not simply a difficulty complying with the law. See Burke, supra note 6, at 309 (discussing abuse victims’ failure to proceed with duress claims). BWS evidence must successfully depict abuse victims as rational actors in order to correctly apply a duress defense. See id. at 309-10 (explaining reluctance to expand duress to accommodate claims using BWS testimony).

\textsuperscript{20} See Joan M. Schroeder, Note, Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer, 76 IOWA L. REV. 553, 563-65 (1991) (describing BWS beyond average juror’s understanding). Where intimate partner violence is a relevant issue, a victim’s psychological response to violence helps explain specific legal issues related to defense or duress. See Dutton, supra note 5, at 1215 (discussing use of psychological
For example, in *United States v. Lopez*, the Ninth Circuit Court of Appeals, in a case of first impression, allowed defense counsel to use BWS expert testimony regarding the defendant’s experience with past abuse to support an affirmative defense of duress to federal firearm charges. After the district court in California denied the defendant, Lashay Marie Lopez, an opportunity to introduce BWS evidence regarding her past abuse, the jury found Lopez guilty of three federal charges of purchasing a firearm with a false identification (ID). At trial, Lopez argued that she purchased the handgun for her boyfriend, Hector Karaca, using her identical twin sister’s ID because Karaca threatened to harm Lopez and her family if she did not comply. Lopez moved to introduce expert testimony on the effects of past physical and sexual abuse, particularly her experiences with other abusers, in order to establish that her subjective fear of Karaca was reasonable, and that she did not have a reasonable opportunity to escape or to seek help from the police. On appeal, the government cited authority from the Fifth Circuit to argue that such evidence was inadmissible because it moved the standard for a duress defense from the defendant’s objective fear to a subjective fear. The appellate court reversed the district court’s findings and held that all BWS evidence is admissible to satisfy the reasonable-person standard of the duress defense. In doing so, the Ninth Circuit not only set new precedent for their circuit, but also directly contested the Fifth Circuit authority relied on by the prosecution.

Components of BWS in legal case). Typically, a defendant who has experienced abuse can use expert testimony to address: the reasonableness of their perception of danger, the psychological damage resulting from the domestic violence, “the basis for sole child custody or restriction of visitation rights, and the defendant’s reasons for engaging in seemingly puzzling behaviors.” See id. at 1216. The relevance of such psychological effects, however, presents a particular challenge for the juror to comprehend how psychological trauma may negate the victim-defendant’s culpability, unless there is a clear link between these psychological effects and the legal elements of the crime. See Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN’S RTS. L. REP. 213, 237-38 (1992). A typical juror may interpret BWS testimony to mean that the accused was “suffering” from a clinical syndrome to the extent that “her behavior reflects a condition where she didn’t know what she was doing.” See Dutton, supra note 5, at 1216 n.145; see also Schneider, supra, at 225-26 (reviewing use of clinical BWS evidence in criminal trials). In reality, BWS describes behavioral reactions to violence, not merely the results of a psychological disorder. See Schneider, supra, at 239 (noting defense lawyers emphasize common experiences of abuse victims).
This Note will analyze the origins of BWS and how its application may be well suited to a duress defense, in addition to its traditional application to a self-defense claim. In comparing dicta from the Ninth Circuit and other sister circuits, this Note will also analyze the Lopez decision and the admissibility of BWS evidence, in particular the idea that past instances of abuse are necessarily included in the objective factors related to a duress defense. This Note concludes that BWS evidence of past abuse does not describe a defendant’s subjective vulnerabilities, and instead describes the difficult circumstances leading to a sincere moral dilemma.

II. HISTORY

A. The Development of BWS Theory

BWS is a psychosocial theory that refers to the effects characteristic of a long-term pattern of abuse, both physical and mental. Lenore Walker coined the term BWS in the late 1970s to describe both a pattern of violence against women and the resulting shift in behavior and psychological processes caused by repeated abuse. Within BWS, Walker developed two distinct theories, the first of which describes a pattern of violence with three different phases that victims experience. In phase one, the tension-building phase, the victim tries to avoid verbal arguments and lower-level physical abuse; phase two involves an explosion of the building tension with physical abuse. Experts refer to this as an “acute battering incident,” which is then followed by a period of loving contrition.
or absence of tension in phase three. The contrition stage lessens a victim’s resolve to end the relationship and strengthens her belief that her relationship will eventually improve. In the end, the tension inevitably rebuilds, and the cycle repeats itself. This cyclical violence imbues the victim with a sense of “learned helplessness.”

“Learned helplessness,” Walker’s second theory relating to BWS, describes a victim’s belief that any attempt to escape her abuser would be futile, therein diminishing the woman’s motivation to respond or take steps to leave her abuser. In other words, the victim does not learn to be helpless, but instead, “is unable to predict the effect her behavior will have on the inescapable, repeated beatings [which] then changes her response to such situations.” This theory attempts to

35. See Long & Wilsey, supra note 5, at 36-37 (describing explosion of physical abuse initiates phase two); Walker, supra note 4, at 330 (naming acute episode of abuse preceding third phase); see also David L. Faigman & Amy J. Wright, The Battered Woman Syndrome in the Age of Science, 39 ARIZ. L. REV. 67, 72 (1997) (introducing cycle theory of BWS). During phase three, the abuser may express regret over the assault, offer apologies, and promise to end their violent behavior. See Long & Wilsey, supra note 5, at 37 (listing means of reconciliation abusers use in final phase). In some cases, the third phase is not readily visible because the abuser shows no remorse for their actions. See Marilyn McMahon, Battered Women and Bad Science: The Limited Validity and Utility of Battered Women Syndrome, 6 PSYCHIATRY, PSYCH. & L. 23, 28 (1999) (noting variations in third phase). Regardless of the “phase” they are in, the abuse victim never feels that they are out of danger. See Walker, supra note 4, at 330 (describing victim’s perceived reality despite lessened tension).

36. See Burke, supra note 6, at 222-23 (arguing cycle of violence explains why women remain in abusive relationships); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 4 (4th ed. 2017) (analyzing four different battering incidents).

37. See Walker, supra note 36, at 94 (setting forth tension-reduction theory); see also Burke, supra note 6, at 222-23 (discussing contrition stage of cycle).

38. See Long & Wilsey, supra note 5, at 37 (introducing Walker’s second theory of violence). When abuse repeats, the cycle “create[s] a condition of non-contingency between response and outcome” that teaches victims not to trust their instincts when danger is present. Walker, supra note 4, at 330 (discussing application of Seligman’s learned helplessness theory to abuse victims).

39. See Long & Wilsey, supra note 5, at 37 (providing origin of “learned helplessness” theory); Burke, supra note 6, at 224 (explaining victim’s experiences led to learned helplessness); see also WALKER, supra note 36, at 87 (noting development of learned helplessness from childhood abuse). Martin Seligman first introduced the theory of “learned helplessness” in 1968 to describe the behavior patterns of caged animals subjected to shocks who stopped trying to escape. See Burke, supra note 6, at 223 (discussing use of caged dogs unable to escape electric shock); see also Bryan A. Liang & Wendy Macfarlane, Murder by Omission: Child Abuse and the Passive Parent, 36 HARV. J. ON LEGIS. 397, 432 (1999) (discussing Seligman’s experiment). Some experts have equated an abuse victim’s experiences with the experiences of hostages or prisoners of war. See Monacella, supra note 9, at 699 (discussing cyclical experience of abuse victims).

40. See Monacella, supra note 9, at 711 (comparing learned helplessness to dogs’ responses to electrical shocks). The Ninth Circuit summarizes BWS as “a set of psychological and behavioral reactions exhibited by victims of severe, long-term, domestic physical and emotional abuse.” See United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) (citing LENORE WALKER, THE BATTERED WOMAN SYNDROME (1st ed. 1984)) (applying symptoms of intimate partner violence to analysis of criminal act). “Battered woman syndrome is not a mental disease or defect; rather, battered woman syndrome is a post-traumatic stress disorder. Its psychological effects are often similar to the effects of imprisonment on kidnap victims and prisoners of war.” Id. In that sense, once victims believe that they are helpless to the repeated abuse, they behave like hostages and stay with their “captors” because they perceive this as the only available method of survival. See id. (discussing symptoms of “learned helplessness” phenomenon). This exemplifies why victims are unable to respond effectively to violence, and why repeated abuse lessens the motivation to respond and reaffirms a negative belief that they are helpless. See id. (describing motivation and ability to confront and identify options for escape). When abuse victims
explain 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. Together, experts use these psychological theories to describe and explain the phenomenon of ongoing domestic violence and the victim’s inability to leave her abuser.

The understanding of BWS has changed since Walker’s initial definition. Research indicates that abuse victims, as a whole, respond in a manner similar to other groups exposed to repeated trauma, even under considerably different circumstances. Thus, many consider BWS a sub-category of PTSD: “[A] collection of thoughts, feelings, and actions that logically follow a frightening experience,” which the victim expects the abuser to repeat. To determine whether a person suffers from PTSD, doctors measure three major symptom clusters: cognitive disturbances, high arousal symptoms, and high avoidance symptoms. Cognitive disturbances “cluster[] around disturbances in memory” and include

develop this sense of learned helplessness, they become hyper-alert to their environment in an effort to prevent further violence, which ultimately comes at the expense of their escape skills. See Walker, supra note 36, at 52-53 (describing “acute stress reaction” symptom of Post-Traumatic Stress Disorder (PTSD) and BWS). While advocates and psychologists see these characteristics as learned survival skills, society often misinterprets them as signs of passivity and weakness, coupled with an unwillingness to leave the violent relationship. See id. at 88 (noting victims believe natural way of fighting abuse unsuccessful in stopping it).

41. See Walker, supra note 4, at 330 (providing overview of theory’s purpose). A victim’s experience of random and uncontrolled abuse over time produces a state of learned helplessness, similar to Seligman’s laboratory animals, which manifests in her belief that she cannot escape her abuser. See Long & Wilsey, supra note 5, at 37 (discussing Walker’s application of animal behavior to abuse victims). As a result, a victim’s belief in the futility of escape decreases her motivation to avoid violence in the future. See id. (describing mechanics of learned helplessness theory). Walker also posited that a victim must experience at least two cycles of the three phases of violence to sufficiently develop BWS. See id.

42. See Long & Wilsey, supra note 5, at 36-37 (identifying Walker’s two theories related to domestic violence relationships); see also Burke, supra note 6, at 222 (noting common misconception of domestic violence victims’ ability to simply leave abusive relationship).

43. See Long & Wilsey, supra note 5, at 37 (introducing development beyond Walker’s definition of BWS). In particular, those with knowledge of abuse victims recognize that each experience is different, and that not all victims are involved in Walker’s defined cycle of violence. See id.; see also Dutton, supra note 5, at 1208 (stating “cycle of violence” not only pattern of abusive behavior within battering relationships). For example, the theories of “power and control” and “a continuum of violence” present alternative descriptions of common dynamics within domestic violence relationships. See Long & Wilsey, supra note 5, at 37 (comparing theories where various control mechanisms or low-level violence describe repeated abuse); see also Off. for Violence Prevention & Victim Assistance, Domestic/Dating Violence, RUTGERS STUDENT AFFS. (2019), http://vpva.rutgers.edu/domesticdating-violence/ [https://perma.cc/26UH-UFE3] (discussing pattern of controlling or coercive behavior).

44. See Walker, supra note 4, at 326 (indicating psychological changes result of repeated abuse). The Diagnostic and Statistical Manual of Mental Disorders, however, does not list BWS as a sub-category of PTSD. See generally AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 (5th ed. 2013).

45. See Walker, supra note 4, at 327 (describing collection of thoughts, feelings, and actions logically following frightening experience). PTSD is defined as “the development of characteristic symptoms following exposure to one or more traumatic events . . . . In some individuals, fear-based re-experiencing, emotional, and behavioral symptoms may predominate . . . while in others, dissociative symptoms predominate . . . [s]timuli associated with the trauma are persistently . . . avoided.” AM. PSYCHIATRIC ASS’N, supra note 44, at 274-75.

46. See Walker, supra note 4, at 327 (listing three major symptom clusters).
the minimization and repression of battering incidents.47 For example, victims who have been abused by multiple abusers, specifically during childhood and from different partners, likely confuse previous abuse experiences with current threats and face flashbacks that fragment abusive incidents and increase their perception of danger.48 This state of high arousal or anxiety represents a physical and neurological change, making the victim hypervigilant to cues of potential danger.49 Avoidance behavior represents another major constellation of BWS symptoms and includes depression, denial, minimization, and repression.50 Altogether, abuse victims usually present with more symptoms than necessary for a PTSD diagnosis.51

Even so, the various psychological realities of BWS cannot be limited to one psychological profile because these realities include the particular experiences of each victim, and not simply their predicted psychological reactions to violence.52 In addition to becoming less involved with family and friends, victims often actively hide their abuse from others and deny the abuse to themselves.53

47. See id. (identifying repetitive, intrusive memories characteristic of cognitive disturbances). When in situations that may incite a fear response, victims of abuse often have flashbacks of past violence, causing them to reexperience memories of previous abuse and thus heightening their overall perception of danger. See id. at 327-28 (explaining cognitive symptoms relate to disturbances in memory and repetitive intrusions).

48. See id. at 327-28 (detailing confusion of current situation with previous abuse experiences).

49. See id. at 328 (elucidating second major area of symptoms trauma victims experience). Abuse victims suffering from high arousal symptoms will interpret small and insignificant cues as signals of impending abuse and, as a result, act nervously, jumpily, and anxiously. See id. Other manifestations include panic attacks, phobic responses, impulsive decision-making, and a lack of sufficient consideration of long-term consequences. See id. (describing physiological reactivity resulting from repeated trauma).

50. See Walker, supra note 4, at 328 (describing techniques abuse victims use to avoid dealing with dangerousness of situation). Victims exhibiting avoidance behavior often become isolated over time, while simultaneously their abuser is increasing their power and control. See id. (discussing phases of learned helplessness).

51. See id. at 329 (suggesting attorneys use PTSD criteria chart when presenting BWS to judge or jury); see also Schneider, supra note 20, at 225 (discussing various conflicts while using BWS evidence at trial). Some victims of abuse object to using BWS evidence because they worry that factfinders will misclassify them as mentally ill. See Walker, supra note 4, at 329 (discussing application of PTSD diagnosis criteria to abuse victims). Many victims fear people will not believe them as a result of the abuser’s repeated taunts and abuse; therefore, professionals using BWS evidence should seriously consider the risk of misdiagnosis and over-clinicalization of abuse victims. See id. at 329 (discussing various psychological traumas of intimate partner violence). See generally Paula J. Caplan, How Do They Decide Who Is Normal? The Bizarre, But True, Tale of the DSM Process, 32 CANADIAN PSYCH./PSYCHOLOGIE CANADIENNE 162, 162-70 (1991) (referencing problems with process and lack of scientific basis for decisions).

52. See Dutton, supra note 5, at 1201 (noting complexities of PTSD related to intimate partner violence). Advocates can use BWS testimony to explain the nature of domestic violence in general, to explain what may appear to be irrational behavior on the part of the victim, or to interpret an accused’s behavior as atypical to the average abuse victim. See id. at 1195 (discussing social and psychological symptoms of BWS); see also Walker, supra note 36, at 95-104 (discussing “cycle of violence”); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 6-7 (1991) (discussing “separation assault”); Schneider, supra note 20, at 225-26 (discussing various uses of BWS evidence in support of and against abuse victims). These various uses have led to confusion about what BWS evidence encompasses. See Dutton, supra note 5, at 1195; see also Developments in the Law—Legal Responses to Domestic Violence, 106 HARV. L. REV. 1574, 1578-79 (1993) (describing lack of clarity caused by changing theory).

53. See Walker, supra note 4, at 328 (highlighting behavior changes associated with third major BWS symptom, avoidance). Victims of abuse lose interest in activities they once enjoyed and become less likely to go
Therefore, in proffering BWS evidence in a criminal prosecution, a defendant should introduce a diagnosis of PTSD, in conjunction with specific evidence of her victimization, to support a claim of self-defense or duress. Such a detailed abuse history aids an expert witness, particularly a forensic psychology expert, in correlating specific symptoms with the victim’s specific abuse experiences.

B. The Affirmative Defense of Duress

The affirmative defense of duress excuses criminal conduct where the accused is under an unlawful threat of imminent death or serious bodily injury, which consequently causes the actor to engage in conduct that otherwise violates criminal law. Similar to claims of self-defense, a duress defense reflects the belief that an accused should not face punishment for acts that are “motivated by a desire for self-protection.” The affirmative defense of duress requires that a reasonable person would also not be able to resist such conduct. Duress, places without their abuser’s approval. See id. (reviewing victim’s behavioral changes in response to abuser exercising more power and control).

54. See Long & Wilsey, supra note 5, at 37 (discussing use of PTSD evidence to prove legal standards of self-defense or duress). For example, evidence of PTSD can explain why a victim may perceive a situation as posing imminent danger after suffering flashbacks and other intrusive experiences resulting from her prior victimization at the hands of her current or previous abuser. See Mary Ann Dutton, Nat’l Online Res. Ctr. on Violence Against Women, Update of the “Battered Woman Syndrome” Critique 6 (2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf [https://perma.cc/SNB7-5FFP] (discussing complex phenomenon of battering and effects).

55. See Walker, supra note 4, at 328 (detailing use of abuse history when cognitive disturbances conflate various abuse experiences); see also Dutton, supra note 5, at 1194 (assessing progression of BWS theory). Assessing BWS as a sub-category of PTSD for additional stressors related to indirect trauma also helps understand the effects of the victim’s abuse. See Walker, supra note 4, at 329 (suggesting impact varies depending upon other stressors involved). These include cultural oppression, racism, religious discrimination, gender bias, and other insidious forms of daily harassments. See id.


One theory of the defense is that the duress negates the existence of the requisite mens rea for the crime, in that the defendant’s free will was overcome by an outside force, but it has also been said that the rationale is not that the defendant lost the mental capacity to commit the crime in question nor did not engage in a voluntary act, but that the conduct was justified because the defendant thereby avoided harm of a greater magnitude.

Id.

57. See Burke, supra note 6, at 251-52 (comparing reluctant use of BWS evidence for duress with its acceptance for self-defense). Duress is a traditional, common law defense. See 2 Wayne R. LaFave, Substantive Criminal Law § 9.7(b) (3d ed. Supp. 2019) (discussing applicability of duress common law defense without statute).

58. See Model Penal Code: § 2.09(1) (AM. L. INST. 1985) (denoting duress considered affirmative defense). A duress defense is unavailable when the accused recklessly placed themselves in a situation where it was probable they would be subject to duress, or if they were negligent in placing themselves in such a situation. See id. § 2.09(2) (delineating duress defense). Section 2.09(3) of the Model Penal Code (MPC), for example, explicitly states that duress is not a defense where a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under section 2.09, thus abolishing the effect of marriage as an
therefore, applies to an actor who maintains rational decision making, but whom circumstance has placed in a moral dilemma where they lack a reasonable opportunity to behave lawfully.59

Each prong of the duress defense parallels the requirements to prove self-defense.60 First, the defendant must have acted in response to an immediate threat of death or serious bodily injury.61 Second, the defendant must have had a “well-grounded” fear that the threat would be carried out if they did not commit the criminal act.62 By requiring that the defendant’s fear be “well-grounded” and “reasonable,” the duress defense mirrors the same objective test that courts apply in self-defense cases.63 Thus, subjective fear alone is not enough to establish duress, and the defendant must show that they had a reasonable, objective fear automatic basis for claims of coercion in some jurisdictions. See id. § 2.09(3) & explanatory note (abolishing previous presumption of woman acting in presence of her husband constitutes coercion).

59. See id. § 2.09(1) (listing elements of duress defense). Some courts have suggested the criminal justice system can excuse an actor committing crimes under duress because their acts are considered involuntary. See Sanford H. Kadish, Excusing Crime, 75 CAL. L. REV. 257, 273-74 (1987) (claiming those acting under duress have no choice); see also United States v. Bailey, 585 F.2d 1087, 1119-20 (D.C. Cir. 1978) (Wilkey, J., dissenting) (stating criminal acts committed under coercion do not involve willing or voluntary minds), rev’d, 444 U.S. 394 (1980); Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits, 62 S. CAL. L. REV. 1331, 1365 (1989) (describing person under duress lacks opportunity to avoid acting unlawfully). “Duress excuses when the available choices are not only hard but also unfair. A person acting under duress is excused, although he possessed the capacity to make the right choice . . . if he lacked a fair opportunity to avoid acting unlawfully.” Dressler, supra, at 1365. Under the MPC, for example, the issue is whether the defendant’s conduct was coerced by a threat of unlawful force that a “person of reasonable firmness” in his or her situation would have been unable to resist. See MODEL PENAL CODE § 2.09(1); see also Burke, supra note 6, at 252 (positing rationale behind duress defense).

60. See Burke, supra note 6, at 253 (delineating three-prong test); Faigman & Wright, supra note 35, at 92 (noting elements of duress defense bear “close resemblance” to elements of self-defense); see also Monacella, supra note 9, at 722-24 (asserting evidence of BWS satisfies Daubert requirements for expert witness testimony); Krista L. Duncan, Note, “ Lies, Damned Lies, and Statistics”? Psychological Syndrome Evidence in the Courtroom After Daubert, 71 IND. L.J. 753, 766 (1996) (concluding “evidence regarding the battered woman syndrome . . . based on scientific knowledge” under Daubert standard). The MPC defines self-defense as “justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” MODEL PENAL CODE § 3.04(1). To successfully claim self-defense, the defendant must prove: that they were confronted with an unprompted attack, that the threat of injury or death was imminent, that the degree of force used in self-defense was objectively reasonable under the circumstances, and that they had an objectively reasonable fear that they would be injured or killed unless they used self-defense. See id. (listing elements of self-defense).

61. See Burke, supra note 6, at 253 (describing Walker’s analysis); see also United States v. Toney, 27 F.3d 1245, 1248 (7th Cir. 1994) (listing requirements of duress defense); United States v. Homick, 964 F.2d 899, 905 (9th Cir. 1992) (describing BWS defense species of duress defense); United States v. Santos, 932 F.2d 244, 249 (3d Cir. 1991) (examining elements of duress defense); United States v. Scott, 901 F.2d 871, 873 (10th Cir. 1990) (stating evidence must sufficiently support all elements of coercion defense to trigger jury instruction); Faigman & Wright, supra note 35, at 92 (comparing legal issues in duress cases to those in self-defense cases).

62. See Burke, supra note 6, at 253 (relating BWS to third prong of duress defense); see also United States v. Bailey, 444 U.S. 394, 410 (1980) (noting defense will fail if reasonable, legal alternative to violating law exists).

63. See Burke, supra note 6, at 253 (explaining how self-defense and duress share same elements of reasonableness, immincence, and need for self-protection).
that the threat would come to fruition.64 The final prong requires that the defendant had no reasonable opportunity to escape the threatened harm, which parallels the self-defense requirement that the defendant’s use of physical force was a last resort.65

C. Admissibility of BWS Testimony on the Issue of Duress

Despite the acceptance of utilizing BWS testimony in self-defense cases—and the similarities between the two defenses—courts have been hesitant to accept BWS evidence to support a duress defense because of a belief that syndrome-based arguments, particularly those that include past experiences from multiple abusers, turn the objective duress standard into a subjective one, assessing the individual’s unique psychological condition instead of the reasonable-person standard.66 In United States v. Johnson, several female defendants


65. See Burke, supra note 6, at 254 (identifying primary discrepancy between law of self-defense and BWS); see also Bailey, 444 U.S. at 410 (explaining need for legal alternative to violation). Because duress and self-defense share the same elements, the argument to use BWS in support of each highlights the theory’s ability to “explain why women who kill their batterers reasonably fear imminent harm . . . and why a battered woman has a ‘well-grounded’ fear of ‘immediate’ harm if she does not commit a crime with her batterer, even if her batterer did not literally hold a gun to her head.” Burke, supra note 6, at 253; Walker, supra note 4, at 330 (explaining social learning theory of “learned helplessness”). Walker’s version of learned helplessness portrays domestic violence victims as “lacking the cognitive capacity to recognize options” for escaping abuse. See Burke, supra note 6, at 254 (describing cognitive realities of perceptions of escape). “Additionally, Walker’s battered woman prioritizes survival skills, so one would expect her to obey any command delivered by her batterer in an attempt—albeit perhaps futile—to avoid further episodes of violence.” Burke, supra note 6, at 254; see WALKER, supra note 36, at 87-89 (explaining need to avoid future violence). Although evidence of BWS is widely admissible to support a woman’s claim of self-defense for the murder of her abuser, federal courts have reached divergent results regarding the admission of BWS evidence in the defense of duress, despite the similarities between the two. See Burke, supra note 6, at 255 (comparing context of application of BWS evidence); Monacella, supra note 9, at 700 (comparing federal courts’ treatment on BWS evidence). Nevertheless, the criminal acts committed by victims of domestic violence commonly result from the pressure to follow the abuser’s demands to avoid future violence. See Monacella, supra note 9, at 699 (describing how abusers force their victims, either directly or indirectly, to commit crimes). For example, in 2019, the Ninth Circuit decided for the first time whether a defendant could use expert testimony of BWS and the effects of past abuse to support her duress defense and rehabilitate her credibility on cross-examination. See United States v. Lopez, 913 F.3d 807, 813-14 (9th Cir. 2019) (noting Lopez argued trial judge erroneously excluded BWS testimony); Expert Testimony on Battered Woman Syndrome Is Admissible in Ninth Circuit, supra note 21, at 6 (characterizing case of first impression).

66. See Burke, supra note 6, at 258 (discussing rationalization for rejection of BWS under duress defense); see also United States v. Willis, 38 F.3d 170, 175-76 (5th Cir. 1994) (differentiating use of BWS evidence for criminal liability versus sentencing). Courts faced with the issue of BWS under a duress defense often reject syndrome-based arguments that they would otherwise accept in a self-defense context in favor of more traditional positions. See Burke, supra note 6, at 254-55 (comparing acceptance of BWS with duress defense); see also Faigman & Wright, supra note 35, at 92 (commenting courts vary in acceptance of BWS evidence for duress). Those who oppose the introduction of BWS evidence in duress cases argue that the standards of duress establish an objective inquiry and the consideration of BWS evidence would turn the objective duress standard into a
facing charges arising from a drug ring claimed that they acted under the duress of the kingpin and testified that he threatened and assaulted two of the defendants and their immediate family members. On appeal, the Ninth Circuit considered whether a special vulnerability to fear, in other words, a vulnerability not produced by those persons inducing the defendant’s criminal action, may be taken into account. This would mean considering prior experiences with individuals other than the kingpin to assess each defendant’s heightened sensitivity and fear of violence. Ultimately, the court decided that subjective fear is admissible at sentencing only; consistent with prevailing jurisprudence, the court was reluctant to accept a “subjective vulnerability” to fear as a defense to criminal conduct.

While the Johnson court did not clarify what constitutes a special, subjective vulnerability to fear, it did establish factors related solely to the defendant, rather than the relationship to the kingpin, to assess the defendant’s heightened sensitivity and fear of violence. The court emphasized the importance of considering the defendant’s unique psychological condition which prevented her from resisting coercion and/or violence. See Burke, supra note 6, at 258-59, 292 (characterizing debate surrounding objective and subjective tests); see also State v. Williams, 937 P.2d 1052, 1058 (Wash. 1997) (en banc) (discussing previous use of BWS evidence to prove reasonable apprehension of harm); State v. Lambert, 312 S.E.2d 31, 35 (W. Va. 1984) (stating defendants entitled to present evidence to support BWS theory); United States v. Maresh, 893 F. Supp. 85, 94 (D. Me. 1995) (allowing BWS evidence). See generally United States v. Johnson, 956 F.2d 894, 901 (9th Cir. 1992) (fearing extension of duress defense to include subjective fear); Homick, 964 F.2d at 905 (holding exclusion of BWS evidence harmless at trial); Willis, 38 F.3d at 175-76 (distinguishing between BWS use at criminal liability and sentencing). Some courts have concluded with little analysis that the usefulness of BWS evidence is limited to self-defense claims. See Burke, supra note 6, at 255 (describing various levels of acceptance of BWS for self-defense and duress). Other courts have articulated their refusal to apply BWS evidence in the duress context by reasoning that the syndrome describes the subjective beliefs of the defendant, making it irrelevant to the issue of whether the objective test for duress has been met. See id. at 258 (discussing inclusion of subjective realities to objective standard). Under this traditional argument, “[i]t is equally obvious that ‘a person of reasonable firmness’ is not someone who has become more susceptible to coercion because of a traumatic event.” Moreno v. State, 605 S.W.3d 475, 477 (Tex. Crim. App. 2020).

67. See Johnson, 956 F.2d at 897-99 (stating duress defense dominant issue on appeal). After a jury found all three defendants guilty, “[t]he dominant issue on the appeals . . . [was] the duress defense as it interacts with sentencing.” Id. at 897 (considering whether subjective evidence applied appropriately at sentencing). As the Ninth Circuit recounted, the district court permitted BWS testimony regarding Wood, but denied the remaining two defendants, Johnson and Beck, the opportunity to call their own expert or to cross-examine Wood’s expert. See id. at 901-02 (concluding district court did not abuse discretion because expert did not interview other two defendants).

68. See id. at 898 (addressing whether court may consider vulnerabilities not produced by persons causing defendant’s criminal action). The Johnson court provided an extensive discussion of BWS evidence and its admissibility when determining a defendants’ sentence under federal guidelines. See id.

69. See id. (describing principle applied to each defendant).

70. See id. at 897-98 (holding subjective element relevant to sentencing, not to defense); see also Laurie Kratky Doré, Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders, 56 OHIO ST. L.J. 665, 732-33 (1995) (discussing mitigating effects of BWS evidence). Before addressing each individual defendant’s claim, the court discussed the objective, reasonable-person standard applied to duress cases.

The formula is addressed to the impact of a threat of force upon a reasonable person: The fear must be “well-grounded.” There must be no “reasonable” opportunity to escape. The formula is in harmony with the analysis of duress in the Model Penal Code which recognizes duress in the use of unlawful force “that a person of reasonable firmness in his [or her] situation would have been unable to resist.” Johnson, 956 F.2d at 898 (describing formula of duress defense).
than to the coercing, threatening party, that courts can consider during the reasonableness inquiry.\textsuperscript{71} In relying on the MPC definition of duress, the court highlighted a person’s size, strength, age, or health as factors to determine duress.\textsuperscript{72} Under the MPC, the “person of reasonable firmness” standard is not wholly external, but rather takes account of the person’s “situation.”\textsuperscript{73} The \textit{Johnson} court noted that it can consider a myriad of evidence relating to the various situational factors, such as size, strength, age, or health, so long as it is linked to “gross identifiable classes of circumstances.”\textsuperscript{74} The court further held that there are sets of circumstances wherein gender is a relevant factor worthy of consideration, and that BWS evidence has “a particular relation to the defense of duress.”\textsuperscript{75} As such, \textit{Johnson} did not establish a categorical bar on subjective BWS evidence in support of a duress defense at trial.\textsuperscript{76}

The Ninth Circuit’s subsequent decision in \textit{United States v. Homick}, which it decided only months after \textit{Johnson}, bolsters such a conclusion.\textsuperscript{77} In that case, the Ninth Circuit held that the BWS defense is a species of duress comprised of the following elements: “(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no

\textsuperscript{71} See \textit{Johnson}, 956 F.2d at 898 (considering stark, tangible factors including size, strength, age, or health). While the \textit{Johnson} court admitted that BWS is particularly tied to a duress defense in general, the court held that subjective evidence relating to the defendant’s special vulnerability should only be taken into account during sentencing as grounds for a downward departure. See \textit{Monacella}, supra note 9, at 720 (summarizing \textit{Johnson} court’s reluctance to admit subjective vulnerability to fear). The \textit{Johnson} court feared that a substantial expansion of the duress defense “may go too far if not linked to [a] gross and identifiable class of circumstances,” and that “[b]attered women are in circumstances forming such a class.” See \textit{Johnson}, 956 F.2d at 900; see also \textit{Monacella}, supra note 9, at 730 (examining \textit{Johnson} court’s reluctance to expand duress defense).

\textsuperscript{72} See \textit{United States v. Johnson}, 956 F.2d 894, 898 (9th Cir. 1992) (providing examples of relevant physical characteristics).

\textsuperscript{73} See \textit{MODEL PENAL CODE} § 2.09 (AM. L. INST. 1985) (codifying application of duress defense); see also \textit{Johnson}, 956 F.2d at 898 (discussing gender).

\textsuperscript{74} \textit{Johnson}, 956 F.2d at 898. Specifically, the Ninth Circuit noted the MPC’s citation to “[a] leading authority on the common law [who] added that the defense applies when the defendant is so far ‘in thrall to some power’ that a legal sanction would be ineffective in controlling any choice that may be made.” \textit{Id.} at 900 (quoting \textit{GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART} 755-62 (2d ed. 1961)); see also \textit{MODEL PENAL CODE} § 2.09(1) (analyzing relationship between BWS and legal liability under duress defense).

\textsuperscript{75} \textit{Johnson}, 956 F.2d at 898-900 (listing applicable symptoms of BWS).

\textsuperscript{76} See \textit{United States v. Lopez}, 913 F.3d 807, 818 (9th Cir. 2019) (noting lack of answers from \textit{Johnson}); see also \textit{United States v. Marenghi}, 893 F. Supp. 85, 93 (D. Me. 1995) (determining admissibility of expert testimony not squarely before appellate court in \textit{Johnson}).

\textsuperscript{77} See \textit{United States v. Homick}, 964 F.2d 899, 905 (9th Cir. 1992) (discussing Homick’s “battered woman” contention). In \textit{Homick}, Homick and her ex-husband were tried for wire fraud based on Homick’s falsified affidavit regarding stolen jewelry. \textit{See id.} at 901-02 (describing dual operation and investigation by local department and FBI). Homick claimed that she acted under duress from her ex-husband, and on appeal, contended “that the district court improperly excluded expert testimony regarding BWS and thereby deprived her of her theory of defense.” \textit{Id.} at 905. The Ninth Circuit found no error in this exclusion, as the wiretapped phone calls between Homick and her ex-husband revealed “[t]here was nothing implicitly or explicitly threatening about [their] conversation[s]” and she “readily agreed” to write the fraudulent affidavit. \textit{Id.} at 906.
reasonable opportunity to escape the threatened harm.\textsuperscript{78} Moreover, the court commented that the unique nature of a BWS defense would permit a modified application to the way courts historically applied these principles.\textsuperscript{79} Nevertheless, the court ultimately held that facts involving a divorced couple fell outside the scope of any reasonable approach to BWS and did not further articulate their application of the defense.\textsuperscript{80}

In other circuits, permissibility of BWS evidence in duress cases varies.\textsuperscript{81} For example, in \textit{United States v. Willis}, the Fifth Circuit held that BWS evidence is “inherently subjective” and thus incompatible with the duress defense’s objective, reasonable-person standard and ultimately irrelevant.\textsuperscript{82} The court held that BWS subjectively addressed why Willis would succumb to duress in comparison to someone without a history of being abused, rather than assessing the effect of coercion under the traditional, objective standard of reasonable firmness.\textsuperscript{83} Specifically, the court reasoned that the testimony would only establish Willis’s psychological condition and its ability to render her “unusually susceptible to . . . coercion.”\textsuperscript{84}

\textsuperscript{78} See \textit{id.} at 905 (stating necessary elements for affirmative defense of duress); DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 12:15 (2019-20 ed.) (describing BWS evidence similarly relevant to both duress and self-defense).

\textsuperscript{79} See \textit{Homick}, 964 F.2d at 905 (analyzing methods of applying BWS testimony to duress defense); Monacella, \textit{supra} note 9, at 715 (discussing court’s different approach to duress defense).

\textsuperscript{80} See \textit{Monacella}, \textit{supra} note 9, at 715 n.130 (noting \textit{Homick} court’s failure to elaborate on its application of defense); \textit{Homick}, 964 F.2d at 905-06 (detailing content of telephone conversations). The court also emphasized that the phone conversations were neither expressly nor impliedly threatening in nature; in that sense, the woman’s victim status lacked the support necessary to raise a duress defense based on BWS. See \textit{Homick}, 964 F.2d at 906 (noting ex-wife’s lack of concern for ex-husband’s reaction).

\textsuperscript{81} See \textit{FAIGMAN ET AL., supra} note 78, § 12:15 (arguing similar legal issues arise in self-defense and duress uses of BWS); see also, e.g., \textit{United States v. Nwoye}, 824 F.3d 1129, 1136 (D.C. Cir. 2016) (concluding BWS testimony can help jury assess whether victim’s actions reasonable).

\textsuperscript{82} See \textit{United States v. Willis}, 38 F.3d 170, 174-76 (5th Cir. 1994) (discussing factual background of appeal). In \textit{Willis}, Willis contended that the gun found in her purse at the time of her arrest was her companion’s, even though she also admitted that they had both planned to sell marijuana to an undercover officer. See \textit{id.} at 173 (detailing U.S. Marshal interrogation).

\textsuperscript{83} See \textit{id.} at 175 (considering nature of BWS evidence); see also United States v. Dixon, 413 F.3d 520, 523-24 (5th Cir. 2005) (applying \textit{Willis} in case involving similar facts), aff’d on other grounds, 548 U.S. 1 (2006). At trial, the court heard testimony of Willis’s extreme fear of her companion and that she allowed him to place the gun in her purse immediately before their apprehension because she believed he would have beaten her if she did not comply. See \textit{Willis}, 38 F.3d at 174 (summarizing Willis’s argument for duress); \textit{FAIGMAN ET AL., supra} note 78, § 12:15 (comparing self-defense and duress applications). With this evidence, Willis argued that she had not knowingly, intentionally, or voluntarily carried the gun. See \textit{Willis}, 38 F.3d at 174 (discussing evidence about mental state). The lower court did not permit expert testimony regarding BWS, and the Fifth Circuit affirmed. See \textit{id.} at 174, 180 (noting classical pattern of BWS and abusive relationship).

\textsuperscript{84} \textit{Willis}, 38 F.3d at 175 (noting requirements of duress defense and effects of abuse on victims). Conversely, the Tenth Circuit held that the refusal to provide funds for a BWS expert witness to an indigent defendant claiming a duress defense infringed upon her due process rights. See Dunn v. Roberts, 963 F.2d 308, 314 (10th Cir. 1992) (discussing significance of expert testimony to Dunn’s defense). In Dunn v. Roberts, Dunn—charged with aiding and abetting felony murder, kidnapping, aggravated robbery, and aggravated battery—was repeatedly physically abused and threatened by her partner. See \textit{id.} at 309-10, 313. Specifically, Dunn’s companion brandished a gun and repeatedly threatened to harm her and her family if she tried to leave him. See \textit{id.} at 310-11
D. United States v. Lopez

In a 2019 case of first impression, the Ninth Circuit in Lopez definitively allowed evidence of past abuse to support an affirmative defense of duress.\(^{85}\) The court held that BWS evidence, including past experiences of abuse, provides context to the jury to better understand the defendant’s fear of her current abuser, to explain why she did not seek help from the police, and to rehabilitate her credibility.\(^ {86}\) At trial, the jury convicted Lopez of three federal charges stemming from her purchase of a firearm through the use of false ID.\(^ {87}\) Because Lopez admitted to the unlawful conduct, the sole issue for the jury was the affirmative defense of duress.\(^ {88}\)

In 2013, Lopez’s former boyfriend Karaca, recently released from prison, visited her at her home where she lived with her mother, her identical twin sister, her sister’s two children, and a sibling.\(^ {89}\) At the time, Karaca was wanted by the state in connection with a double homicide in Phoenix, Arizona.\(^ {90}\) During his visit with Lopez, Karaca admitted that he was on the run from police and asked her if she knew where he could procure a gun.\(^ {91}\) Karaca also made sexual advances toward Lopez, who rejected these efforts, but when Karaca “didn’t stop [Lopez] just gave in.”\(^ {92}\)

Two days later, Karaca returned and again asked Lopez about acquiring a gun, at which point she explained that she could not purchase a gun or “be around” one because she was on probation for a felony drug conviction.\(^ {93}\) In response, (noting Dunn’s counsel discussed case with two psychologists). Prior to trial, Dunn sought funds to hire an expert to testify that due to BWS, she lacked the necessary intent to aid and abet any of these crimes, but the judge denied her request. See id. at 311 (noting trial court allowed Dunn to address intent issue but without expert assistance). Dunn’s post-conviction appeal eventually came before the Tenth Circuit Court of Appeals and the court reasoned that psychiatric assistance becomes a “basic tool of an adequate defense” when “a defendant makes a threshold showing that her mental condition at the time of an offense is likely to be a ‘significant factor’ at trial.” Id. at 312 (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971) and Ake v. Oklahoma, 470 U.S. 68, 83 (1985)). The Tenth Circuit determined that expert testimony may have provided an explanation for why a victim would not leave her abuser, making such evidence necessary for an adequate aiding and abetting defense. See id. at 313-14 (granting Dunn new trial with assistance of expert).

85. See United States v. Lopez, 913 F.3d 807, 811 (9th Cir. 2019) (holding BWS evidence of past abuse properly supports duress defense).

86. See id. (describing Lopez’s efforts to support duress claim); see also ANGELA BROWNE, WHEN BATTERED WOMEN KILL 15 (1987) (presenting reasons why battered women may not report abuse to police).

87. See Lopez, 913 F.3d at 811, 814 (noting jury’s verdict despite instruction on duress defense and Lopez’s own testimony).

88. See id. at 811 (discussing Lopez’s explanation of duress defense).

89. See id. at 812 (reviewing facts presented at trial). At the time of the crimes at issue and when her ex-boyfriend Karaca was released from prison, Lopez was twenty-seven years old. See id. at 811. The two had dated as teenagers, but the relationship ended when the State sentenced Karaca to eight years of imprisonment in 2006 for a shooting at a convenience store. See id. at 811-12. Karaca was released in the fall of 2013. See id.

90. See id. at 812 (contextualizing relationship and Karaca’s criminal history).

91. See United States v. Lopez, 913 F.3d 807, 812 (9th Cir. 2019) (discussing defendant’s conversation with Karaca involving gun).

92. See id. (reviewing recent examples of abuse and threats from Karaca).

93. See id. (explaining Lopez’s criminal past).
Karaca grabbed her arm and threatened to “shoot up” her house and hurt her family if she failed to get him a gun. Karaca returned to Lopez’s home several days later and told her that he was in a “shootout,” a reference that made her believe he already had a gun and increased her fear that Karaca would harm her family. Karaca returned four days later still insisting that Lopez pose as her identical twin sister in order to purchase a gun, to which Lopez complied.

At trial, Lopez stipulated to many of the elements of her offense, insisting that she had acted under duress because of Karaca’s threats against her and her family. To support her duress defense, Lopez asked the court to admit BWS evidence including testimony on the syndrome and the effects of abuse in her past. Lopez, whose stepfather had physically and sexually abused her, argued that this evidence would “help provide context” to the jury regarding her fear of Karaca and why she did not go to the police for help. Lopez also explained that the expert’s description of the “characteristics of [a] domestic violence victim” would help explain her “counterintuitive” behavior regarding Karaca. Nevertheless, the district court ultimately granted the government’s motion in limine to exclude the expert testimony.

In reversing that decision, the Ninth Circuit explained that women who have experienced prior battering relationships are often hypervigilant to signs of imminent danger and are often able to more accurately perceive the seriousness of a situation than another person who does not have a history of abuse. Moreover, a jury may consider the defendant’s prior experiences with domestic abuse and police response in order to determine whether their actions were reasonable because an assessment of reasonableness must take into account the individual’s “particular circumstances.”

---

94. See id. (assessing acts by Karaca contributing to Lopez’s perceived fear).
95. See Lopez, 913 F.3d at 812 (revealing timeline of Karaca’s demands and threats against Lopez and her family).
96. See id. Karaca grabbed Lopez and threatened, “I already told you what I was going to do if you don’t get this gun for me. I know you don’t want anything happening to your mom or your sisters.” Id. Two days later, Karaca further threatened Lopez that he would “f--- [her] up, and no one will do anything about it.” Id. Later, while meeting with her own probation officer and a U.S. Marshal, Lopez admitted to seeing Karaca and purchasing the gun for him. See id. at 812-13 (describing arrest and charges against Lopez). Lopez was ultimately indicted for making a false statement during the purchase of a firearm, aggravated identity theft, and being a felon in possession of a firearm. Id. at 813.
97. See United States v. Lopez, 913 F.3d 807, 813 (9th Cir. 2019) (noting Karaca’s insistence on Lopez purchasing gun).
98. See id. at 811.
99. See id. (discussing subjective attributes of evidence of prior intimate partner violence).
100. See id. (reviewing Lopez’s request for expert testimony).
101. See Lopez, 913 F.3d at 814 (discussing government’s argument against BWS subjectivity).
102. See id. at 820 (analyzing recent D.C. Circuit decision); see also United States v. Nwoye, 824 F.3d 1129, 1137-38 (D.C. Cir. 2016) (holding BWS evidence particularly relevant to duress); Walker, supra note 4, at 324 (discussing hypersensitivity to perceived danger after experiencing repeated abuse).
103. See United States v. Lopez, 913 F.3d 807, 822 (9th Cir. 2019) (reviewing perception of reasonableness for not contacting police); see also United States v. Chi Tong Kuok, 671 F.3d 931, 949-50 (9th Cir. 2012) (finding government’s suggestion of contacting authorities unreasonable because defendant knew his family still in
learned helplessness, the Ninth Circuit reasoned that BWS testimony of past and current experiences would not describe Lopez’s special vulnerability to fear, but instead appropriately explain not just those circumstances at the “snapshot” of the crime, but the entire context of circumstances which the factfinder is entitled to hear.104

III. ANALYSIS

A. BWS is Particularly Relevant to the Duress Defense

While some courts have failed to accept all variants of BWS evidence in duress cases out of a fear that it violates the objective standard, this preoccupation with the distinction between objective and subjective fails to explain why the BWS theory is any more acceptable in the self-defense context than in cases employing the affirmative defense of duress.105 A traditional approach to self-defense applies the same objective standard used in a duress defense: whether a reasonable person would have perceived a threat.106 When analyzed closely, BWS better describes a victim submitting to her abuser’s demands than a victim
danger); United States v. Contento-Pachon, 723 F.2d 691, 694 (9th Cir. 1984) (holding trier of fact should decide whether someone in defendant’s position would reasonably believe police); Nwoye, 824 F.3d at 1132 (noting defendant afraid to report coercing party). “To effectively present the situation as perceived by the defendant, and the reasonableness of her fear,” a defendant must often “overcome stereotyped impressions about women who remain in abusive relationships.” Lopez, 913 F.3d at 823 (discussing threshold to establish duress). Accordingly, the jury should receive a professional explanation of the battering syndrome and its ramifications for its victims through introduction of expert testimony. See People v. Humphrey, 921 P.2d 1, 9 (Cal. 1996) (noting BWS evidence helps jury objectively analyze defendant’s claim by dispelling misconceptions about abuse victims); see also United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) (describing society’s misrepresentation of BWS). Since a common misunderstanding is that the victim’s responses are indicative of weak character, the Ninth Circuit concluded that BWS expert testimony is relevant to supporting a defendant’s argument that she had a well-grounded fear she would be harmed, to the idea that she had no reasonable opportunity to avoid committing the crime, and to rehabilitate the victim’s credibility. See Lopez, 913 F.3d at 823 (finding relevancy of BWS to duress). Courts addressing “psychological states analogous to BWS, such as rape trauma syndrome and child sexual abuse accommodation syndrome . . . have generally held expert opinion admissible for” the purpose of “disabusing[ing] the jury of some widely held misconceptions about [the] victims, so that it may evaluate the evidence free of the constraints of popular myths.” Humphrey, 921 P.2d at 15 (Brown, J., concurring) (quoting People v. Bledsoe, 681 P.2d 291, 298 (Cal. 1984)); see United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757, at *6-8 (9th Cir. July 22, 1992) (holding BWS cannot apply to defense for charges of embezzlement); United States v. Homick, 964 F.2d 899, 905 (9th Cir. 1992) (denying BWS evidence in case involving forged phony affidavit); People v. Smith, 608 N.E.2d 1259, 1270 (Ill. App. Ct. 1993) (involving BWS testimony for defendant who killed three-month-old son by forcing caustic substance down throat); Cox v. State, 843 S.W.2d 750, 755-56 (Tex. App. 1992) (involving conspiracy to commit murder). To this end, “[j]urors faced with testimony from a battered woman concerning her abuse and its effects may doubt the testimony because they do not believe that a woman subject to such abuse would stay with her abuser without alerting police or others.” Nwoye, 824 F.3d at 1140. “Expert testimony on battered woman syndrome” can help “dispel the ordinary lay person’s perception that a woman in a battering relationship is free to leave at any time.” Id. (quoting Humphrey, 921 P.2d at 9).

104. See Lopez, 913 F.3d at 822 (asserting importance of Lopez’s prior experience with police).

105. See Burke, supra note 6, at 258, 265 (describing reliance upon distinction between objective and subjective standards).

106. See id. at 258 (discussing how other courts have articulated basis for refusal).
using force against her abuser. In explaining the “unpredictable insecurity and terror” imbued by the presence of severe violence and the knowledge of past abuse, 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.

B. Past Abuse Inherent to BWS Evidence Does Not Describe Subjective Vulnerabilities, but Rather Tangible Factors Necessary to Understand the Reasonableness of an Unlawful Act

A defendant acting under duress tends to retain the ability to make rational decisions, but faces such fear and moral dilemma that they lack a reasonable opportunity to avoid behaving unlawfully. When a factfinder determines whether this fear is well-grounded, courts consider the circumstances in which a defendant faces duress objectively. As such, a fear deemed irrational in one circumstance may be well-grounded if the defendant has experiences which would make them reasonably anticipate harm. It is therefore essential to understand how victims respond to violence and abuse inflicted by an intimate partner, or partners, whenever the issue of domestic violence arises in a criminal context. With such an understanding, specific evidence of prior abuse by

---

107. See id. at 251 (noting some courts permit BWS evidence in support of duress claims but most remain reluctant). While the crimes committed at the demand of an abuser may vary, each can be similarly explained when placed in the context of an abusive relationship. See Walker, supra note 4, at 323 (observing psychological commonality between substantively different cases). Where a history of abuse exists, expert testimony concerning the dynamics of a battering relationship and its physiological impact on the woman’s state of mind can inform legal defenses. See id. (describing legal standards of self-defense). While courts initially only accepted BWS evidence in support of a self-defense claim, both state and federal courts eventually began allowing BWS expert testimony in cases where abuse victims claimed to be under duress from their partner while committing a separate criminal act. See id. at 322 (identifying how BWS psychological analysis helps defendant meet legal standard of self-defense or duress). At trial, a psychologist evaluates the woman to determine whether she is a victim of abuse, if the abuse led to the development of BWS, and if so, how BWS impacted the woman’s state of mind at the time of the action for which the State is charging her. See id. at 323 (noting understanding of defense definition in jurisdiction critical to meeting legal standards). It is important to note, however, that the availability of using BWS evidence for the affirmative defense of duress still varies among jurisdictions. See FEIGMAN ET AL., supra note 78, § 12:15 (illuminating how defendants increasingly use BWS for crimes committed complicity with abusers). Where it is available, “the legal issues closely resemble those in self-defense cases, including, in particular, the specific relevance of the expert testimony to the elements of a duress defense and general concerns over the objective versus subjective nature of the defense.” Id.

108. See Monacella, supra note 9, at 699 (discussing effect of repeated, severe abuse). Such crimes include forging checks to pay an abuser’s bills and burglary for necessities the abuser did not provide for his family. See id. (noting commission of crimes to comply with abuser furthers feelings of unpredictable insecurity and terror).

109. See Burke, supra note 6, at 252 (noting traditional approach to duress defense). For Lopez, the moral dilemma was to violate her probation and illegally purchase a firearm for Karaca, or risk that Karaca use violence on Lopez or her family. See United States v. Lopez, 913 F.3d 807, 812 (9th Cir. 2019) (detailing Karaca’s threat).

110. See Lopez, 913 F.3d at 815 (discussing formula for review of duress claims with “objective, reasonable-person standard”).

111. See Dutton, supra note 5, at 1193 (describing use of BWS to understand abuse victims’ response to violence); see also BROWN, supra note 86, at 15 (discussing analysis of BWS evidence in legal context);
abusers not creating the immediate source of duress is equally supportive of the defense.\textsuperscript{113} In other words, the person threatening the defendant need not be the same person as the original abuser because BWS and the objective standard for duress both inherently include a person’s prior experiences.\textsuperscript{114}

From the perspective of an abuse victim, danger is always imminent.\textsuperscript{115} 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.\textsuperscript{116} The victim takes her abuser’s threats seriously because she has first-hand knowledge of the kind of injury her batterers, and abusers in general, are capable of inflicting.\textsuperscript{117} As such, it is not only necessary but imperative to the reasonableness inquiry that a jury be allowed to assess factors related to the defendant rather than to the coercing party.\textsuperscript{118} The factors relevant to creating a “snapshot of circumstances” must include gender and BWS evidence, which itself includes past episodes of abuse and police response to those prior experiences.\textsuperscript{119} Such a detailed abuse

\textsuperscript{113} See Lopez, 913 F.3d at 821-22 (explaining BWS evidence did not change standard from objective to subjective in self-defense trial). A determination allowing BWS evidence for a duress defense creates another issue: the scope of permissible BWS evidence to support a duress claim. See Monacella, supra note 9, at 741 (explaining complications created by accepting BWS evidence in support of duress defense). In a self-defense claim, BWS evidence is most relevant when limited to a description of the general condition and the characteristics identified in a person afflicted with BWS; courts should not “permit the expert to opine on the issue of whether an individual defendant suffers from the syndrome or acted pursuant to it.” See id. at 742; see also, e.g., People v. Wilson, 487 N.W.2d 822, 825 (Mich. Ct. App. 1992) (holding admissibility limited to general description of syndrome, excluding new facts about victim); State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989) (holding expert should not render opinion regarding whether defendant suffers from BWS).

\textsuperscript{114} See 3 FEDERAL TRIAL GUIDE, supra note 26, § 60.30(4)(d) (expanding evidence relevant to reasonable-person standard for duress to include prior experiences).

\textsuperscript{115} See Monacella, supra note 9, at 725 (applying BWS to first element of duress).

\textsuperscript{116} See id. at 725-26 (discussing requirements of first elements of duress); United States v. Lopez, 913 F.3d 807, 820 (9th Cir. 2019) (noting remarks and gestures may trigger abuse victim more than another, non-abused person).

\textsuperscript{117} See Monacella, supra note 9, at 727 (noting history and cycle of abuse coloring victim’s experience).

\textsuperscript{118} See Lopez, 913 F.3d at 816 (applying more specific, subjective context to BWS under duress analysis).

\textsuperscript{119} See id. at 816, 822 (quoting United States v. Marenghi, 893 F. Supp. 85, 94 (D. Me. 1995)) (expanding circumstances beyond those existing immediately prior to commission of crime). Gender, and therefore BWS
history is imperative to BWS experts as they correlate the victim’s symptoms with their specific abuse experiences.\textsuperscript{120} As such, BWS evidence of past abuse and former abusers is not a description of unfounded hysteria or a cry for sympathy, but rather evidence to determine how a reasonable person in the defendant’s position would perceive imminent danger, despite a seemingly peaceful relationship.\textsuperscript{121}

\textbf{C. BWS Plays a Key Social Role in Dispelling Myths About Abuse Victims and Rehabilitating the Credibility of Defendants}

The realities of BWS evidence aid the factfinder in determining the requisite elements of duress, but also dispel stereotypes surrounding the syndrome and strengthen the defendant’s credibility.\textsuperscript{122} Contrary to common opinion, abuse victims cannot easily leave their home at the onslaught of violence because of both an actual and perceived inability to leave their abuser.\textsuperscript{123} Victims experience such impaired escape skills that they are no longer capable of recognizing viable options for escape.\textsuperscript{124} Due to the impact of abuse, one should expect the victim to remain with her abuser, even if he is committing criminal acts and enlisting her help.\textsuperscript{125} Moreover, abuse victims often feel futile in seeking protection from authorities due to the overall lack of police intervention in cases of domestic evidence, contributes equally to the list of factors considered within a defendant’s particular circumstances on its own and by its relationship to size, strength, financial security, social isolation, and lack of self-confidence. \textit{See id.} (listing possible factors included by MPC).

\textsuperscript{120} \textit{See} Walker, \textit{supra} note 4, at 327-28 (exploring victims’ confusion of current perceptions with past abuse experiences).

\textsuperscript{121} \textit{See} Monacella, \textit{supra} note 9, at 726 (describing abuser’s control of abusive situation).

\textsuperscript{122} \textit{See id.} at 700 (proposing abused defendants claiming duress should use BWS evidence); United States v. Lopez, 913 F.3d 807, 823 (9th Cir. 2019) (allowing use of BWS evidence to rehabilitate defendant’s credibility).

When faced with a battered woman defendant who asserts a defense of duress based upon her circumstances, the courts should allow evidence of battered woman syndrome. . . \textit{[h]owever, admission of expert testimony on battered woman syndrome should be limited to battered woman syndrome generally, leaving the ultimate inferences and conclusions to the fact-finder. Battered woman syndrome evidence in the context of duress should not be used to endorse the defendant’s behavior or account for what happened.}\textsuperscript{123} \textit{See} Burke, \textit{supra} note 6, at 222 (discussing importance of dispelling myths).

\textsuperscript{124} \textit{See id.} at 224 (describing Walker’s speculation of heightened survival skills). When victims are viewed as rational actors, society does not excuse choosing to commit crimes against an unrelated third party in the absence of an imminent threat, rather than getting out of an abusive relationship, making BWS evidence necessary to explain these behaviors. \textit{See id.} at 310 (discussing underlying notions of rationality and blameworthiness). Similarly, victims usually develop heightened survival skills at the expense of escape skills throughout the abuse cycle, and even “become hyperalert to [their] environment in an attempt to prevent further violence.” \textit{See id.} at 224 (discussing Walker’s theory of “learned helplessness”). The result is “a diminished cognitive capacity to perceive the possibility of success and an inability to visualize alternatives to the battering relationship.” \textit{Id.} (noting Walker’s hypothesis regarding reduction of motivation).

\textsuperscript{125} \textit{See id.} at 254 (describing BWS’s relation to third prong of duress defense).
violence, reminding victims they indeed have nowhere to go. Violence teaches factfinders to expect victims to obey any command delivered by their abuser in an attempt to avoid further episodes of violence toward themself and others. Furthermore, using BWS evidence explains how psychological realities of victims vary considerably from each other and deserve individual analysis. Abuse victims are of no particular class, race, economic status, or educational level, and there is no one singular profile of a “battered woman.” Victims of intimate partner violence exist in every corner of the United States. Still, society often misinterprets the survival skills developed by victims as signs of passivity, weakness, and a lack of intelligence. Abuse victims are simply attempting to cope with an abusive and controlling environment, and more importantly, stay alive—a reality that BWS testimony is uniquely capable of unveiling to the factfinder. By characterizing domestic violence as a social and legal problem, and not just an isolated issue of violent partners or dysfunctional relationships, the utilization of BWS evidence in the defense of duress is one of the most important achievements of feminism and of the criminal justice system.

IV. CONCLUSION

A proper reasonableness inquiry for the defense of duress necessarily takes into account not only external factors, but the particular factors contributing to an individual’s situation, including size, strength, age, health, and gender. The consideration of gender naturally and logically includes BWS evidence, and therefore individual experiences with abuse, both past and present. In fact, victims who experienced multiple abusers are particularly vulnerable to the minimization and repression of battering incidents, confusion of previous and current threats, and ultimately hypervigilant perception of danger that BWS theory describes. Therefore, Walker’s theories of cyclical violence and learned helplessness, evidence of past abuse, and experiences with police response collectively contribute to the entire context of circumstances that a factfinder is entitled to

126. See Mangum, supra note 9, at 597 (noting advocates criticized lack of police intervention).
127. See Burke, supra note 6, at 254 (stating duress and self-defense share elements of reasonableness, imminence, and need for self-protection). “Walker’s theory of learned helplessness . . . does explain why an abused woman complies with her batterer’s requests, even if she apparently has an opportunity to escape him, and even if compliance requires her to commit crimes against third parties.” Id. (connecting duress defense and Walker’s theory of learned helplessness).
128. See Monacella, supra note 9, at 703-04 (differentiating stereotypes and realities of abuse victims).
129. See id. at 703 (discussing Walker’s definition of “battered women”).
130. See id. (listing various stereotypes about abuse victims); supra note 3 (providing statistics about domestic violence).
131. See United States v. Lopez, 913 F.3d 807, 817 (9th Cir. 2019) (discussing common myths surrounding victims of abuse).
132. See id. at 811 (discussing defendant’s belief BWS provided context to jury).
133. See Mangum, supra note 9, at 593 (introducing breadth and severity of domestic violence).
hear when evaluating a claim for duress by a defendant who has also been a victim of abuse. Otherwise, abuse victims are beholden to an interpretation of circumstances at the snapshot of a crime rather than a sincere and life threatening moral dilemma.

Presenting BWS evidence to the factfinder to prove a duress defense is not about eliciting sympathy, but dispelling preconceived notions about abuse victims who become controlled, and practically imprisoned, with no reasonable opportunity to escape. It is imperative for courts to accept that an effective jury must understand the cumulative terror victims experience, and that previous abuse and brutality makes danger acutely imminent to a victim of abuse, even when their abuser appears passive. In that sense, BWS evidence does not describe the subjective, psychological vulnerabilities of the accused, but rather the objective factors leading to a decision that will forever alter the victim’s future.

Michaela Dunn