VICTIM-SURVIVORS OF INTIMATE PARTNER VIOLENCE WHO ARE FORCED TO PARTICIPATE IN CRIMES: ARE THEY TREATED FAIRLY IN THE CRIMINAL LAW?

Julia Tolmie,[1] **Jane Calderwood Norton,**[2] **Denise Wilson**[3] **and Rachel Smith**[4]

Research suggests that a portion of female offenders in Aotearoa New Zealand offend in response to intimate partner violence (IPV) victimisation. It is therefore critical to consider whether coercion because of IPV is adequately accommodated in the criminal justice response to such offending. In this article we examine the law on party liability and the defences of compulsion and duress of circumstances. We suggest that these defences are currently not capable of adequately recognising the coercive circumstances that can result in women offending or being held accountable for their violent male partner's offending by means of the expansive doctrine of party liability. The current law therefore requires urgent reform.

This article is inspired by the authors' involvement in a case in which a woman was charged with, and pleaded guilty to, a number of serious property offences committed by her intimate partner. Her liability was based on the fact that she was present at the scene where he committed the crimes and, on one occasion, she attempted (on his instructions) to get the occupants inside the building to open the door to let him in. He had subjected her to extreme and life-threatening physical violence throughout their relationship, including the use of lethal weapons. She was terrified of him and his associates.

Although women's offending, and particularly their serious offending, is numerically minor when compared to male offending,[5] it is nonetheless

1 Professor of Law at the University of Auckland.
2 Senior Lecturer in Law at the University of Auckland.
3 Associate Dean of Māori Advancement and a Professor in Māori Health at Auckland University of Technology.
4 Lecturer in Violence and Trauma at Auckland University of Technology.
5 For example, there were 7,243 male prisoners and 426 female prisoners in New Zealand as of 31 March 2022: Department of Corrections "Prison facts and statistics – March 2022" <www.corrections.govt.nz>.

important for a number of reasons. First, the disproportionate incarceration of Indigenous peoples in Aotearoa New Zealand is particularly pronounced for women: Māori constitute 53 percent of the male prison population but 66 percent of the female prison population.[6] Second, the response to women's offending, and particularly their incarceration, has a serious ripple effect on their dependent children and communities because of women's caring responsibilities.[7] For wāhine Māori "embedded within whānau contexts",[8] the intergenerational effect of systemic incarceration has a "devastating impact".[9] Third, some of the most concerning discrepancies between the underlying moral wrongness of an offender's criminal behaviour and the gravity of the criminal justice response occur in relation to women who sit at multiple axes of oppression, including race and class.[10] These cases tend to involve wāhine Māori living in precarious circumstances whilst dealing with extreme levels of interpersonal, structural and state violence.[11]

International research suggests that for a proportion of women convicted of crimes (we do not know precisely what proportion), their pathway into

6 Department of Corrections *Wāhine: E Rere Ana Ki te Pae Hou Women's Strategy 2021 – 2025* (2021) at 8.

7 The Department of Corrections' data about women's parenting status is limited to women who were directly caring for a child before entering prison. This is likely to be an underestimate as many women are involved with Oranga Tamariki and may have had children uplifted. Based on research conducted in 2013, Corrections estimates that 29 percent of women in prison have a direct parenting role (a child under 18 living with them) prior to imprisonment: Office of the Inspectorate, Department of Corrections *Thematic Report: The Lived Experience of Women in Prison* (October 2021) at 15. See also Julia Tolmie "Women and the criminal justice system" in Julia Tolmie and Warren Brookbanks *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 295 at 311; and Kailash Bhana and Tessa Hochfeld *Now we have Nothing: Exploring the impact of maternal imprisonment on children whose mothers killed an abusive partner* (Centre for the Study of Violence and Reconciliation, December 2001) at 16.

8 Lily George and Elaine Ngamn "Te Piringa Poho: Healing, Potential and Transformation for *Māori Women*" in Lily George and others (eds) *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 250.

9 Tracey McIntosh and Maja Curcic "Prison as Destiny? Descent or Dissent" in Lily George and others *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 223 at 232.

10 Patricia Hill Collins *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (2nd ed, Routledge, New York, 2000) at 227–229. These axes are located within what Collins terms a matrix of domination — "the overall social organization within which intersecting oppressions originate, develop, and are contained". In Aotearoa New Zealand, settler colonialism is integral to the operation of the matrix of domination.

11 As was the offender in the case that inspired this article. See also *Police v Kawiti* [2000] 1 NZLR 117 (HC); *R v Wihongi* HC Napier CRI-2009-041-2096, 30 August 2010; *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *Wihongi v R* [2012] NZSC 12; *R v Paton* [2013] NZHC 21; and *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

crime,[12] and particularly for "more serious, 'gender atypical'" offending,[13] occurs through relationships with men, and often violent male partners. For example, women can offend in an attempt to cope with, escape or resist victimisation,[14] or they may be coerced into involvement in, or taking the blame for, their partner's offending.[15] The UK Prison Reform Trust states that a key difference between men and women in prison is that family relationships tend to be a protective factor for men, whilst for women relationships are more often a risk factor.[16]

In Aotearoa New Zealand, data provided by the Department of Corrections suggests a high correlation between women's victimisation and their incarceration, with 68 percent of incarcerated women having experienced family violence, and 75 percent having experienced either (or both) family or sexual violence.[17] For many of these women, the abuse commenced when

12 Charlotte Barlow and Sandra Walklate *Coercive Control* (1st ed, Routledge, London, 2022) at 20–22. See also Baroness Jean Corston *The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System* (UK Home Office, March 2007) at 3 and 19.

13 Barlow and Walklate, above n 12, at 20; and Sarah Becker and Jill A McCorkel "The Gender of Criminal Opportunity: The Impact of Male Co-offenders on Women's Crime" (2011) 6 Feminist Criminology 79 at 84 and 99–100.

14 Self-medicating with drugs and using violence in defence or retaliation can be strategies used for coping with, and escaping, violence and abuse. Melissa Dichter and Sue Osthoff observe that "Victimisation can lead to economic strain and limited opportunities for financial independence, leaving women and girls to engage in criminalized activities such as drug sales, commercial sex work, and theft or fraud … Abusive partners may also falsely accuse women of engaging in criminalised activities and manipulate the criminal legal system to have women arrested and incarcerated" in *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update* (National Resource Center on Domestic Violence and the National Online Resource Centre on Violence Against Women, July 2015) at 10.

15 Becky Clarke and Kathryn Chadwick *Stories of Injustice: The Criminalisation of Women Convicted Under Joint Enterprise Laws* (Manchester Metropolitan University, November 2020) at 5. See also Jessica Jacobson, Amy Kirby and Gillian Hunter *Joint Enterprise: Righting a Wrong Turn? Report of an exploratory study* (Prison Reform Trust and Institute for Criminal Policy Research, University of London, 2016) at 2, where the authors note that how often and against whom the law on party liability (and particularly the joint enterprise doctrine, discussed below) is employed remains hidden because data is not kept.

16 UK Prison Reform Trust "*There's a reason we're in trouble" Domestic abuse as a driver to women's offending* (2017) at 3.

17 Department of Corrections, above n 6, at 8. The data on combined family and sexual violence comes from the strategy for 2017–2021 – this includes in the overall percentage, experiences of sexual violence that is not family violence: Department of Corrections *Wahine – E Rere Ana Ki Te Pae Hou: Women's Strategy 2017 – 2021* (June 2017) at 4. Note that 75 percent of incarcerated women are suffering from mental health problems (compared with 61 percent men) and 52 percent from forms of post-traumatic stress disorder (compared with 22 percent of men). A study of incarcerated Indigenous women in Western Australia found that 90.7 percent of those convicted for violence had also been the victims of violence: Mandy Wilson and others "Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia" (2017) SAGE Open 1 at 6.

they were young, and was part of "a sustained period of violence".[18] When conducting research documenting Māori women's experiences of "unsafe relationships", Denise Wilson was informed that some women were forced to engage in illegal activities by their partner, while others committed crimes to be imprisoned for respite from their partner's violence.[19] Māori women in unsafe relationships, who are also living with "social marginalisation, generational social and economic disenfranchisement, ongoing effects of colonisation… [and] racism and discrimination",[20] "know" that their partners will retaliate in response to resistance and, from past experience, that they cannot rely on the family violence system for support.[21] Wilson and others found Māori women utilised compliance, silence, placating and mediating as safety strategies when faced with a partner's demands, including engaging in illegal activities, to actively protect others and prevent further violence.[22]

Given the relevance of women's intimate partner violence victimisation to their offending, it is critical to consider whether it is adequately accommodated in the criminal justice response. In this article we propose to address two criminal law issues raised by the case that inspired it: the law on party liability and the defences of compulsion and duress of circumstances. We suggest that these defences are currently not capable of adequately recognising the coercive circumstances that can result in women offending *or* being held accountable for their violent male partner's offending by means of the expansive doctrine of party liability.

18 Marianne Bevan "New Zealand prisoners' prior exposure to trauma" (2017) Practice: The New Zealand Corrections Journal 8 at 14.

19 Denise Wilson and others *E Tū Wāhine, E Tū Whānau – Māori women keeping safe in unsafe relationships* (Taupua Waiora Māori Health Research Centre, Auckland, 2019). See also Denise Wilson and Melinda Webber *The People's Report: The People's Inquiry into Addressing Child Abuse and Domestic Violence* (The Glenn Inquiry, 2014).

20 Wilson and others, above n 19, at 22.

21 At 65. The authors refer to systemic entrapment when Māori women seek help because they can no longer "manage" their partner's coercive control and in doing so: (a) fear their children will be removed from their care; (b) encounter bias, prejudice and racism from those with whom they engage in agencies; (c) encounter unhelpful people; and (d) find services unhelpful in providing the resources and support needed to keep themselves and their tamariki safe.

22 At 39. Growing up amidst family violence and sexual violence also laid patterns that dictated how Māori women responded in their adult intimate relationships: see *R v Ruddelle* [2020] NZHC 1983 at [5]-[18]. Karen Ruddelle grew up amid violence and alcohol abuse, as well as being compelled to take up parental responsibilities for young siblings. This gave her a heightened sense of responsibility to care for and protect others at risk of harm.

I PARTY LIABILITY

The operation of party liability in relation to women in relationships with coercive and controlling men who offend has been described as a "significant blind spot in the legal system and in much academic work", which results in the "unfair labelling of women's actions and their grossly disproportionate punishment".[23]

Women who are subjected to coercive control from their partner and his lifestyle[24] — sometimes "layered on top of previous abuse suffered in childhood",[25] ill health and self-medicating coping strategies,[26] as well as broader circumstances of entrapment[27] — are rendered vulnerable to being convicted of their male partner's crimes. This can be because they play a role in his offending (minor or more significant) or simply because they are present at the scene of the crime and unable to leave because of significant fear or threats.[28] Or they can be involved in a crime and become implicated in a more serious offence because their partner "suddenly raises the stakes" by, for example, unexpectedly producing a weapon during an altercation.[29]

---

23 Susie Hulley "Defending 'Co-offending' Women: Recognising Domestic Abuse and Coercive Control in 'Joint Enterprise' Cases Involving Women and their Intimate Partners" (2021) 60 The Howard Journal 580 at 581–582.

24 By lifestyle we mean, for example, his involvement with criminal networks or activities or gang association. For practical examples see Family Violence Death Review Committee *Appendix: Social entrapment: A realistic understanding of the criminal offending of primary victims of intimate partner violence* (Health Quality and Safety Committee, 2018). In June 2021, Corrections recorded that 155 women in prison (25 percent) had links to gangs: Office of the Inspectorate, Department of Corrections, above n 7, at 15.

25 Hulley, above n 23, at 583. See also Ladan Hashemi and others "Exploring the health burden of cumulative and specific adverse childhood experiences in New Zealand: Results from a population-based study" (2021) 122 Child Abuse Neglect 105372.

26 For example, poor mental and physical health and substance use or dependencies. See Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality and Safety Committee, June 2014) at 79.

27 See Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" (2018) 2 NZ L Rev 181; and Wilson and others, above n 19.

28 Women can be "unaware of offences involving their partner until they [a]re 'at the crime scene', at which stage 'it [i]s very difficult to back out' not least because they [a]re 'scared'": Hulley, above n 23, at 582, citing Christopher Mullins and Richard Wright "Gender, Social Networks and Residential Burglary" (2003) 41 Criminology 813 at 820. Note that the law on omissions can result in women being convicted as primary offenders, rather than secondary parties, for failing to protect their children from their partner's abuse: see Julia Tolmie and others "Criminalising Parental Failures: Documenting Bias in the Criminal Justice System" (2019) 3 NZWLJ 136.

29 Dorinda Welle and Gregory Falkin "The Everyday Policing of Women with Romantic Co-defendants" (2000) 11 Women and Criminal Justice 45 at 55–56.

In one of the few sustained investigations into this issue, Becky Clarke and Kathryn Chadwick found that 90 percent of the women they identified who were convicted of serious violence via the joint enterprise doctrine in the United Kingdom had not engaged in any violence themselves.[30] These women were often marginal to the violent event that formed the basis of criminal charges against them and yet they were convicted and punished in the same way as those who actually used violence. They were "most likely to be implicated in the offence based on their association with their male partner or presence at the scene, rather than their active involvement in the offence".[31] Many of the women in the study had experienced abuse in childhood and almost half were experiencing IPV at the time of offending.[32] In 87 percent of these cases their co-defendant was the perpetrator of this abuse.[33] Similarly, Stephen Jones found that the majority of women offending with a male co-defendant in his sample had offended as the result of "coercive or manipulative behaviour on the part of a male co-defendant".[34]

In Aotearoa New Zealand there are no studies on women who are brought into the criminal justice system as parties to the offending of their male associates. However, cases on the public record provide examples of this phenomenon. For example, in the leading Supreme Court case on party liability, *Ahsin v R*, two women had their convictions for murder based on secondary party liability overturned because of inadequacies in the summing up of the trial judge on the law on party liability.[35] As a result they were sent back for retrial on homicide charges six years after the killing occurred.[36] The murder was actually committed by two patched Black Power male gang members. The women were charged because one (who was in intimate relationship with one of the men) was driving the car that conveyed the men to the scene, whilst the

30 Clarke and Chadwick, above n 15, at 4. These percentages are in relation to 84 cases about which the authors had sufficient detail to comment.

31 Hulley, above n 23, at 585.

32 Clarke and Chadwick, above n 15, at 17.

33 At 17.

34 Stephen Jones "Partners in Crime: A study of the relationship between female offenders and their codefendants" (2008) 8 Criminology and Criminal Justice 147 at 159. The participants were classified as offending under direct violent coercion, as a result of male expectation (by men who were usually abusive or manipulative), through infatuation with men, by willing participation or with a female codefendant.

35 *Ahsin v R*, above n 11.

36 In 2015 Ms Ahsin plead guilty to manslaughter charges and in 2016 Ms Rameka was found not guilty by a jury after going to trial on manslaughter charges: see Kirsty Lawrence "Rameka found not guilty in Whanganui manslaughter trial" *Stuff* (online ed, 18 April 2016).

other was sitting in the car and had shouted abuse during the evening at rival gang members.

A The Law on Party Liability

Secondary party liability is a legal construct, and in some cases a legal fiction. When someone meets the legal requirements for party liability in respect of someone else's offending they are convicted of that offence as though the primary party's offending was their own.[37] Any diminution of responsibility because of their secondary role is accommodated at sentencing. However, if the person is being sentenced for very serious offending their sentence is still likely to reflect that fact. A conviction for murder, for example, has a presumption of life imprisonment for anyone convicted of it — either as a principal or secondary party — and this presumption must be overturned if a lesser sentence is to be given.[38] The women convicted under the joint enterprise doctrine in Clarke and Chadwick's report were serving long or indeterminate sentences (the average was 15 years imprisonment) for crimes that they had not personally committed.[39]

1 Aiding and Abetting

In New Zealand there are two pathways to party liability. The first pathway is under s 66(1)(b)–(d) of the Crimes Act 1961 which imposes liability upon a person who intentionally "aids, abets, incites, counsels or procures" the principal's offending, knowing the essential matters of the offence.

Aiding, abetting, inciting, counselling or procuring is essentially any form of "assistance or encouragement".[40] There is no requirement that the assistance or encouragement be substantial. Whilst simply being present at the scene of the crime is not enough to amount to encouragement in respect of the principal's offending,[41] it does not take much to tip the threshold. For example, when there is some additional (minor) behaviour by the party that indicates support;[42] where their presence directly contributes to the offending by giving the principal an audience;[43] or where prior behaviour by the party or an existing

37 Crimes Act 1961, s 66.
38 Sentencing Act 2002, s 102.
39 Clarke and Chadwick, above n 15, at 4.
40 *Larkins v Police* [1987] 2 NZLR 282 (HC) at 14; and *Ahsin v R*, above n 11.
41 *R v Coney* (1882) 8 QBD 534 at 557–558 per Hawkins J.
42 *R v M* [2008] NZCA 193 at [26]; and *R v Inoke* [2008] NZCA 403 at [30].
43 *R v Schriek* [1997] 2 NZLR 139 (CA); and *R v Witika* (1991) 7 CRNZ 621 (CA) at 622.

relationship between the party and the principal gives a supportive flavour to the party's presence.[44] And of course presence is not required for assistance or encouragement to be proven at an earlier point in time.

It is thought that stringent mens rea requirements avoid spreading the web of criminal liability too wide for this form of party liability:[45] the need to prove an intention by the secondary party to assist or encourage the primary offender whilst they know the essential matters of that offending.[46] However, there is no requirement that the party "desire" that the principal commit the actual offence. It is therefore possible to "intend" to assist or encourage someone because the party knows that it is certain that the offender will take encouragement or receive assistance from their actions, even if the party hopes they will not and does not wish the offending to take place.[47] A mens rea requirement that can be easily satisfied in circumstances where the secondary party does not have significant choice or agency in relation to their involvement does little to constrain the operation of party liability.

This brief discussion shows that not much is required for party liability under s 66(1)(b)–(d). A party's contribution to the principal's offending can be slight, if not negligible, and consist of behaviours that in any other context would be entirely innocent. It follows that a woman in a "relationship" with an abusive man who uses coercive control, including threats to her or others' lives (including children), would not need to do much to constitute support or encouragement of his criminal behaviour. For example, being in his company at the scene of the crime or driving the car is likely to be enough, so long as she can be inferred to be aware of the offending he embarked upon and therefore intend to assist or encourage it.

The rationale for liability under s 66(1)(b)–(d) is that a person who deliberately encourages or helps another person to commit a crime has some moral responsibility for what takes place. However, a victim-survivor of IPV

44 *R v Duncan* [2008] NZCA 365 at [12]. In *Duncan* the Court of Appeal held "A person who is voluntarily and deliberately present, witnessing the commission of a crime and offering no opposition or dissent when he or she might be expected to do so, could be a basis for an inference that the person was intending to encourage and assist the commission of an offence": at [15].

45 Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis Wellington 2022) at 558.

46 This is subject to the caveat that it is sufficient that the offence committed by the principal is one of a range of offences that the accused knew that the principal would commit: *R v Baker* (1909) 28 NZLR 536 (CA) at 543–544, per Cooper J; and *R v Kimura* (1992) 9 CRNZ 115 (CA).

47 *R v Wentworth* [1993] 2 NZLR 450 (HC).

— whose encouragement or help to their co-offender is provided only under coercion from their co-offender (because, for example, they are in such fear of their partner that they can neither protest, refuse to help him or leave the scene)[48] — can hardly be considered to have much influence on their partner's offending (if any). In these circumstances it is he, not she, who is the impetus for the offending, including whatever assistance she provides. It follows that the rationale for conviction is absent, or at least greatly diminished, in the kinds of cases under examination here.

It is important to note that in the authors' experience of supporting women in these circumstances, statutory agencies have not been able to protect such women from their abusive partners prior to the men's criminal offending (to which the women can be deemed a party).[49] Their (ex)partners and his associates tracked the women down when they sought safety from friends and whānau, in refuge accommodation and in residential substance abuse treatment. The public were warned not to approach some of these men because they were considered too dangerous, yet these women were somehow expected in the eyes of the law to be able to safely remove themselves from such men and their criminal activities. It is not surprising that some women said that the only place they could be safe from their male partner was in a women's prison.

2 *Common Purpose Liability*

Section 66(2) of the Crimes Act is the second pathway to party liability in New Zealand. This imposes liability on a person who embarks on a criminal enterprise with the principal offender in respect of any crimes committed by the principal, including crimes that the party did not specifically encourage or assist, so long as they knew those crimes were at risk of occurring in pursuit of their joint criminal enterprise and did in fact occur whilst the principal was pursuing the criminal plan.[50] This form of party liability is called the "common purpose doctrine" or the "joint enterprise doctrine".

Under the common purpose doctrine, a woman could be liable for crimes committed by her violent partner that she is not privy to and which occur when she is not present, so long as she can be proven to have joined

48 Hulley, above n 23, at 592.

49 Wilson and others, above n 19, which describes systemic entrapment by agencies in the family violence and sexual violence sectors.

50 See Tolmie and others, above n 45, at 566, 572-584.

a "common unlawful purpose" with him (which he is pursuing when he commits these crimes) and it can be inferred that she foresaw these crimes "could well happen".[51]

The suggested justifications for this form of party liability all hinge on the secondary party *voluntarily* joining a "common unlawful purpose" with the person who offends.[52] For example, it is said that the secondary party, by "… joining forces with [the principal], signs up to the goals of the joint enterprise and accepts responsibility for all the wrongs (perpetrated by [the principal]) in realising that goal".[53]

Alternatively, the secondary party is said to have enhanced the risk that the principal might commit the incidental offending by lending their weight to the main offending out of which it flowed.[54] Clearly none of these rationales are satisfied by circumstances in which a woman is part of the common unlawful purpose only because of coercion from the principal.

3 Withdrawal from Party Liability

A party can withdraw under both s 66(1) and s 66(2) of the Crimes Act and escape criminal liability, provided they do so effectively prior to the crime being committed by the principal. The majority in *Ahsin* set out the legal requirements for withdrawal in the following terms:[55]

> First, there must be conduct, whether words or actions, that demonstrates clearly to others withdrawal from the offending. Secondly, the withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime.

In deciding whether what has been done by way of withdrawal is "reasonable and sufficient in the circumstances of the case":[56]

> … particular consideration must be given to the nature and degree of assistance or encouragement that has been given and the timing of the attempted withdrawal in relation to the perpetration of the offence.

51 Hulley, above n 23, at 593, describes the police inferring this knowledge from the fact of the relationship with her partner.

52 See Beatrice Krebs "Joint Criminal Enterprise" (2010) 73 MLR 578 at 593–594.

53 At 594.

54 At 595–596.

55 *Ahsin v R,* above n 11, at [134].

56 At [135].

If the party's conduct was words, then "communicating discouragement … with sufficient clarity … may be enough actually to undo … the influence of" their encouragement.[57] However, if it was "actions of assistance, further reasonable steps to undo" or otherwise prevent the crime may be required — "for example, retrieval of a weapon provided, warning the victim or contacting the police".[58] If left too late there may be circumstances where withdrawal is extremely difficult, or even impossible, because no action is capable of undoing what has been done.

The majority in *Ahsin* held that as soon as a party has provided assistance or encouragement, they are liable as a secondary party, albeit that their liability does not "crystallise" until the principal offender commits the main offence.[59] Taking this approach means that once the secondary party has provided assistance or encouragement guilt automatically follows unless they are able to raise the "defence" of "withdrawal".[60]

In *Ahsin*, as noted above, Ms Ahsin drove the principals (two male patched Black Power members — one of whom was her partner) to the place where an attack was launched on the victim, selected because he was in the street wearing the colours of a rival gang. Whilst the attack was taking place, she exhorted the two men to return to the car and then drove them from the scene of the crime. It was held that to withdraw she needed to do more than try to verbally dissuade the principal from attack:[61]

> … [i]n light of her considerable prior involvement in driving and positioning the car for the attack … Had she driven off, with or without a prior warning that she was going [to] do so, that conduct might have been sufficient and capable of influencing [the principal] to end the attack. But she did not.

The Court was not asked to consider whether these courses of action were available to Ms Ahsin or if they would have invited serious violent retaliation against her, by either her partner or his associates. The majority went on to

57 At [136(a)].
58 At [136(b)].
59 At [114]–[123].
60 The alternative view — see, for example, Elias CJ dissenting on this point at [20] — is that the party must be actively assisting or encouraging or still be part of the unlawful enterprise when the principal commits the main offence in order to meet the requirements for party liability at the relevant moment. In other words, if their support is not current or has lapsed at that point then they are not guilty even if they do not meet the requirements for the "defence" of "withdrawal".
61 At [148].

express the opinion that she had already provided "such considerable and crucial assistance and had allowed the course of events to progress" so far that it was likely to be impractical for her to undo her assistance and therefore legally withdraw on this set of facts.[62]

B Conclusion

This brief overview of the law demonstrates the breadth of party liability. The problem for women in an intimate relationship with violent men who offend is that little by way of action is required to prove support for their partner's offending or to demonstrate that they "joined" the offending out of which his further offending arises. In other words, it will not be difficult when a victim-survivor has an intimate relationship with an abusive partner who chooses to offend to find evidence of the victim-survivor's support or assistance for any known offending by their partner and liability for any predictable further flow on offences.

Furthermore, the effect of the majority position in *Ahsin* is that any practical assistance or encouragement that a victim-survivor provides does not lapse with time. To "withdraw" once she has provided such assistance or encouragement, a party must expressly communicate to her violent partner her lack of support for his offending and undo the effect of any assistance that she has provided. In other words, she must engage in highly confrontational acts of overt resistance — something that may not be realistically possible on the facts without extreme violent (and other forms of) retaliation.[63]

The law on party liability is built on the assumption that the party has a choice to become involved in another's offending. However, this assumption is highly problematic for women in intimate relationships with men who abuse them. Some of these women do not even have a choice about being in a "relationship" with the principal offender, let alone his activities.[64] The authors are not aware of any party liability case in Aotearoa New Zealand

62 At [149].

63 Wilson and others found one way young Māori women at risk of harm or in situations that threatened their safety resisted violence, was by indicating agreement with partners, or living "a lie" to get safely out of an unsafe situation: see Denise Wilson and others "Reflecting and learning: A grounded theory on reframing deficit views of young indigenous women and safety" (2019) 41 Health Care for Women International 690 at 695.

64 Some women have no choice about entering the relationship (see for example, *R v Chase* [2017] NZHC 244) and many are unable to separate — as noted above, when they attempt to leave they may be tracked down by their partner and his associates who are carrying weapons.

that recognises an IPV victim-survivor's restricted autonomy and agency as being relevant to her liability, even when the circumstances in which she joins or supports her partner's offending are inherently coercive. This lack of case law may be because any coercion is designed to be addressed via the general criminal defences of duress by threats (the defence of compulsion under s 24 of the Crimes Act) or duress by circumstances (which exists at common law). In the next section we therefore turn to explain that these defences are not realistically able to account for the coercion experienced by an IPV victim-survivor in relation to her violent partner's offending.

We note that, as pointed out by Hulley, the situation is worse than simply the expansive breadth of the law on party liability combined with an underlying assumption that those who support another person's offending are exercising agency and choice in doing so.[65] Women may not feel safe in even mounting a defence related to their partners: as illustrated by the *Ahsin* case, women are often physically tried with their male co-offenders.[66] This means that the coercion a victim-survivor is under comes into the courtroom with his presence, making it impossible for her to be honest about the nature of that coercion to the court and making navigation of the court process, including any resolution discussions and pleas in mitigation at sentencing, extremely dangerous.[67] If she is in a relationship with a gang affiliated partner then she is not dealing with only one man but a collective who may monitor her activities and enforce her partner's control from a distance.[68] For example, even if her case is tried separately, these associates may be in court when she is tried and may be able to physically reach her even if he is incarcerated.

Women may also struggle to mount a defence due to their partner undermining them. Hulley cites an example of an abusive man who wanted his partner incarcerated whilst he was in prison for his offending so that she was not free to build a life without him.[69] The simple way of achieving this was to implicate her in his offending by alleging that she had provided him with support or encouragement.

65 Wilson and others, above n 19, at 593–597. See also Welle and Falkin, above n 29, at 56–59.

66 See *R v McCallum* HC Whanganui CRI 2008-083-2794, 12 February 2010.

67 Asking for severance and a closed court is likely to advertise that such disclosures will be made. Clarke and Chadwick, above n 15, at 14, note that the Crown overcharges in order to create pressure on defendants to plead guilty at the plea bargaining stage.

68 Welle and Falkin, above n 29, at 57–58.

69 Hulley, above n 23, at 596.

Coercively implicating their intimate partners in criminal offending should be considered as a strategic part of a male offender's pattern of coercive control — by entangling his partner in a criminal context he is able to make her social position even more precarious. Forced criminal activity forecloses safety for her because active criminal charges and a criminal history can exclude women from crisis services, such as refuges, and being framed as an "offender" calls into question the authenticity of her IPV victimisation. In the authors' experience, abusive male partners can purposely expose women to information about their criminal activity because this is very effective in preventing them from seeking help from the Police for IPV. If these women subsequently have any contact with the Police, it will be assumed by abusive partners they have informed the Police about *everything*. For women and those they hold dear, there are severe consequences for being an informant. In this context, forced involvement in criminal activity is another means by which abusive male offenders further entrap their female partners.

II THE DURESS DEFENCES

The way IPV operates over time to limit a victim-survivor's space for action has been well documented elsewhere and will be not traversed in great detail here.[70] We simply note at the outset the need in this context to understand IPV as a form of entrapment,[71] as was accepted by Palmer J in *R v Ruddelle*.[72] This means that to understand the effect of IPV on the victim-survivor we must appreciate the impact of her abusive partner's pattern of coercive control on her over time,[73] as well as the deficiencies of the current New Zealand family violence safety system in mitigating the operation and harm of such abuse. In addition, it is necessary to understand how broader interlocking structural and intersectional inequities manifest in her life and how these affect her abusive partner's ability to coercively control her and diminish the quality of the IPV safety responses available to her from those around her.[74]

70 See Shevan (Jennifer) Nouri "Critiquing the Defence of Compulsion as it Applies to Women in Abusive Relationships" (2015) 21 Auckland U L Rev 168. For a more dated account see Janet Loveless "Domestic Violence, Coercion and Duress" (2010) Crim LR 93.

71 Tolmie and others, above n 27, at 185.

72 *R v Ruddelle*, above n 22.

73 See Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007); and Hulley, above n 23, at 583.

74 See Hulley above n 23, at 591–592 and 595–596; and Rosemary Hunter "Narratives of domestic violence" (2006) 28 Syd LR 733 at 743.

The defences designed to recognise the role of moral compulsion in relation to a defendant's offending — either as a primary or a secondary party — are the defences of duress by threats (compulsion) and duress by circumstances (sometimes called "necessity"), and we turn now to address these in this order. These defences provide exceptions to the:[75]

> … fundamental principle that those who choose to break the law are, and should be held, responsible for their crimes. The defences' underlying rationale is that, in these circumstances, the accused has no real choice but to break the law.

A The Law on Compulsion

1 The Legal Requirements of the Defence

Section 24(1) of the Crimes Act enacts the defence of "compulsion", codifying the common law defence of "duress by threats". Section 24(1) provides that:

> … a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he or she believes that the threats will be carried out and if he or she is not a party to any association or conspiracy whereby he or she is subject to compulsion.

The New Zealand Law Commission has expressed the view that the wording of s 24 should not require a battered woman to justify continuing in a relationship with a violent offender before she can raise the defence.[76] Not only, as pointed out by the Law Commission, should the defence only be excluded when there is some moral fault on the part of the defendant contained in the fact of association,[77] but separation does not guarantee safety for women in violent relationships (in fact, it may escalate danger) and is not always readily achievable, particularly when there are children involved.

75 Nouri, above n 70, at 170.

76 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at [206]–[207].

77 At [206].

The Court of Appeal in *R v Teichelman* distilled s 24 of the Crimes Act into the following legal requirements: [78]

i) There must be a specific *threat* to *kill* or cause *grievous bodily harm* if the defendant does not commit the crime.
ii) The threat must be that death or grievous bodily harm will occur *immediately*.
iii) The person making the threat must be *present* during the commission of the offence.
iv) The defendant must have committed the offence in the *belief* that *otherwise* the threat will be immediately carried out.

This test can be contrasted with the defence of duress by threats as it now exists in those jurisdictions that have retained a common law defence. The Supreme Court in *Akulue v R*, noted that at common law imminence (or immediacy) of threat and the presence of the threatener are no longer legal requirements, instead: [79]

> … the common law defence depends on the defendant not having had a reasonably practicable way of avoiding compliance with the threat. While in part less restrictive than the statutory test (because immediacy and presence are not required), the common law test is objective rather than subjective and in this respect is more restrictive than s 24.

In other words, the defence as set out in s 24 measures coercion subjectively — the person must believe that the threat will be carried out — but contains narrow legal requirements confining the defence to certain types of threats. On the other hand, the common law defence drops these requirements but sets a broad normative test requiring proof of objective or reasonably experienced coercion.

As noted by the New Zealand Law Commission and Shevan Nouri, the narrow requirements set out in s 24 are particularly ill-suited for offences

78 *R v Teichelman* [1981] 2 NZLR 64 (CA) at 66–67. The cases insist on a specific threat. It will not be enough for the accused to comply with a request from someone because they are afraid of what that person will do to them if they do not. This is so even if they have good reasons for being afraid and even if they feel that the outcome will be immediate harm or death if they do not comply with the requirement: see also *R v Raroa* [1987] 2 NZLR 486 (CA).

79 *Akulue v R* [2013] NZSC 88 at [14].

committed because of IPV coercion.[80] Such requirements essentially limit the defence of compulsion to situations where the abuser is physically standing over the victim-survivor and using specific threats of immediate serious harm or death *on that occasion* to force her to participate or be present to his offending. In other words, they require the coercion that she is under to be in the immediate transaction or "single event" that constitutes the offending.

The problem is that IPV is not one transaction — rather, it is a raft of strategies (the use of violence and threats, as reinforced by other indirect strategies of control, such as isolation, surveillance and micro-regulation) which have a cumulative and compounding effect over time and are directed at closing down the victim-survivor's space for action and removing her autonomy.[81] Physical violence in this dynamic is not random or incidental but rather strategic and retaliatory.[82] The victim-survivor's fear can be rooted in her "knowledge of [her] partner's competency as a dangerous avenger".[83] The physical violence may also consist of chronic low level violence that has a cumulative intensity for the victim-survivor so that she begins to contain her own behaviour because she is exhausted and overwhelmed. Evan Stark comments that: [84]

> … the single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts.

80 Law Commission, above n 76; Nouri, above n 70. Loveless, above n 70, at 95, suggests that the defence of compulsion "is based on the way in which men may more typically experience coercion through clearly identifiable specific threats of serious harm rather than by the incremental destruction of self-esteem characteristic of prolonged domestic violence".

81 Nouri, above n 70, at 180 points out that the immediacy requirement "wrongly separates out the abused offender's behaviour from the abusive context of coercive control to which it responds". Furthermore, the requirement for a specific threat of grievous bodily harm of death fails to account for the coercion that is contained in the accumulated weight of multiple harms over time.

82 *R v Maurirere* [2001] NZAR 431 (CA) is arguably wrongly decided on this point. In this case the accused's violent partner backhanded and continued to hit her across the face, demanding that she drive the car or he would "smash" her. His past violence included incidents in which he had severely blackened both her eyes, tramped a child's bike on her, dragged her by the hair and "booted" her in the head. The Court of Appeal held that she could not raise the defence of compulsion because serious injury was not threatened, as opposed to more of the kind of behaviour she had already been subjected to, perhaps a "serious assault" but not the infliction of grievous bodily harm (at [20]). This suggests that had the defendant not complied with her partner's wishes on this occasion the abuse was not likely to have continued escalating in intensity until she did so. In the authors' view this is faulty logic given the dynamics of this sort of violence.

83 Hulley, above n 23, at 590.

84 Stark, above n 73, at 94.

Stark also explains how coercive control is designed to exercise coercive pressure on the victim-survivor even when she is not in the presence of the predominant aggressor. He comments that frequently:[85]

> … men deploying coercive control prevent escape and exposure through a spatially diffuse pattern of rules, stalking, cyber-stalking, beepers, cell phones, and other means that effectively erase the difference between confinement and freedom by extending surveillance and behavioural regulation to all those settings where victims might restore their identity or garner support, including work, school, church, service, family and shopping sites.

The ongoing terror experienced by a woman dealing with a coercively controlling partner is therefore not based on nothing — it is the effect of cumulative and compounding violence and abuse that is strategic and retaliatory in nature, which is often combined with abusive partners' unpredictable nature.

The requirement for physical presence and a specific threat of immediate harm — as currently needed for a successful defence of compulsion — are built on the assumption that if the person making the threat is not physically present or the threat will not be immediately executed, then the threat may not come to pass or the victim has other realistic means of defusing it and achieving safety (for example, calling the police, appealing to members of the public or exiting the situation).[86] These assumptions are factually erroneous in the IPV context.

When the true nature of IPV is understood it also becomes apparent that, contrary to popular assumption, the safety strategies currently available to victim-survivors of IPV do not match the coercive pressure of the abuse that they experience. Calling the police, getting a protection order or attempting to separate from the abusive partner may, in fact, escalate the danger a victim-survivor is in by inviting a retaliatory response from their partner, without providing effective protection against this probable risk.[87] For women

85 At 208.

86 William Young J stated in *Akulue,* above n 79, at [23], that the requirements for presence and immediacy "reflect a legislative purpose that if there was sufficient time to seek assistance from the authorities, a defence of compulsion is not available". Furthermore, the defence of compulsion is not available "based on the belief, reasonable or otherwise, of the defendant that assistance from the authorities would not be forthcoming if requested".

87 For a discussion of this dynamic see Stella Tarrant, Julia Tolmie and George Guidice *Transforming Legal Understandings of Intimate Partner Violence* (ANROWS Research Report 3, June 2018) at 36–38.

dealing with broader structural inequities, the responses by agencies charged with providing them with safety and other support may make the situation significantly more dangerous, cause further harms and fail to provide real help or protection.[88] This aspect of IPV (the second and third dimensions of an entrapment framework) is crucial to grasp if we are to apply the law with any degree of reality to the facts of such cases.

The difficulties in raising the defence of compulsion were acknowledged by the New Zealand Law Commission in 2001. The Commission said that:[89]

> … some defendants, especially victims of domestic violence, may require neither a specific threat nor the actual presence of their abuser to be coerced into offending. Experience may have taught them that the response to disobedience on their part would be severe physical retribution, so that they may offend out of general fearfulness of their abuser without the need for the abuser to make "a particular kind of threat associated with a particular kind of demand". Arguably the coercive force of this fearfulness is not any less because the abuser is not actually present, if his or her ability to mete out punishment is certain.

This means that a woman who is too terrified to withdraw, protest or resist during her abusive partner's offending because she knows what will happen to her if she does, or who experiences coercion even when she is not in his immediate physical presence because she sees no real safety options in her situation for herself or her children,[90] will not be able to meet the specific requirements of the defence of compulsion. This is despite the fact that she may fall squarely within the rationale for having such a defence, in that she had no realistic choice but to act as she did.

In other jurisdictions there have been legislative reforms directed at addressing this justice gap. A number of Australian jurisdictions have relaxed or removed the specific technical requirements of "imminence" and "presence" in favour of a broad normative but objective test for compulsion in their

88 See Wilson and others, above n 19.

89 Law Commission, above n 76, at 63 (citations omitted).

90 The danger that the predominant aggressor poses to the victim-survivor's parents, siblings, children and friends may exercise a far greater coercion over her than threats to herself. It is not clear whether threats to third parties satisfy the requirements of s 24, although it is likely that they do: see for example: *R v Sowman* [2007] NZCA 309 at [40]; and *R v Neho* [2009] NZCA 299 at 469.

legislative provisions.[91] For example, in Western Australia, reforms were adopted following explicit recognition that the law disadvantaged battered women.[92]

In Aotearoa New Zealand, however, calls for similar legislative reform have been unheeded. In *Accident Rehabilitation and Compensation Insurance Corporation v Tua*, the accused had fraudulently claimed ACC home-help expenses at the instigation of her partner and was convicted of using a document to obtain a pecuniary advantage.[93] Although her partner regularly beat her and forced her to do things she did not want to do and she had a head injury and functioned at the level of a seven-year-old child, she was unable to demonstrate compulsion because she was unable to satisfy the requirements of immediacy and proximity at all the times that she filled out the claim forms. Although not directly speaking about the defence of compulsion, the District Court Judge said:[94]

> In my view the law is deficient in this case, as in New Zealand, there is no scope for negativing the specific intent formed on the basis of acts done in response to a grossly abusive and battering relationship. The present type of scenario is not uncommon in cases coming before the District Court in these type of charges …

In 2001, a large majority of those making submissions to the New Zealand Law Commission concerning the defences to homicide for battered defendants were of the view that the defence of compulsion should include non-specific threats arising from the circumstances of the relationship with

91 See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "When Self-Defence Fails" in Kate Fitzgibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, Sydney, 2015) 110 at 122. See also Crimes Act 1958 (Vic), s 9AG(4).

92 Section 32(2) of the Criminal Code (WA) provides that:

> A person does an act or makes an omission under duress if—
>
> (a) the person believes—
>
> (i) a threat has been made; and
>
> (ii) the threat will be carried out unless an offence is committed; and
>
> (iii) doing the act or making the omission is necessary to prevent the threat from being carried out; and
>
> (b) the act or omission is a reasonable response to the threat in the circumstances as the person believes them to be; and
>
> (c) there are reasonable grounds for those beliefs.

93 *Accident Rehabilitation and Compensation Insurance Corporation v Tua* DC Auckland CIV-1999-480-12179, 18 February 1999. The case was under the previous version of s 228A of the Crimes Act 1961.

94 *Accident Rehabilitation and Compensation Insurance Corporation v Tua*, above n 93, at 15. See also *R v Atofia* [1997] DCR 1053 upheld by *R v Atofia* CA453/97 and CA455/97, 15 December 1997.

a violent offender and that the requirement for immediacy of threat should be replaced by a requirement of inevitability.[95] The Law Commission did not go this far; however, it did recommend modifying the defence so that whilst an immediate threat of death or serious bodily harm remains necessary, the requirement that the threatener be present during the offending be abolished.[96] This recommendation has never been implemented.

In the absence of legislative reforms, courts in other jurisdictions have attempted to address these problems by taking expansive interpretations of the legislative requirements for the defence so that more of the context can be considered in determining whether these requirements are met. For example, in *Goddard v Osborne*, a woman presented false documents in an attempt to obtain a welfare benefit whilst her husband remained out in the street.[97] The South Australian Court held that the husband was "present" for the purposes of duress and marital coercion if he was "near enough to exercise immediate control or influence over his wife's conduct".[98] New Zealand courts have, by way of contrast, strictly interpreted the requirements of s 24. For example the requirement that the threatener be "present" has been taken to require immediate physical proximity at all times during the offending.[99] In *R v Richards*, a woman in a relationship with a man who was abusing her was convicted of five counts involving dealing, drug utensils and premises offences under the Misuse of Drugs Act 1975.[100] The Court of Appeal acknowledged that had she not committed the offences "it seems likely she would have been beaten",[101] but dismissed defence counsel's attempt to argue that the woman's violent partner was constructively present due to "the battered women's syndrome condition".[102] The Court referred to the "plain words of the statute which require actual presence and the established line of authority".[103]

95 Law Commission, above n 76, at [188]. The idea is that this would extend consideration of the threat the victim faced beyond the immediate circumstances surrounding her offending.

96 At [201].

97 *Goddard v Osborne* (1978) 18 SASR 481 (SC).

98 At 485 and 493.

99 The Crimes Act 1961 replaced the words "actually present" in the previous version of s 24 with the word "present" — suggesting that constructive presence might be contemplated by the new wording. The Court of Appeal in *R v Joyce* [1968] NZLR 1070 (CA) found that the deletion of the word "actually" was of no significance and "present" meant physical presence.

100 *R v Richards* CA272/98, 15 October 1998.

101 At 2

102 At 4.

103 At 2.

Worse still, the New Zealand courts have begun to read requirements into s 24 that tighten the defence further and, arguably, are in direct contradiction to the wording used in the statute. For example, as noted above, on the express wording of s 24 the element of coercion itself is subjective. In *Raroa*, the Court of Appeal was clear that "an objective test" for the element of coercion "is not open in New Zealand where the wording of s 24 specifically refers to the belief of the accused thereby requiring a subjective test".[104] However, subsequent New Zealand cases have often failed to inquire into the accused's subjective appraisal of their options for dealing with the violence and, instead, used language suggesting that this issue is assessed as an objective question of fact. In *R v Neho*, the Court of Appeal said that:[105]

> It has been recognised as implicit in the defence of compulsion that the offender must have no realistic choice other than to break the law. If there is a reasonably available opportunity for the offender to seek help or protection or to escape the defence will not ordinarily be available.

The Court opined on the facts of that case that the accused had options available to her:[106]

> While we can understand her reluctance to notify the police, it was a reasonably available option to her at any stage prior to the offending. It was also open to her to advise the shop assistant of her situation while she was in the store on each of the occasions.

In this instance, given that the issue as to whether the threat would be carried out if she failed to commit the crime was to be assessed subjectively, the inquiry should have been whether the defendant — rather than the Court — thought that going to the police or speaking to the shop assistant would effectively defuse the threat. The approach taken in *Neho* arguably reinterprets the requirement for coercion as objective.[107]

104 *R v Raroa* [1987] 2 NZLR 486 (CA) at 492.

105 *R v Neho,* above n 90, at [13].

106 At [19].

107 See also *R v Sowman,* above n 90, at [38]; and *Holland v R* [2016] NZCA 621. One is tempted to think that the courts in the cases discussed here have merged aspects of the common law defence with s 24, leaving defendants with the worst of both worlds — a test with rigid elements of imminence and presence but also with an overall objective rather than subjective appraisal of the compulsion itself.

In Canada the defence of duress by threats is set out in similar restrictive terms to s 24.[108] In 2001, the Canadian Supreme Court held that it is:[109]

> … contrary to the principles of fundamental justice to punish an accused who is psychologically tortured to the point of seeing no reasonable alternative, or who cannot rely on the authorities for assistance. That individual is not behaving as an autonomous agent acting out of his own free will when he commits an offence under duress.

It was held that to deny such a defendant a defence was contrary to s 7 of the Canadian Charter of Rights and Liberties.[110] In *R v Ruzic*, the defendant imported heroin because threats had been made to her mother in Serbia, who the police were unable to protect.[111] Whilst the common law defence of duress would have been potentially available on the basis that there was no safe avenue of escape, the defendant was unable to raise the statutory defence set out in s 17 because the threats were to a third party, not immediate, and the threatener was not present during her offending. Section 17 was found to be unconstitutional in part — the Court stripped away the immediacy and presence requirements.[112] However, drawing on the common law, it replaced these requirements with the need for a "close temporal connection between the threat and the harm threatened" and the requirement that there be no safe avenue of escape.[113] This was to be assessed on the basis of how the situation would appear to a reasonable person in the circumstances in which the accused found herself.[114] Proportionality was also required — the harm caused cannot be greater than the harm sought to be avoided.[115]

In *Akulue v R*, the Supreme Court of New Zealand rejected taking the same approach on facts that were very similar to those in *Ruzic*.[116] It held that

108 See Criminal Code RSC 1985 c C-46, s 17.

109 *R v Ruzic* 2001 SCC 24 at [88]. See also *R v Ryan* 2013 SCC 3 at [23].

110 Section 7 of the Canadian Charter of Rights and Liberties provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

111 *R v Ruzic*, above n 109.

112 Four requirements of the statutory defence remain: there is a threat of bodily harm; there is a belief that the threat will be carried out; the offence is not on the list of excluded offences; and the accused cannot be subject to a conspiracy or criminal association.

113 *R v Ruzic*, above n 109, at [96].

114 At [61].

115 At [62].

116 *Akulue v R,* above n 79.

New Zealand courts, unlike Canadian courts, do not have the constitutional power to strike down statutory provisions.[117] This is clearly correct. However, the fact the legal requirements for a defence are contrary to fundamental justice should be influential in any process of interpreting what those statutory requirements mean and, particularly, whether they are to be interpreted strictly or more expansively.[118]

Foreclosing this possibility, the New Zealand Supreme Court went on to conclude that s 24 was consistent with fundamental rights to justice because not every case of moral involuntariness had to be covered by the defence.[119] The Court also concluded the common law defence was unavailable. The Court said:[120]

> While any humane system of criminal law must make allowance for involuntariness, we see no reason why this cannot fairly be achieved by the adoption of rules, the application of which turn on objective criteria (such as, for instance, immediacy and presence).

What the Supreme Court failed to recognise, as the Law Commission[121] and Nouri[122] have explained in detail, and as we have asserted above, is that the legal requirements set out in s 24 automatically rule out recognising coercion when it comes in the form of IPV (except in unusual cases) because the assumptions that underpin those requirements are not accurate in this context. The Supreme Court recognised that the defence might be under-inclusive because threats that are nevertheless very coercive may not meet the immediacy and presence criteria.[123] In our view the Supreme Court missed an opportunity to consider this under-inclusivity in terms of consistency with the New Zealand Bill of Rights Act 1990.[124] Such an assessment would be relevant, and perhaps indirectly beneficial, to victim-survivors of IPV acting under coercion.

The legislative and judicial indifference to the plight of IPV victim-survivors in this context is astonishing. It is feasibly explicable on the part

117 At [20].
118 See *D v Police* [2021] NZSC 2; and *Fitzgerald v R* [2021] NZSC 131.
119 At [20].
120 *Akulue v R*, above n 79, at [20].
121 Law Commission, above n 76.
122 Nouri, above n 70.
123 At [13].
124 See [24].

of the courts as judges have not traditionally understood the full nature of IPV and therefore have failed to realise that a justice gap exists. When IPV is wrongly conceptualised as a series of violent physical incidents,[125] in between which the victim-survivor is free to "choose" one of the (assumed to be) effective safety options, then the justice gap identified here becomes invisible. For example, in *R v Witika*, it was argued that where the offence charged is of a continuing nature — in that instance, the accused's failure to protect her child from her violent partner or to get medical care for the child's injuries — it should be a matter for the jury as to whether the threatener was sufficiently present to result in a continuing immediate threat throughout the commission of the offence.[126] However, the trial judge held that s 24 ceased to be available as soon as there was an omission by Ms Witika to get help at a time when Mr Smith (the predominant aggressor and the person threatening Ms Witika) was not physically present. The Court of Appeal agreed, remarking that:[127]

> … it is quite clear that there were substantial periods during which Smith was not present and Witika had opportunities to seek assistance and secure medical care for her child and otherwise bring an end to her ill-treatment. While those periods continued she failed in her duty. Her situation was no different from that of a person who has an opportunity to escape and avoid committing acts under threat of death or serious injury.

2 *The Unavailability of the Defence for Serious Offending*

The defence of compulsion is not available (even in its currently problematic iteration) for women who are coerced into serious offending. Section 24(2) of the Crimes Act sets out a list of offences for which the defence of compulsion is not available.[128] These encompass a range of the most serious offences in the Crimes Act, including murder, serious interpersonal violence and robbery.

Section 24(1) sets out the law of compulsion as it applies to the person who "commits an offence" and subs (2) provides that subs (1) does not apply

125 Family Violence Death Review Committee, above n 24, at 71–81; and Tolmie and others, above n 27, at 201–203.

126 *R v Witika* [1993] 2 NZLR 424 (CA).

127 At 436.

128 Treason (s 73) or communicating secrets (s 74); sabotage (s 79); piracy (s 92) and piratical acts (s 93); murder (ss 167, 168) and attempt to murder (s 173); wounding with intent (s 188); injuring with intent to cause bodily injury (s 189(1)); abduction (s 208); kidnapping (s 209); robbery (s 234) and aggravated robbery (s 235); and arson (s 294).

for a person who "commits" one of the listed offences. In *R v Witika*, the Court of Appeal said that the statutory exclusion covers both primary and secondary offenders — even though the primary offender is the one who actually commits the offence.[129] It follows that s 24 codifies the law on duress by threats for both the principal and secondary parties, meaning that the common law defence also does not survive for secondary offenders.[130] As a consequence, Ms Witika could not argue compulsion in relation to party liability for manslaughter on the basis that her violent partner threatened her, because s 24(2) expressly excludes the serious interpersonal violence offences (that result in manslaughter charges if death is caused) as offences for which the defence of compulsion is available.[131]

The court in *Witika* chose not to follow the Supreme Court of Canada in *Paquette v R* which arrived at the opposite conclusion on a very similarly worded provision.[132] The Supreme Court of Canada held that s 17 of the Criminal Code codifies duress where the person seeking to rely on the defence is the principal and has themselves committed the offence, whilst the more flexible common law version of the defence remains available for secondary parties[133] — and in relation to a broader range of crimes, because the legal

129 *R v Witika*, above n 126, at 435. The Court of Appeal was influenced by the fact that when the original version of s 24 was enacted (s 24(1) of the Criminal Code Act 1893), the defence of compulsion was excluded under the equivalent of s 24(2) for the offence of "assisting in rape". The Court of Appeal took this as indicating that the legislature contemplated that the statutory defence would, in the absence of such an exclusion, extend to a secondary party to a rape and, by implication, secondary parties in general. Although the Crimes Amendment Act (No 3) 1985 removed the words "assisting in rape" from s 24, "such a consequential amendment is not to be taken as changing the interpretation of 'commits' from that clearly required before the amendment".

130 Section 24 of the Crimes Act 1961 is a codification of the common law defence of "duress by threats" and the New Zealand courts have been clear that the defence does not survive at common law since codification: *Akulue v R,* above n 79, at [25].

131 In *R v Witika*, above n 126, at 435, the Court also commented that "[i]t is hardly sensible to assert that she was forced by threats from Smith to intentionally encourage Smith to commit the offences". This does not follow — there is no reason why a person cannot threaten a third party in order to ensure that that person both provides support to them and suppresses dissent in respect of the offending.

132 *Paquette v R* [1977] 2 SCR 189. What was more compelling for the Supreme Court of Canada than the fact that the exclusions included the offence of "assisting in rape," was the fact that the party liability provision in the Canadian Criminal Code, like s 66 of the Crimes Act 1961 (NZ), refers only to the principal offender as the one who "actually commits" the offence.

133 Because it allows a "more contextual and less arbitrary" enquiry — to borrow the words of David Paciocco "No-one Wants to be Eaten: The Logic and Experience of the Law of Necessity and Duress" (2010) 56 Crim LQ 240 at 289.

exclusions set out in Canada's equivalent of s 24(2) do not apply.[134] William Young J points out that the:[135]

> … exclusion of some offences from the scope of the defence is a mechanism, albeit perhaps a little crude, for ensuring that the harm done by the defendant is not disproportionate to the threatened harm.

Similarly, Martha Shaffer suggests that the policy underlying these exclusions is that "people should be expected to endure serious threats, and if necessary, to give up their lives, rather than commit serious offences".[136]

However, as we have explained earlier, the incredible breadth of the doctrine on party liability means that a secondary offender may have done very little to contribute to another person's offending. As such, the policy reasons, including the moral obligations, behind the exclusions are considerably muted in relation to this form of liability. Indeed, it could be said that the policy rationale would result in a disproportionate harm to the secondary offender. Is it reasonable to expect a woman to lay down her life or endure serious physical harm rather than drive the car, for example, or sit in the passenger's seat whilst her violent partner conducts a robbery? Further, is it consistent with the policy of the defence of duress that it is not available in such a case because of the nature of her partner's offending?

3 Conclusion

Section 24(3) appropriately abolishes a previous common law presumption that if a woman committed a crime either jointly with her husband or in his presence then she was acting under coercion and should be acquitted. Unfortunately, as we have noted here, this abolition is not accompanied by a defence that can realistically accommodate those women who are acting under coercion from their abusive partner. In other words, we no longer assume that all women are under the thrall of their husbands, but we fail to provide a defence for those who are.

134 At common law compulsion was only clearly unavailable in respect of murder and attempted murder: *R v Howe* [1987] AC 417 (HL) (murder); *R v Gotts* [1992] 2 AC 412 (HL) (attempted murder); and *R v Z* [2005] UKHL 22 at [21] (perhaps including "some forms of treason"). But see William Young J in *Akulue v R,* above n 79, at [12], suggesting that treason and robbery may also have been excluded.

135 *Akulue v R,* above n 79, at [12].

136 Martha Shaffer "Scrutinising Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998) 40 Crim LQ 444 at 463.

B The Law on Duress of Circumstances

The second defence designed to recognise coerced offending is duress by circumstances. Section 20(1) of the Crimes Act provides that the common law defences survive "except so far as they are altered by or are inconsistent with this Act". A general common law defence of duress of circumstances, which some judges previously called the defence of "necessity", is preserved by this provision.[137] The defence is designed to cover situations where a person is coerced into offending not because another person is standing over them and demanding that they offend, but because they are caught up in emergency circumstances and left with no real choice. Duress of circumstances currently has four requirements in New Zealand:

i) The defendant has a genuine belief, "on reasonable grounds of imminent peril of death or serious injury".[138]
ii) The circumstances are such that there is "no realistic choice" but to break the law.[139]
iii) The breach of the law is "proportionate to the peril".[140]
iv) There is a nexus between the imminent peril of death or serious injury and the choice to respond to the threat by unlawful means, in the sense that the defendant committed the crime because in the agony of the moment their will was overcome.[141]

The New Zealand courts have effectively made this defence unavailable to primary victim-survivors of IPV by holding that the emergency situation must not be threats from a human (which must fall within the narrow stand-over requirements specified in s 24 to attract the defence of compulsion).[142] In *Akulue v R*, William Young J, writing for a unanimous Supreme Court, said that the Commissioners who developed the original draft code which contained the precursor to s 24, "sought to codify exclusively the circumstances in which compulsion by threats of harm from another person

137 *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA) at 57; *Police v Kawiti* [2000] 1 NZLR 117 (HC) at 122; and *R v Hutchinson* [2004] NZAR 303 (CA) at [43].
138 *Kapi v Ministry of Transport* at 57.
139 *Kapi v Ministry of Transport* at 57; and *R v Hutchinson* above n 137, at [34] and [60].
140 *Kapi v Ministry of Transport* at 57; and *R v Hutchinson* at [34].
141 *R v Hutchinson* at [34].
142 *Kapi v Ministry of Transport,* above n 137, at 54–55; *Police v Kawiti,* above n 137, at 120; *R v Neho*, above n 90, at [23]; and *Hocking v Police* [2012] NZHC 3192 at [10].

provides a defence, leaving only other circumstances of necessity to the common law".[143]

This was not a necessary conclusion. A principled distinction could have been drawn between the defence of duress by threats (which deals with stand-over situations) and the defence of duress of circumstances (which deals with emergency situations). The courts could have concluded that s 24 codifies the former but not the latter. In this case there is nothing inconsistent between s 24 codifying the law on duress by threats and the simultaneous survival of a common law defence of duress of circumstances, even where the source of the emergency is a human being. The former deals with situations where the threat is targeted at forcing the defendant to commit the crime. The latter deals with situations where the threat is not specifically directed at bending the defendant's will, but rather where the emergency that the defendant is in (which might include both a general threat of harm from a human source and a lack of other alternatives to deal with that threat) deprives them of a real choice about committing the crime.[144] At English common law the distinction between duress by threats and duress of circumstances was referred to by Woolf LJ in *R v Conway* as the "'do this or else' species of duress" and situations of more generalised emergency or danger.[145] Similarly, the English case law does not make a distinction between threats from human and non-human sources for the purposes of the defence of duress of circumstances.[146]

The problem with the current position in New Zealand is that it leaves those caught up in emergency situations created by other people, but who are not in stand-over situations, in a gap in coverage — without access to either the common law defence of necessity or duress of circumstances or the

143 *Akulue v R,* above n 79, at [29].

144 In *R v Hibbert* [1995] 2 SCR 973 at [50], the Supreme Court of Canada drew a distinction between duress where "it is the intentional threats of another person that are the source of the danger" and necessity where "the danger is due to other causes such as forces of nature, [or] human conduct other than intentional threats of bodily harm".

145 *R v Conway* [1989] QB 290 (CA) at 297.

146 *Conway*, above n 145, is an example of a case in which the defendant was permitted to raise the defence of duress of circumstances in response to the threat of harm from a person. The defendant in that case was charged with reckless driving but asserted that he was trying to avoid what he thought was going to be a fatal attack on one of the passengers in his car by some men approaching the car, whom he thought were potential assassins. In fact, the men were police officers who wished to apprehend his passenger. We note also that in the proposed New Zealand Crimes Bill 1989 (152-1) the defence of compulsion was split into two defences with distinct legal requirements: duress by threats and duress of circumstances (the latter not limited to threats with a non-human source): see Crimes Bill 1989, cls 30–31.

defence of compulsion set out in s 24.[147] Kevin Dawkins points out that there is an incoherence in the courts' current position. On the one hand s 24 is limited to specific types of threats, not the defendant's generalised fear of a dangerous person:[148]

> Yet on the other hand, when it comes to the availability of any common law defence of duress, s 24 is effectively recast so as to cover 'fear' cases and to exclude the preservation of such a defence under s 20.

III CONCLUSION

When the criminal justice response fails to recognise the coercion that women experience from their violent partners in finding them liable as primary or secondary offenders, as we have suggested in this article that it does, the legal response arguably perpetuates the abuse they experience, further restricting their freedom and exacerbating their systemic vulnerability to further abuse.[149] In other words, the criminal justice response becomes part of the systems of abuse which IPV victim-survivors are forced to navigate. As Shannon Speed asserts with respect to Indigenous and migrant women's experiences of incarceration in the United States, while interpersonal violence, criminal violence and state violence are often conceptualised separately:[150]

> … these forms of violence are inseparable, each bound to the other and mutually formative in the larger context in which they affect women's lives. Understanding that context is what necessitates an examination of the larger structures of power that render them vulnerable.

The focus of this article has been precisely that — seeking to understand how the wider operations of power embedded in New Zealand's law and

147 See Khylee Quince and Julia Tolmie "*Police v Kawiti*" and "Commentary on *Police v Kawiti*" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 481 and 489. See also *Hocking v Police*, above n 141.

148 Kevin Dawkins and Margaret Briggs "Criminal Law" (2001) 2001 NZ L Rev 317 at 336.

149 Hulley, above n 23, at 600. Welle and Falkin, above n 29, at 61–62, note that women with romantic co-defendants are policed by their partners in the private space, who augment the policing of these women by law enforcement in the public space — meaning that these women are subject to a "continuum of policing by law enforcement and romantic co-defendants". They note that "the unpoliced nature of the abusive behaviors of women's partners contributes to the criminalization of women" — who are understood to be offenders but not victims.

150 Shannon Speed *Incarcerated Stories: Indigenous Women Migrants and Violence in the Settler-Capitalist State* (University of North Carolina Press, 2019) at 17.

legal responses to crime render women experiencing IPV criminally liable for coerced "offending", inconsistent with the policy schema sitting behind party liability and the defences of duress and necessity.