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# HE PĀ HARAKEKE TĀMOREMORE ROBBED OF MOTHERHOOD<sup>1</sup>

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## ABSTRACT

The lives of Indigenous women<sup>3</sup> have been disproportionately impacted by the ongoing effects of colonization, and especially, of settler-colonial family structures that dismantle important family support networks for Indigenous women. An egregious and controversial example of this experience is the removal of Indigenous children. The removals serve to sever Tribal connections, and create trauma for Indigenous mothers, further marginalizing Indigenous women.

This thesis—focused on the impact removing Indigenous babies has on Indigenous mothers in a comparative, international Indigenous context—offers an opportunity to recognize removing Indigenous children as part of a wider gender issue for Indigenous women indicative of settler colonialism. This paper transposes the narrative from the effect removing children has on children, to the effect it has on mothers. Given the mental health effect it has on mothers, this paper argues ways to change legal systems to mitigate the impact. The aim for this thesis is to contribute to the abolition of child welfare systems as we know them.

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<sup>1</sup> I want to acknowledge and thank Annette Sykes who gifted this title/taonga. Ngā mihi nui ki a koe e te Rangatira. As someone who is not fluent in te reo Māori, I am so grateful to those who share their knowledge with aroha.

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<sup>3</sup> The term “women” is used in this article as inclusive of takatāpui/two-spirited people. Gender was fluid in traditional society and not the construct that exists today. The feminine divine was about being the givers of life (female sexualized body) and not the roles people played in society. See ALISON GREEN & LEONIE PIHAMA, HONOURING OUR ANCESTORS: TAKATĀPUI, TWO-SPIRIT AND INDIGENOUS LGBTQI+ WELL-BEING (2023).

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INTRODUCTION

*Our experiences are largely shared by those of other Indigenous Peoples who have been subjected to the forces of colonisation. What their experiences tell us is that the remoulding of Indigenous societies to reflect the patriarchal values of their colonisers is just as central to the colonisation process as is death by introduced diseases, theft of land, suppression of language and denial of spiritual beliefs. It is indeed as if the colonisers understood that throwing the hearts of our women to the ground was and is vital to the success of the colonisation project. – Ani Mikaere<sup>4</sup>*

There is a need to fully understand the power imbalance in motherhood at play in Western patriarchal societies. Particularly for Indigenous women who do not align with Western patriarchal principles and values. Indigenous women have long suffered at the hands of the colonizer. The history of harm to Indigenous women cannot be called history when it exists in the present day and has often been overlooked. The ongoing colonization of Indigenous Peoples in settler colonial states continue to diminish and attack the feminine divine through violent patriarchal laws, policies and norms. One of the most abhorrent examples of this is the removal of Indigenous children. Much research has been done on the impact removing Indigenous babies has on children but very little on the mother. We know that miscarriages, stillbirths, and child deaths severely impact the psychology of women, thus removing a child from a mother can reasonably be expected to have similar effects and can be understood as an egregious breach of Indigenous women’s rights. It is time to tell herstory.

For far too long, we have ignored women in important research areas. Most notably, in medical research to do with a woman’s sexualized body and reproductive health. We diagnosed women with hysteria in the 1950s

<sup>4</sup> Ani Mikaere, *Colonisation and the Imposition of Patriarchy: A Ngāti Raukawa Woman’s Perspective*, in 2 MANA WAHINE READER: A COLLECTION OF WRITINGS 1999–2019 4, 8 (Kotahi Research Inst. 2019).

if they did not conform to the 1950s housewife societal norm. Indigenous women have received similar treatment but to a greater extent because Indigenous world views and ways of life do not conform to Western norms. Settler colonialism told Indigenous women that their sole role in society was to be confined to the home to be good mothers and wives, but then Western perspectives of what it meant to be a “good mother” told Indigenous women they were unfit for this role. Reproductive justice for Indigenous women has been controlled by the colonizer through regulating abortions, birth control, and midwifery, conducting involuntary sterilizations, and removing Indigenous children. Many Indigenous women are in situations not of their own choosing and are trying to survive in societies that inflict violence in many areas of their lives. The personal factors that determine when a mother is unfit cannot be viewed in isolation from society and the way they have been treated throughout history to the present day. If the State wants to be seen as a parent then it should be given the same interrogation. The State is illegitimate or an unfit parent when it fails to protect Indigenous women from egregious assaults on their womanhood. Particularly when the state is in breach of its own laws, treaties or international conventions to which the State is a signatory.

Since colonization, societies have dehumanized Indigenous Peoples and justified removing children from Indigenous mothers through a Western patriarchal lens that declared Indigenous women “savages” and unfit mothers. This is a result of Western principles and norms conflicting with Indigenous familial structures and ways of life. For example, the Meriam Report viewing the custom of swaddling babies as an inhibitor of muscle development,<sup>5</sup> or claiming that having large familial groups housed in one home makes it impossible for cleanliness and order in the home.<sup>6</sup> Of course, it is also necessary to acknowledge the importance Indigenous fathers have in society and the suffering they have endured from child removal. In Indigenous societies all genders are seen as equal and balance is central to every area of life. The focus on Indigenous mothers in this paper attempts to restore the imbalance that has existed in settler colonial states since colonization imposed patriarchal norms and set out to destroy the gynarchy that existed in traditional Indigenous communities. Whilst this paper recognizes that sometimes there may be valid reasons for removing Indigenous children from their mothers, this paper argues that removing children does not address the problem and instead further discriminates against Indigenous women and perpetuates a cycle of intergenerational trauma.

New Zealand (Aotearoa)<sup>7</sup> and the United States of America (Turtle Island/U.S.)<sup>8</sup> have very different legal frameworks for Indigenous child removal.

<sup>5</sup> Lewis Meriam et. al., INST. FOR GOV'T RSCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928), [https://narf.org/nill/documents/meriam/r\\_meriam\\_chapter11\\_part1\\_family.pdf](https://narf.org/nill/documents/meriam/r_meriam_chapter11_part1_family.pdf), 558–59.

<sup>6</sup> *Id.* at 560.

<sup>7</sup> Aotearoa is the Māori name for New Zealand. It means “the land of the long white cloud” because this is what our ancestors saw when first arriving via waka/canoe.

<sup>8</sup> Turtle Island is the Native American name for North America. Throughout this essay I will use “Turtle Island” when talking about place and “U.S.” when talking about the United States as a State.

The U.S. recognizes sovereignty for Native American federally recognized Tribes.<sup>9</sup> Whereas the Crown does not recognize sovereignty for Māori in Aotearoa, despite Māori never ceding sovereignty. The U.S. has the Indian Child Welfare Act 1978 (ICWA)<sup>10</sup> in place in federal law as an attempt to protect Native American children from being removed and placed into non-native families. States can strengthen the minimum federal standards through state ICWA laws to govern how states work with Tribes in child welfare cases. Aotearoa has no legislation like ICWA, but it does have the Oranga Tamariki Act 1989 which provides no real protections for Māori children. Section 7AA provided a protection under Te Tiriti o Waitangi/the Treaty of Waitangi, but was repealed in April 2025 by the Nation-led coalition government. In the U.S., federally recognized Tribes have Tribal sovereignty<sup>11</sup> and Tribal Courts may take jurisdiction of state child welfare cases.<sup>12</sup> Māori do not have recognized sovereignty or Tribal jurisdiction. A clear distinction must be made between Māori and Native Americans as well. Māori is considered a racial classification in Aotearoa whereas Native American or American Indian is a political one in the U.S. What is clear is that Native Americans have far greater opportunities to exercise self-determination and sovereignty than Māori. It is also clear is that both Native American and Māori children continue to be taken from their mothers. This reality triggers interrogation.

Dismantling violent patriarchal norms of Western society is the key to protecting Indigenous mothers and is in the best interest of the child. Ultimately this paper argues for abolition of the child welfare system as we know it and to give sovereignty to Māori and Native Americans over their own peoples in a way to ensure iwi/Tribes can truly exercise that sovereignty. *Part I* will explain Indigenous perspectives on families. *Part II* explores the colonization of Indigenous motherhood. Indigenous maternal health consequences as a result of removal are discussed in *Part III*. Legal frameworks in both Turtle Island and Aotearoa are described in *Part IV*. Finally, *Part V* provides the only solution for the problem, which is abolition.

## I. INDIGENOUS PERSPECTIVE ON FAMILIES

The Māori worldview understands the interconnectedness of all things and to the environment.<sup>13</sup> Traditionally women and men were seen as having equal value in maintaining balance in society and continuing whakapapa (genealogy)

<sup>9</sup> Recognizing the U.S.'s failure to give the same acknowledgement, rights and privileges to Kānaka Maoli/Native Hawaiians, this paper only discusses Alaska Natives and American Indians. The same sovereignty should be given to Kānaka Maoli and its Tribes to protect Kānaka Maoli children and women if that is what Kānaka Maoli want. Many Kānaka Maoli was an end to the U.S. military occupation, which would grant full sovereignty over their own people.

<sup>10</sup> Indian Child Welfare Act, Pub. L. No. 95–608, 92 Stat. 3069 (1978).

<sup>11</sup> This means that Tribal Courts have jurisdiction over child welfare cases that involved a Tribal citizen child (or child eligible for citizenship).

<sup>12</sup> Noting, that Tribes have to be notified to know about a state case that involves a Tribal citizen child (or child eligible for citizenship) to intervene, which does not always happen.

<sup>13</sup> Mikaere, *supra* note 4, at 8–9.

for the survival of a peoples.<sup>14</sup> Women particularly played a “key role in linking the past with the present and the future.”<sup>15</sup> Indigenous women were respected with the dignity deserved as the givers of life and as having important authority and responsibility of the life they created and of the entire nation.<sup>16</sup>

Native Americans “have long understood that raising children is a community responsibility.”<sup>17</sup> Māori also understood a collective responsibility to see that roles in society were upheld and protected.<sup>18</sup> Women and men played different roles in society but no role was viewed as having lesser value than the other. The Māori language indicates that there was no sex hierarchy because there are no gender pronouns; “ia” is used for both men, women and takatāpui.<sup>19</sup> The most important thing in Indigenous cultures is balance and in traditional society balance was central to every area of life, including the role gender played.<sup>20</sup> Men were often away for long periods of time, which meant women were very self-reliant and would take up male roles to keep the community running.<sup>21</sup> Carrying out what would now be considered men’s tasks “was not seen to take away from one’s femininity.”<sup>22</sup>

Indigenous Peoples have similar family structures where families are not just confined to the children’s immediate parents.<sup>23</sup> Families are much broader and incorporate grandparents and wider family members whom all play a role in raising children. When a woman was married in traditional society, she was not transferred as property from her father to the man, but remained part of the family and if she chose to live with the spouses family, her in-laws would take up the responsibility to protect her.<sup>24</sup> Divorce was possible where misconduct occurred and was supported by the family groups, which included child custody and support for the children.<sup>25</sup> Everything was very public in society and there was no distinction of the private and public spheres, which brought an element of safety.<sup>26</sup>

Antithetical to Western societies, Indigenous women were given decision-making power in society and were not seen as a subservient member of the community.<sup>27</sup> Many Indigenous communities were matrilineal and some

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.*

<sup>16</sup> Dawn Memee Lavell-Harvard & Jeanette Corbiere Lavell, *What More Do You People Want? The Unique Needs of Aboriginal Mothers in a Modern Context*, in *WHAT DO MOTHERS NEED? MOTHERHOOD ACTIVISTS AND SCHOLARS SPEAK OUT ON MATERNAL EMPOWERMENT FOR THE 21ST CENTURY* 107, 109 (Andrea O’Reilly ed. 2012).

<sup>17</sup> Michael D. Petoskey, *Foreword*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* at 30 vii, viii (2009).

<sup>18</sup> Mikaere, *supra* note 4, at 9.

<sup>19</sup> *Id.* at 10.

<sup>20</sup> Lavell-Harvard & Lavell, *supra* note 16.

<sup>21</sup> *Id.* at 115.

<sup>22</sup> *Id.*

<sup>23</sup> MARGARET D. JACOBS, *A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* xxxiii (2014).

<sup>24</sup> Mikaere, *supra* note 4, at 8–9.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *Id.*

<sup>27</sup> Lavell-Harvard & Lavell, *supra* note 16.

Tribes were named after women. Since time immemorial the feminine divine (strength, self-reliance and independence) has defined Indigenous motherhood. These beliefs and gynocratic societal structures threatened western patriarchal order, which is why settler colonialism set out to dismantle them.<sup>28</sup>

The very existence of women who were subject to the authority of neither fathers nor husbands had the potential to throw into question the supposed natural order of patriarchal hierarchies and could therefore not be tolerated.<sup>29</sup>

Indigenous Peoples are connected to the land and the Earth Mother<sup>30</sup> is an ancestor. The relationship with the biological mother through and the connection to Mother Earth has been weakened through child removal.<sup>31</sup> Māori have a ritual where after birth the placenta will be buried on the child's whenua (land). This ritual is called whenua ki te whenua. Whenua means both land and placenta and this ritual is what continues Māori peoples' connection to their land. This practice is a good example of how Indigenous Peoples are inherently connected to the land and Mother Earth and the abhorrent impact removing a child from this connection must have on the mother when she knows the placenta is buried on the land, but the child is lost.

Tikanga Māori<sup>32</sup> and Native American religious freedom were trampled on by the colonizer. Colonization erased many of the cultural understandings of the role women play in Indigenous societies.<sup>33</sup> Only through Indigenous women who have stayed staunch in Tribal communities against settler colonialism and passed down knowledge orally through generations can we understand this today and have the ability to be critical of the impact lost culture has had on Indigenous women and motherhood.

## II. COLONIZATION OF INDIGENOUS MOTHERHOOD

*He tōtara ka tāmoremoretia – a tree made to be without branches*

Indigenous feminism is an intersectional feminist legal theory that focuses on decolonization, Indigenous self-determination, rights, responsibilities, and freedoms. Removal of Indigenous children, unlike other male-enforced practices of settler colonialism, was largely centered around motherhood and was carried out by white women.<sup>34</sup> Removing Indigenous children and young people served to empower white women in patriarchal societies and further colonize Indigenous women by diminishing their mana (authority) as mothers

<sup>28</sup> Mikaere, *supra* note 4, at 7.

<sup>29</sup> Lavell-Harvard & Lavell, *supra* note 16, at 110.

<sup>30</sup> Papatūānuku is the Māori word for Mother Earth, whilst there are many names in Alaska Native and American Indian languages.

<sup>31</sup> Frances Wyld, *Knowing the State We're In: Indigenous Motherhood as a Human Right* 111 (2012), [https://find.library.unisa.edu.au/discovery/fulldisplay/alma9915909604501831/61USOUTHAUS\\_INST:ROR](https://find.library.unisa.edu.au/discovery/fulldisplay/alma9915909604501831/61USOUTHAUS_INST:ROR) [<https://perma.cc/EM2Z-N2Z6>].

<sup>32</sup> Māori law.

<sup>33</sup> Mikaere, *supra* note 4, at 12.

<sup>34</sup> Margaret D. Jacobs, *White Women and Indigenous Child Removal in the American West and Australia, 1880–1940* 256, 26(4) W. HIST. Q. (2005).

in Indigenous communities.<sup>35</sup> Margaret D. Jacobs coined this “colonial motherhood.”<sup>36</sup> This is why an Indigenous feminist perspective is important. Feminism is something that belongs to white women and erases Indigeneity, whilst Indigenous feminism upholds the intersecting identities of Indigenous women.<sup>37</sup> For Māori, there is an Indigenous feminist concept that directly intertwines Tikanga Māori and the te ao Māori (Māori world view) with Indigenous feminism called Mana Wāhine, which recognizes the inherent mana (prestige) Māori women have as he tapu te whare tangata (the sacred house of humanity).

There is no single concept of Indigenous motherhood but an amalgamation of multi-faceted perspectives that arise from “variable historic, geographic, economic, social, and political factors, Tribal origins, social classes, and gender identities.”<sup>38</sup> However, the Indigenous worldviews mentioned above provide a shared belief system that is adopted in motherhood, making Native American and Māori motherhood similar. Particularly with the shared settler colonial<sup>39</sup> experiences in Turtle Island and Aotearoa that subjugated women. Native Americans have suffered in the same colonial hands as Māori women.<sup>40</sup> Colonizers feared the destruction of the nuclear patriarchal family structure would threaten social order.<sup>41</sup> The nuclear family structure is an imposition of settler colonialism that clashes with Indigenous culture. British colonizers<sup>42</sup> were deliberately destructive to Indigenous families and mothers because they were seen as a “hindrance to the appropriation of land and the creation of a white settler nation.”<sup>43</sup> Settler colonialism brought a further imposition on Indigenous motherhood by removing generations of Indigenous children from their mothers, which left Indigenous women disenfranchised from society. Welfare policies authorizing the removal of Indigenous children have been centered around assimilation, which evolved into the “best interest of the child.” The individualistic approach to childcare and protection leaves Indigenous Peoples vulnerable in a host of ways and there is an intergenerational impact. It fails to recognise the importance of identity for Indigenous peoples. It also cuts

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<sup>35</sup> *Id.*

<sup>36</sup> JACOBS, *supra* note 23.

<sup>37</sup> Lori Campbell, *Indigeneity, Indigenous feminisms and Indigenization*, in *INDIGENOUS WOMEN'S VOICES: 20 YEARS ON FROM LINDA TUHIWAI SMITH'S DECOLONIZING METHODOLOGIES* 123 (2022).

<sup>38</sup> Lavell-Harvard & Lavell, *supra* note 16, at 108.

<sup>39</sup> Settler Colonialism is a system, rather than one historical event, that sets out to destruct and erase Indigenous Peoples and cultures to establish the colonizer as the rightful inhabitants of the lands. See PATRICK WOLFE, *THE SETTLER COMPLEX: RECUPERATING BINARISM IN COLONIAL STUDIES* (2016).

<sup>40</sup> Mikaere, *supra* note 4, at 6.

<sup>41</sup> Lavell-Harvard & Lavell, *supra* note 16, at 110.

<sup>42</sup> Noting that colonization in Alaska was different, as there was Russian colonization and then US cession. Moreover, some of the lower 48 states had Spain, France, Netherlands, and Swedish colonial contact. Regardless, there were similar violent settler-colonial impacts on all Indigenous families in Turtle Island.

<sup>43</sup> Lavell-Harvard & Lavell, *supra* note 16, at 110.

important familial ties Indigenous women need to thrive, leaving them vulnerable to violent patriarchal laws, policies and norms.<sup>44</sup>

Whilst this article focuses on child removal in relation to the child welfare systems, the violence and intergenerational harm boarding schools<sup>45</sup> have had on Indigenous families and motherhood cannot be ignored. Recent research shows the first boarding school in the U.S. opened in 1877 in Alaska.<sup>46</sup> In 1879, the more well-known notorious residential boarding school, Carlisle School, opened in the Lower 48.<sup>47</sup> In Turtle Island between 1889 and 1910, a white woman reformer by the name of Estelle Reel passed an education law that removed most Native American children in the American West from their families and required them to attend boarding school.<sup>48</sup> Reel considered it her “maternalistic duty to rescue indigenous children from what she considered a savage background and to raise them instead in a “civilised” environment.”<sup>49</sup> By 1900 approximately 21,500 Native American children were housed in 150 boarding schools and young people were housed as labourers and servants for white families in an attempt to assimilate them.<sup>50</sup> The histories for each Tribe in the US is different, but all share the violent history of native boarding schools, the depletion of populations, and intergenerational trauma.

Māori have a shared-experience of boarding schools, where church-based boarding schools served as the main education option, Māori were removed from families, and suffered from abuse in these institutions. The first church-based boarding schools for Māori opened in 1844 as a form of assimilation.<sup>51</sup> The 1847 Educational Ordinance encouraged the formation of boarding schools as a way to remove Māori children from their families.<sup>52</sup> In 2018 the Royal Commission of Inquiry into the Abuse in Care was established to investigate abuse and neglect of children, young people, and adults in State and faith-based institutions from 1950–1999.<sup>53</sup> The Inquiry took place over more than six years and in 2024 its final report confirmed what we already

<sup>44</sup> This is not to say that Indigenous women have been victims. Indigenous women have a long history of standing up to patriarchy and many of our most prominent Indigenous activists have been, and are, women. We have always remained staunch in who we are and stood our ground with Mother Earth and our ancestors against Western patriarchy.

<sup>45</sup> In the U.S. these are often referred to as “residential schools.” In Aotearoa they are also referred to as “faith and state-based institutions.”

<sup>46</sup> Alaska Native Heritage Center, *Alaska's Historic Boarding Schools*, WWW.ALASKANATIVE.NET, <https://storymaps.arcgis.com/stories/74c3be9251284ac1a8e72c95fa7ef50b> [https://perma.cc/3TJM-8JS2].

<sup>47</sup> BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 29 (2010).

<sup>48</sup> Jacobs, *supra* note 34, at 453.

<sup>49</sup> *Id.* at 454.

<sup>50</sup> *Id.*

<sup>51</sup> St Stephen's School in Auckland and Wesley College in Auckland. See Ross Calman, *Māori education – mātūranga – Māori church boarding schools*, TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND, <https://teara.govt.nz/en/maori-education-matauranga/page-4> [https://perma.cc/GR5H-XZ4H].

<sup>52</sup> U.N. Permanent F. on Indigenous Issues, *Indigenous Peoples and Boarding Schools: A Comparative Study*, U.N. Doc. E/C.19/2010/11 (April 2010).

<sup>53</sup> The extent of which I will not be covering in this article.

knew, that these institutions were abusive beyond comprehension.<sup>54</sup> It is also important to note the date restrictions of the Inquiry and that survivors have come forward expressing abuse prior and after these dates. It only takes common sense to understand the impact these experiences have on Indigenous motherhood. Namely, stripping mothers of motherhood when their children were taken away from them and sent away to boarding school. But also, when these same children have grown up and had their own children, many have not known how to be good mothers because they were never nurtured in that same way.<sup>55</sup> Hence, the intergenerational trauma.

Examining the history of boarding schools and the broader colonization of Indigenous motherhood provides essential context for understanding the depth and continuity of child removal experiences by Indigenous mothers. These institutions functioned as mechanisms of State intervention aimed at severing maternal-child relationships, undermining Indigenous motherhood and reshaping family structures for assimilation. The profound ambiguous loss endured by Indigenous mothers, marked by psychological, cultural, psychosocial, and related harms, can be further illuminated through the limited but growing body of research on the Indigenous maternal health consequences. Together, this historical record and emerging scholarship demonstrate how colonial-child removal policies have produced enduring reproductive and intergenerational trauma for Indigenous women.

### III. INDIGENOUS MATERNAL HEALTH CONSEQUENCES

Globally, Indigenous women experience higher rates of perinatal mental health issues compared to non-Indigenous.<sup>56</sup> Approximately 30,000 Native American births occur annually and 17% of Native American women experience postpartum depression.<sup>57</sup> Native American “women disproportionately experience postpartum depression in the U.S. as compared to the rest of the population.”<sup>58</sup> The maternal death rate for Native American mothers through suicide within a year after childbirth is 3.5 times higher than non-Native Americans.<sup>59</sup> However, reproductive justice for Native American women is an under researched area and little literature has been written on the topic. In Aotearoa, between 15,000–20,000 Māori births occur annually.<sup>60</sup> Suicide is the leading

<sup>54</sup> Royal Commission of Inquiry on the Abuse in Care, *Whanaketia – Through Pain and Trauma, from darkness to light*, WWW.ABUSEINCARE.ORG.NZ (2024), <https://www.abuseincare.org.nz/reports/whanaketia> [<https://perma.cc/WN7C-JLRJ>].

<sup>55</sup> Acknowledging also that some young Indigenous women and girls gave birth whilst in these institutions and had their babies taken away from them. These pregnancies were often a result of sexual abuse by adults working in these institutions. These experiences are a stain on Indigenous motherhood, but will not be interrogated further in this article.

<sup>56</sup> Sawayra Owais et al., *The Perinatal Mental Health of Indigenous Women: A Systematic Review and Meta-Analysis*, 65 CANADA J. PSYCHIATRY 149, 149–63 (2020).

<sup>57</sup> December Maxwell, Rebecca Mauldin, Johanna Thomas & Victoria Holland, *American Indian Motherhood and Historical Trauma: Keetoowah Experiences of Becoming Mothers*, INT. J. ENV'T RSCH. PUB. HEALTH 1, 1 (Jun. 9, 2022).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Māori babies born in New Zealand*, STATS NZ (Feb. 18, 2025), <https://figure.nz/chart/>

cause of maternal death, with Māori women 2.91 times more likely to die by suicide than NZ Europeans.<sup>61</sup> Māori have higher rates of adverse pregnancy outcomes to non-Māori.<sup>62</sup> Reproductive justice includes the right to have a children and parent children with safety.<sup>63</sup> The right to parent with safety and dignity has continuously been withheld from Native American and Māori mothers through racist child welfare policies.

It is clear that Native American and Māori mothers experience disproportionate negative reproductive health outcomes before, during, and after birth. What is less clear are the maternal health implications of removing children.<sup>64</sup> Depression, post traumatic stress disorder (PTSD), Complex PTSD, acute stress, panic-like episodes, insomnia, and eating disorders are just some of the examples of the psychological effect on mothers.<sup>65</sup> Other examples include suicide, self-harm, substance use, and grief.<sup>66</sup> From a broader lens, looking at the societal impact, mothers receive the most extreme forms of demoralization and degradation that stems from the feeling and shaming of failure.<sup>67</sup> This largely stems from the individualistic and punitive nature of child welfare systems. Instead, States should take responsibility for maternal mental health crises and disadvantaged families.

Mental health can be a leading cause for child removal and due to overrepresentation of Indigenous mothers in these statistics, as mentioned previously, this impacts Indigenous mothers at higher rates. Moreover, the stigma associated with mental health struggles is intensified for Māori and Native

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RwIReYQi7UaCf2VO-DeuZFTyavDjXewLJ [<https://perma.cc/G4A4-5Q86>].

<sup>61</sup> *Fifteenth Annual Report of the Perinatal and Maternal Mortality Review Committee | Te Pūrongo ā-Tau Tekau mā Rima o te Komiti Arotake Mate Pēpi Mate Whaea Hoki: Reporting Morbidity and Mortality 2020 | Te Tuku Pūrongo mō te Mate me te Whakamate 2020 (Perinatal and Maternal Mortality Review Committee, 2022)*, <https://www.hqsc.govt.nz/assets/Our-work/Mortality-review-committee/PMMRC/Publications-resources/15thPMMRC-report-final.pdf> [<https://perma.cc/E3Q2-HJ69>].

<sup>62</sup> Beverley Lawton et al., *He Korowai Manaaki (Pregnancy Wraparound Care): Protocol for a Cluster Randomized Clinical Trial*, 10 J. MED. INTERNET RSCH. 1 (2021).

<sup>63</sup> Sydney L. Hans & Barbara A. White, *Teenage Childbearing, Reproductive Justice, and Infant Mental Health*, 40 INFANT MENTAL HEALTH J. 690, 701 (2019).

<sup>64</sup> Much research has been done on the impact on children, but very little on the impact on mothers. The American Bar Association has even published a tool to help lawyers that speaks to the trauma (experienced by children) caused by separation of children from parents. See AM. BAR ASS'N, *TRAUMA CAUSED BY SEPARATION OF CHILDREN FROM PARENTS: A TOOL TO HELP LAWYERS* (2020), [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf) [<https://perma.cc/R679-DDGC>].

<sup>65</sup> Rosa Furneaux, *Forcibly Separating Children from their Mothers Doesn't Just Hurt the Kids*, MOTHER JONES (June 21, 2028), <https://www.motherjones.com/politics/2018/06/trump-forced-family-separation-children-devastating-effects-mothers-1/> [<https://perma.cc/W6BD-FBZ7>].

<sup>66</sup> “Where does that Leave Me?” *The Effects of Child Removal*, CHANGING LIVES (Apr. 2023), <https://www.changing-lives.org.uk/insights/the-effects-of-child-removal> [<https://perma.cc/A65R-WPFJ>].

<sup>67</sup> See generally Kathleen S. Kenny, *Mental Health Harm to Mothers When a Child is Taken by Child Protective Services: Health Equity Considerations*, 63 CAN. J. PSYCHIATRY 304, (Dec. 2017).

American women due to the systemic and systematic racism that exists in child welfare. Research has shown that removing children from mothers can further exacerbate maternal mental health struggles.<sup>68</sup>

According to study results, mothers who lost custody of a child to foster care experienced significantly higher rates of depression, substance use, physician visits for mental illness, and prescriptions of psychotropic medications compared to mothers surviving the death of a child.<sup>69</sup>

A qualitative study published in 2025 found that mothers who had children put in foster care expressed removal as an “overwhelming traumatic event creating long-lasting effects on their lives”.<sup>70</sup> The main adverse psychosocial outcomes were: depression; suffering and hopelessness; loneliness and isolation; loss of identity; and disconnectedness and broken bond.<sup>71</sup> These challenges point to ambiguous loss, which may be the reason mothers who have had their children removed can experience mental health challenges at higher rates than those who have experienced infant loss.

In a study based on interviews with non-Indigenous and Indigenous sex workers in Canada, it was found that the Indigenous mothers who had their children removed were more severely jeopardised due to the intergenerational colonial history of child removal.<sup>72</sup> A family therapist in the U.S. explained how grief for Native American mothers presents differently from non-Indigenous mothers, like experiencing a death of a child, coupled with cultural terrorism of trampling on their dignity as “life givers”.<sup>73</sup> It is without question that Indigenous mothers suffer greatly from child removal. This is worsened by court systems working against them if they do need to seek support. One Māori mother said that despite being diagnosed with anxiety, she made the decision to not take anxiety medication due to the fear it would be used against her in court.<sup>74</sup> This further punishes mothers. It leaves them without the support they need to regain custody of their children. This is a multifaceted health, legal, and policy issue that profoundly affects Indigenous mothers and communities, and demands urgent attention.

<sup>68</sup> Karen Broadhurst & Claire Mason, *Child Removal as the Gateway to Further Adversity: Birth Mothers Accounts of the Immediate and Enduring Collateral Consequences of Child Removal*, 19 QUALITATIVE SOCIAL WORK 15, 24 (Dec. 19, 2019).

<sup>69</sup> Kenny, *supra* note 67, at 304.

<sup>70</sup> Marina Lalayants & Inga Saitadze, *Separation and Psychosocial Challenges of Parents with Children in Foster Care*, 171 CHILDREN AND YOUTH SERVICES REVIEW 1, 4 (Apr. 2025).

<sup>71</sup> *Id.* at 4–5.

<sup>72</sup> Kathleen S. Kenny et. al., *Health Consequences of Child Removal Among Indigenous and Non-Indigenous Sex Workers: Examining Trajectories, Mechanisms and Resiliencies at 1905–07*, (Sept. 2021) (unpublished manuscript) (on file with the Indigenous Peoples Journal of Law, Culture, and Resistance).

<sup>73</sup> Ashley L. Landers, *The Grief of Native American Mothers Whose Children Were Separated from Them*, OHIO STATE NEWS (Dec. 8, 2023), <https://news.osu.edu/the-grief-of-native-american-mothers-whose-children-were-separated-from-them/> [<https://perma.cc/738J-8F2V>].

<sup>74</sup> Preeti Kannan, *New Zealand's Indigenous Women Battle Trauma Over 'Stolen Children'*, THOMSON REUTERS FOUNDATION. (Apr. 23, 2020), <https://news.trust.org/item/20200423172017-1sszi/> [<https://perma.cc/5NFU-44BN>].

#### IV. LEGAL FRAMEWORKS FOR CHILD REMOVAL

There are clear distinctions between the legal frameworks in Aotearoa and Turtle Island in relation to its Indigenous Peoples. The U.S. has a written Constitution, whereas Aotearoa does not. The U.S. recognizes sovereignty for Tribes, whereas Aotearoa does not. Some Native American Tribes have reaffirmed jurisdiction over certain things, whereas iwi and hapū in Aotearoa do not. Federally recognized Native American Tribes are recognized as political sovereigns, whereas Māori are recognized as a racial classification. The U.S. has states and federal structures where the federal government, states and Tribes are separate sovereigns. Aotearoa only has one sovereign, which is the British Crown.<sup>75</sup>

At face value, Native American Tribes are in a better place to exercise sovereignty, which remains true. However, it is complex and only relates to federally recognized Tribes. It is also one thing to say that a Tribe has sovereignty and then another to *actually* have the ability to exercise it. Child removal by State agencies continue in both Native American and Māori communities despite the starkly different legal frameworks in which these Indigenous Peoples live. Both countries are common law countries and the impact that legislation, treaties, and the Constitution (written or unwritten) has on Indigenous Peoples can be examined through court decisions. Parliament is supreme in Aotearoa and in the U.S., Congress has plenary power. Legislation that comes from parliament in Aotearoa and federal legislation in the U.S. are supreme sources of law.

Recent developments in Aotearoa and Turtle Island have further degraded Indigenous women's rights. In Aotearoa, proposals such as the Treaty Principles Bill,<sup>76</sup> the disestablishment of Te Aka Whai Ora (the Māori Health Authority),<sup>77</sup> and broader efforts to weaken statutory references to te Tiriti o Waitangi will have significant implications for Māori mothers. In the U.S. a similar maternal health crisis is taking place. The current administration is exacerbating barriers to reproductive healthcare for Native Americans. FY 2026 proposes cuts to HHS, including nearly \$900 million in cuts to the IHS.<sup>78</sup> Additionally it proposes a restructure with establishing new agencies, and eliminating critical Tribal health programs.<sup>79</sup> FY 2026 also proposes \$6.4 billion cut to the Administration for Children, Families, and Communities (ACFC). The federal government has a trust responsibility to provide healthcare to

<sup>75</sup> New Zealand is a constitutional monarchy. The British Crown is the head of state and acts on the advice of elected New Zealand Ministers, the Prime Minister being the principal advisor. The Governor General, appointed by the Crown, may carry out the Crown functions delegated to the Governor-General.

<sup>76</sup> Treaty Principles Bill 2024 (N.Z. House of Representatives).

<sup>77</sup> *Pae Ora (Healthy Futures) (Te Aka Whai Ora Disestablishment) Amendment Bill 2023* (N.Z. House of Representatives).

<sup>78</sup> NAT'L COUNCIL OF URB. INDIAN HEALTH, *NCUIH Urges HHS to Reconsider Proposed Budget Cuts to Indian Health Service and HHS* (Apr. 18, 2025), <https://ncuih.org/2025/04/18/ncuih-urges-hhs-to-reconsider-proposed-budget-cuts-to-indian-health-service-and-hhs/> [<https://perma.cc/XR4A-LFV4>].

<sup>79</sup> *Id.*

Tribes. Cuts to the IHS and maternal health programs breach this obligation. Moreover, cuts to Tribal justice attempt to erode Tribal sovereignty by limiting Tribes' already unmet needs and capacity.

Ongoing state authority over Indigenous reproductive health and family life is sustained through legal and policy structures that inadequately embed and entrench Indigenous rights, thereby reinforcing settler-colonial governance over Indigenous bodies and kinship structures.

#### TURTLE ISLAND

They proposed to place them in the homes of well-meaning non-Indian families who thought they were doing a good deed by taking in a poor little Indian child or baby and legally adopting them to raise them in their own culture and society.<sup>80</sup>

ICWA was enacted in 1978, which is a federal law that governs the removal of Native American children. It instructs states to work with Tribes for the protection of Native children. Federally recognized Tribes have inherent sovereignty in the U.S. as separate political sovereigns.<sup>81</sup> ICWA has affirmed this sovereignty for Tribal civil regulatory jurisdiction to deal with citizenship, child protection and child custody matters.<sup>82</sup> ICWA does two fundamental things: (1) it requires states to recognize Tribal sovereignty when a Native American child is taken by the state; and (2) it provides a framework for Tribes to exercise sovereignty in child welfare.<sup>83</sup> ICWA has empowered Tribes to enforce their own laws and policies by reaffirming jurisdiction. However, despite ICWA, a Supreme Court decision in 2013, *Adoptive Couple v. Baby Girl*, ruled against the biological Indigenous father and in favour of a non-Indigenous couple who had adopted his daughter.<sup>84</sup> ICWA only goes so far—it really comes down to courts, state parties, federal funding, and Tribal resources to allow an exercise of jurisdiction over Tribal citizen children (or children eligible for citizenship).<sup>85</sup>

In the 1960s and 1970s Native American women encountered “social workers and judges who believed their families to be inadequate and their communities to be unfit places to raise a child.”<sup>86</sup> Native American families saw the removal of their children as “one of the most egregious violations of their rights.”<sup>87</sup> ICWA was passed in response to these cries and to growing

<sup>80</sup> ALAN R. PARKER, PATHWAYS TO INDIGENOUS NATION SOVEREIGNTY: A CHRONICLE OF FEDERAL POLICY DEVELOPMENTS 41 (2018).

<sup>81</sup> Terry L. Cross & Robert J. Miller, *The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance*, in FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 13 (2009).

<sup>82</sup> *Id.* at 13–14.

<sup>83</sup> *Id.* at 14.

<sup>84</sup> *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).

<sup>85</sup> Moreover, it excludes children who come from Tribes that are not federally recognized. INDIAN CHILD WELFARE ACT OF 1978, 25 U.S.C. §§ 1903, 1915 (1978). Urbanized children and families also further complicate jurisdiction ability.

<sup>86</sup> JACOBS, A GENERATION REMOVES, *supra* note 23, at xxvi.

<sup>87</sup> *Id.* at xxviii.

recognition that the current system served to steal Indigenous children through institutional means. There is more on this story below.

ICWA, like most of modern federal Indian law, was designed to prevent the extinction of unique Tribal cultures and to prevent the forced assimilation of Indian peoples into the greater American polity.<sup>88</sup>

One aspect of Tribal governance is citizenship. Federally recognized Tribes have jurisdiction over their own citizens. During the allotment period the federal government imposed the notion of blood quantum and enrollment.<sup>89</sup> Tribal citizenship/membership is the business of the Tribe and not for the federal government or states to determine.<sup>90</sup> ICWA uses citizenship/membership to determine whether Tribal jurisdiction is triggered, this allows Tribes to make their own determination as to whether they want jurisdiction over a child.<sup>91</sup> If jurisdiction is triggered, ICWA provides an order of placement preference that states are required to follow, which includes criteria for foster and adoption.<sup>92</sup> Tribes can decide on their own placement preference to do what is best for their children i.e. put the Tribe as first in the order of placement preference.

One of the most sovereign-affirming aspects of ICWA is that states must recognize Tribal Court decisions as equal to that of state courts and thus grant full faith and credit.<sup>93</sup> Cases in state courts have been important in reaffirming Tribal jurisdiction.<sup>94</sup> Native Americans have a negative view of Western law and courts because they have suffered at the hands of suppression and domination.<sup>95</sup> This is why Tribal Courts are so important. Native Americans need judges who “are uniquely positioned to look people in the eye, [and] speak from the heart” to help heal people from intergenerational trauma.<sup>96</sup> Tribal Court judges are best positioned to do this.

ICWA is not widely known amongst social workers and sometimes those who are familiar with it are unwilling to comply with it.<sup>97</sup> This arises out a lack of focus on ICWA in social work education—just providing it as an optional topic within the curriculum. Social workers have a code of ethics they

<sup>88</sup> MATTHEW L.M. FLETCHER & WENONA T. SINGEL, Introduction: Indian Experience and Randall Kennedy’s Mythology, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30* xiv (MATTHEW L.M. FLETCHER, WENONA T. SINGEL & KATHRYN E. FORT eds.) (2019).

<sup>89</sup> Cross & Miller, *supra* note 81, at 14.

<sup>90</sup> This derives from inherent sovereignty of Tribes, which has been reaffirmed by the U.S. Supreme Court. *See* *United States v. Wheeler* 435 U.S. 313 (1978) (“... inherent powers of a limited sovereignty which has never been extinguished.”); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1945); Nixon’s Special Message to Congress on Indian Affairs in 1970, followed by the Indian Self-Determination and Education Assistance Act of 1975, reaffirmed Tribal self-governance.

<sup>91</sup> CROSS & MILLER, *supra* note 81, at 14.

<sup>92</sup> *Id.* at 15.

<sup>93</sup> *Id.*

<sup>94</sup> *See* PETOSKEY, *supra* note 17, at viii.

<sup>95</sup> *Id.* at ix.

<sup>96</sup> *Id.*

<sup>97</sup> SUZANNE L. CROSS, ANGELIQUE G. DAY & EMILY C. PROCTOR, Working on the Front Lines: The Role of Social Work in Response to the Indian Child Welfare Act of 1978, in *Facing the Future: The Indian Child Welfare Act at 30* 3 (MATTHEW L.M. FLETCHER, WENONA T. SINGEL & KATHRYN E. FORT eds., Univ. of Mich. Press 2009).

must follow under the National Association of Social Work (NASW), which includes meeting the needs of clients.<sup>98</sup> The only way social workers will meet the needs of Native American clients is if they understand ICWA and the need to work with Tribes. Tribal and non-Tribal social workers have a professional responsibility to be knowledgeable about ICWA, the existing Indian family exception doctrine,<sup>99</sup> accompanying terminologies, and the impact on Native American children.<sup>100</sup>

“[All] school of social work should be required to have at least one unit (class period) dedicated to ICWA: its rationale, implementation process, case analysis, and consequences of noncompliance.”<sup>101</sup>

In state child welfare cases, states are required to notify a Tribe once an abuse or neglect has been identified within a Native American family. There is an investigation process that takes place and during this time the state should collaborate with Tribe social workers to establish a plan to best accommodate the intentions of ICWA.<sup>102</sup>

Reasons for child removal in Tribal communities are often due to allegations of improper supervision or physical neglect. Non-Tribal social workers are often unaware of, or discredit, Indigenous familial structure of the extended family and thus substantiate allegations of improper supervision.<sup>103</sup> Moreover, they often do not understand the standard of living in communities. What they might deem physical neglect might actually be a normal standard of living.<sup>104</sup> Social workers need to understand Indigenous ways of life and that a child is not in danger just because they are being cared for through a non-nuclear family structure or in conditions different to those familiar to the social worker. In cases of physical neglect, the reasons are generally due to poverty and there is a need to address the reason instead of solely removing the child.<sup>105</sup> For example, connecting the family with financial assistance and services to care for the child made available by the Tribe through federal grants. However, preconceived notions of what neglect is plays a role here and a lack of cultural

<sup>98</sup> *Id.* at 4.

<sup>99</sup> A harmful doctrine adopted by some courts to say that ICWA does not apply because a child or parent is “not Indian enough.” The genesis of the doctrine is generally ascribed to *In re Adoption of Baby Boy L*, 643 P.2d 168 (Kan. 1982). For a general overview of the doctrine and its accompanying harms, see Cassandra Erler, *Excepted Out of Existence: The Existing Indian Family Doctrine as a Violation of Procedural Due Process and a Destructive Tool Against Tribal Communities*, J. OF GENDER, SOC. POL’Y, & THE L. BLOG, <https://jgspl.org/excepted-out-of-existence-the-existing-indian-family-exception-as-a-violation-of-procedural-due-process-and-a-destructive-tool-against-tribal-communities/> [<https://perma.cc/7822-6U7H>].

<sup>100</sup> CROSS *et al.*, *supra* note 97, at 5–6.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> *Id.* at 7.

<sup>103</sup> *Id.* at 8.

<sup>104</sup> For example, many communities in Alaska use honey buckets and do not have running water. A state social worker who has never lived in a community like this may view it negatively, but it is normal.

<sup>105</sup> See CROSS *et al.*, *supra* note 97, at 8.

understanding can result in declaring physical neglect when the situation is normal in the community.

Child protection cases are the most resource intensive of any cases, which means that Tribes need to have extensive legal and service infrastructure to handle them.<sup>106</sup> Tribal Courts are the best place to handle child protection matters because of their grounding in culture and tradition, and their familiarity with childcare dynamics in the community.<sup>107</sup> These courts are also “well positioned to ensure that the services ordered are tailored to meet the needs of the unique individual human beings who are involved.”<sup>108</sup> Tribal Court judges “are rooted in problem-solving, consensus-oriented, peacemaking, healing and wellness philosophy.”<sup>109</sup> Their approach is very different to the individualistic and adversarial nature of state courts where judges do not need to be specialized in family law and may not be aware of the unique needs of Tribal Citizens. Tribal Court jurisdiction is key to preventing child removal and maintaining a process that cares about mothers. However, this requires a less paternalized structure of Tribal Court and justice federal funds, contracts and compacts to give Tribes the resources to properly exercise their sovereignty in matters relating to Tribal justice and family wellness.<sup>110</sup> As well as increasing funding amounts to address the unmet need.<sup>111</sup>

ICWA allows for Tribe-state agreements, recognizing Tribes and states as equal partners responsible for implementing the Act.<sup>112</sup> This includes funding arrangements. However, there is a problem with this in some Public Law 280 (P.L. 280) states. ICWA does have a provision that allows Tribes to follow a process of retrocession from P.L. 280, but P.L. 280 inhibits Tribes in exercising their full authority.<sup>113</sup> Moreover, in P.L. 280 states Tribes receive less federal funding because the jurisdiction is seen to be shared with states. Less funding and grant resources for Tribes are a barrier for Tribal Courts to take jurisdiction of ICWA cases. It is necessary for the federal government to address this, both in clarity of jurisdiction and also in funding.<sup>114</sup>

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<sup>106</sup> PETOSKEY, *supra* note 17.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> This includes lessening the reporting requirements and restriction on what funding can be used for. A model structure is seen in the Alaska Native health model, which should be adopted for Tribal justice. See *Alaska Tribal Health Compact*, ALASKA NATIVE HEALTH BD., <https://www.anhb.org/tribal-resources/alaska-tribal-health-compact/> [<https://perma.cc/E4ST-P6NC>] and OUR HEALTH IN OUR HANDS, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM (2019).

<sup>111</sup> A 2024 BIA report estimates the unmet need for Tribal Courts to be \$1.44 billion, and an additional 12,618 personnel are needed. See U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFS., OFF. OF JUST. SERVS., *Report to Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country* (2021).

<sup>112</sup> INDIAN CHILD WELFARE ACT OF 1978, 25 U.S.C. § 1919 (1978).

<sup>113</sup> See Brief for the National Congress of American Indians, as Amicus Curiae, pg. 25, *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022).

<sup>114</sup> This will address discrepancies between states, particularly those that have not enacted their own state ICWA.

## AOTEAROA

Our whakapapa is embedded into the land of this country. It is that whakapapa that is being severed by the actions of the Crown. I could not in all my time [ . . . ] think of anything more horrendous than the severance and disconnection of children from their whānau and their whakapapa. (Annette Sykes (quoted in Meriana Johnsen, *Power Transfer from Oranga Tamariki Must Be Radical*, Waitangi Tribunal Told (Oct. 28, 2020)).<sup>115</sup>

Unlike the U.S., the Crown does not recognize inherent sovereignty for Māori in Aotearoa despite *He Whakaputanga*<sup>116</sup> and *Te Tiriti o Waitangi*<sup>117</sup> (the Treaty) forming a constitutional basis for reaffirming sovereignty and self-determination for *iwi/hapū*.<sup>118</sup> Instead the Crown applies the English version of the treaty and its principles, which denies Māori the sovereignty in the *te reo* Māori version.

The Treaty of Waitangi Act 1975 allows Māori to make a claim to the Waitangi Tribunal (the Tribunal) if they have been, or are likely to be, prejudicially affected by any legislation, policy, act, or omission made by the Crown after the signing of the Treaty. The Tribunal can only make recommendations, and its findings are not binding. Moreover, the Tribunal is not a means of Tribal sovereignty because it is a Crown entity. However, the tribunal has acted as an important function of recognizing Māori rights and is an important function of New Zealand's unwritten constitution. The tribunal has been under threat from the current government, which I want to make clear that I strongly oppose. In June 2025 the *Mana Wahine Kaupapa Inquiry*<sup>119</sup> had its first hearing on outstanding claims which allege prejudice to *wāhine* Māori because of Treaty breaches by the Crown. Inquiries like this are extremely important for Māori. One way to strengthen the Crown's fulfilment of its Treaty obligations would be to treat the Tribunal's decisions as though they were rulings of a Constitutional Court, as this would make the decisions enforceable and incorporate them into the common law and constitutional structure.<sup>120</sup> Alongside this form of redress for Crown breaches of the Treaty, reaffirming sovereignty is essential to minimizing future breaches.

<sup>115</sup> Meriana Johnsen, *Power Transfer from Oranga Tamariki Must Be Radical*, *Waitangi Tribunal Told* (Oct. 28, 2020), <https://www.rnz.co.nz/news/te-manu-korihi/429344/power-transfer-from-oranga-tamariki-must-be-radical-waitangi-tribunal-told> [<https://perma.cc/5FL5-DPNH>].

<sup>116</sup> *He Whakaputanga o te Rangatiratanga o Nu Tireni* (Declaration of Independence of New Zealand 1835).

<sup>117</sup> The *te reo* Māori text of the Treaty of Waitangi was signed in 1840. Most Māori chiefs signed the *te reo* Māori (Māori language) version, which did not cede sovereignty for Māori, instead reaffirmed it. The English version used wording that did cede sovereignty for Māori, and many scholars have argued that this version should not be used.

<sup>118</sup> Both *Te Tiriti o Waitangi* and *He Whakaputanga o te Rangatiratanga o Nu Tireni* are recognized documents by the Crown; the Treaty forms part of New Zealand's unwritten Constitution. *He Whakaputanga - Declaration of Independence*, NEW ZEALAND HIST., <https://nzhistory.govt.nz/culture/declaration-of-independence-taming-the-frontier> [<https://perma.cc/GR5H-XZ4H>].

<sup>119</sup> WAI 2700.

<sup>120</sup> Almost like a constitutional court but based on *te Tiriti* (the Māori version).

Sovereignty for Māori has been an ongoing debate in politics, academia and law. An Inquiry from the Waitangi Tribunal found:

they<sup>121</sup> did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor . . . The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the rangatira did not surrender to the British the sole right to make and enforce law over.<sup>122</sup>

In 2012, Māori were five times more likely to be taken into state care than non-Māori.<sup>123</sup> In 2015, the Minister for Social Development conducted a review into the care and protection system and determined that the needs of vulnerable children were not being met. Additionally, the report found that it had failed to address the overrepresentation of Māori in the system. It revealed that six out of ten children likely to be vulnerable at some stage throughout their childhood were Māori.<sup>124</sup> The report called for a different system centering social investment and community. These recommendations resulted in the establishment of the operating model that exists today under Oranga Tamariki – Ministry for Children (the Ministry).

The Oranga Tamariki Act 1989 (OTA) is the legislation that governs child welfare in Aotearoa and the Ministry is the governmental department that operates the child welfare system. Amendments were made to the Children, Young Persons, and Their Families Act 1989 in 2017 which triggered a name change to the act and its respective governmental department.<sup>125</sup> Many Māori find the name change to be racist and disrespectful to the language because it is used for a system that has caused continuous intergenerational trauma for Māori. The Ministry has been under journalistic scrutiny for its overrepresentation of Māori in the system and its handling of cases. As a result, various inquiries have been made into Māori child removal.<sup>126</sup> The 2017 amendments to the OTA included a new provision Section 7AA, which provides duties to the child executive of Oranga Tamariki in relation to the Treaty. It specifically includes an obligation to Māori children and includes te ao Māori familial concepts and definitions to the act. However, in 2017 the number of Māori in care had increased to 61.2% from 54.7% in 2013.<sup>127</sup> And in 2018, data revealed that five babies a week were being taken from their mothers, the majority of

<sup>121</sup> Māori chiefs.

<sup>122</sup> WAITANGI TRIBUNAL, *He Whakaputanga me te Tiriti: The Declaration and the Treaty—The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (2014).

<sup>123</sup> *Id.* at 46.

<sup>124</sup> *Id.* at 35.

<sup>125</sup> *Id.* at 37.

<sup>126</sup> WAITANGI TRIBUNAL; OFFICE OF THE CHILDREN'S COMMISSIONER; WHĀNAU ORA COMMISSIONING AGENCY; ROYAL COMMISSION OF INQUIRY INTO THE ABUSE IN CARE; NZ OMBUDSMAN.

<sup>127</sup> WAITANGI TRIBUNAL, *He Pāharakeke, He Rito Whakakīkinga Whāruarua 19*, WAITANGI TRIBUNAL (2021).

whom were Māori.<sup>128</sup> The Tribunal found that the removal of Māori children breached the Treaty.<sup>129</sup> The Tribunal and courts have found that the Crown has a duty to actively protect Māori rights and interests under the Treaty.<sup>130</sup> Section 7AA was seen as the main protective mechanism for Māori children, however, in April 2025 this section was repealed.<sup>131</sup>

The OTA has several warrants that permit the removal of a child. One of the measures that has been abhorrently used against Māori mothers are urgent uplifts that are warranted if Oranga Tamariki decide a child is at immediate risk of serious harm. A Section 78 warrant sits between a place of safety warrant (without notice and lasts maximum 5 days) and final custody orders (which happen after a Family Group Conference). A Section 78 order is an interim custody order. It is supposed to be temporary and is supposed to only be used in urgent cases where all other options to ensure the safety of the child have already been considered. It is also supposed to be made with notice, to give parents and whānau (family) a chance to respond. Of the most notable circumstances where the Ministry was under fire for the use of Section 78 was when an investigative journalist released a documentary in 2019 revealing the abhorrent treatment of a young Māori woman having her baby uplifted at birth.<sup>132</sup>

In 2019, 823 reports of concern regarding unborn [Māori babies] were made to Oranga Tamariki, an 800 per cent increase, compared to the equivalent number reported to Child, Youth and Family in 2004.<sup>133</sup>

The Oranga Tamariki Act 1989 suppresses Tikanga, a fundamental alternative position that is valid and mana (pride) enhancing to ensure the protection of everybody involved. Despite many amendments and rehaults of the child welfare system in Aotearoa, Māori children continue to be overrepresented in the system. Data showed that on 31 December 2020, Māori constituted 75% of children in youth justice custody, compared to 9% of whom were New Zealand European or other.<sup>134</sup> For over ten years, half of the children entering state care were Māori<sup>135</sup> despite Māori making up under 20% of the population.<sup>136</sup> Granting Māori the sovereignty that was envisioned in the Treaty and

<sup>128</sup> *Id.* at 47–48.

<sup>129</sup> *Id.* at 106–108.

<sup>130</sup> *Id.* at 19.

<sup>131</sup> Oranga Tamariki (Repeal of Section 7AA) Amendment Act 2025. ORANGA TAMARIKI (REPEAL OF SECTION 7AA) AMENDMENT ACT 2025 (N.Z.).

<sup>132</sup> Melanie Reid, NZ's Own 'Taken Generation', Newsroom (Oct. 6, 2019) <https://newsroom.co.nz/2019/06/10/nzs-own-taken-generation/> [<https://perma.cc/L3V4-USQR>].

<sup>133</sup> WAITANGI TRIBUNAL, *supra* note 127, at 48.

<sup>134</sup> *Id.* at 48.

<sup>135</sup> ORANGA TAMARIKI: MINISTRY FOR CHILDREN, Disparities and Disproportionality Experienced by Tamariki Māori (Aug. 23, 2023) <https://www.orangatamariki.govt.nz/about-us/research/our-research/report-on-disparities-and-disproportionality-experienced-by-tamariki-maori/> [<https://perma.cc/KXF5-XE2Q>].

<sup>136</sup> STATS N.Z., 2023 Census Population Counts (By Ethnic Group, Age, and Māori Descent) and Dwelling Counts (May 29, 2024) <https://www.stats.govt.nz/information-releases/2023-census-population-counts-by-ethnic-group-age-and-maori-descent-and-dwelling-counts/> [<https://perma.cc/5WXY-NT2E>].

jurisdiction over child welfare cases would ensure culturally appropriate healing for families and communities.

#### RECENT COMMON LAW

Both the U.S. and Aotearoa are common law countries and cases have played a significant role in Indigenous child removal. The issue has been brought to the forefront in recent cases both in Aotearoa and the U.S. In a recent U.S. Supreme Court decision, ICWA was under attack from non-Native couples and the state of Texas.<sup>137</sup> The Court upheld Tribal sovereignty and the Constitutionality of ICWA. However, it left open the grounds for equal protection arguments in future cases. Additionally, reproductive health rights are under threat in the Supreme Court in cases such as *Dobbs v. Jackson Women's Health Organization*,<sup>138</sup> which overturned *Roe v. Wade*.<sup>139</sup> In Aotearoa, a recent case was brought by a Māori father attempting to gain custody of his daughter from non-Māori.<sup>140</sup> The court held that the child was to remain in the custody of non-Māori. Both recent cases and future potential cases threaten the protection of Indigenous children from being placed in non-Indigenous homes, which shows that the harm is ongoing and a different approach must be taken to keep children with Indigenous families.

#### INTERNATIONAL LAW

New Zealand has a fairly strong foundation in international law to argue for Indigenous reproductive justice, especially in preventing discrimination, ensuring access to culturally safe reproductive health services, and preventing coercive practices. The State is party to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Elimination of Racial Discrimination (CERD). It has also ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and Convention Against Torture (CAT). Although New Zealand initially voted against the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it has now endorsed it. However, unlike Canada, it has not enacted domestic legislation to incorporate it into its constitutional framework.<sup>141</sup> To ensure meaningful implementation of

<sup>137</sup> *Haaland v. Brackeen*, 599 U.S. 255 (2023).

<sup>138</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

<sup>139</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>140</sup> *Moana's Mother v. Smith & Chief Executive of Oranga Tamariki Ministry for Children & Taipa*, [2022] NZHC 2934, [2022] NZFLR 444.

<sup>141</sup> In 2019, British Columbia became the first jurisdiction in Canada to enact legislation implementing UNDRIP through the Declaration on the Rights of Indigenous Peoples Act (DRIPA). This framework has enabled First Nations to advance and uphold their rights in alignment with UNDRIP. At the federal level, the United Nations Declaration on the Rights of Indigenous Peoples Act, passed in 2021, affirms a commitment to ensuring that Canadian laws are consistent with Indigenous rights, duties, and responsibilities. More recently, in 2023, the Northwest Territories further advanced this legislative trend with the enactment of Bill 85, the United Nations Declaration on the Rights of Indigenous Peoples Implementation Act.

UNDRIP in Aotearoa, legislation must be enacted and entrenched to realize the rights guaranteed to Māori under the Declaration.

The U.S.'s lack of ratification of CEDAW and ICESCR is a major gap.<sup>142</sup> Without ratification the U.S. does not have the same binding international obligations. However, because the U.S. has ratified ICCPR and CAT, there is some legal basis to raise Indigenous women's rights concerns, but it is more limited in scope. Like New Zealand, the U.S. voted in favour of UNDRIP, but has not passed domestic laws to enforce it. Additionally, from an American context—the U.S. has not ratified the American Convention on Human Rights or accepted jurisdiction of the Inter-American Court of Human Rights.<sup>143</sup>

Despite obligations under international law, both countries have breached Indigenous women rights in relation to reproductive justice. Historically international pressure through UN reports have pressured governments to improve laws and policies, however, the issue remains. The U.S. often remains largely unresponsive to international pressure due to its status as a global power.<sup>144</sup>

## V. THE ONLY SOLUTION IS ABOLITION

It is time, then, for the state and its laws to take a backseat. The disproportionate representation of tamariki Māori in state care and the harms that have followed are not aberrations.<sup>145</sup>

This paper could provide recommendations for incremental change to attempt to address the Indigenous child removal crisis. In Aotearoa, it would call for an ICWA to be implemented to allow iwi/hapū/Tribes to be parties in child welfare cases and have jurisdiction over their own people. In the U.S., it would call for the federal government to meet unmet funding needs to empower Tribes in child welfare matters, as well as Congress to pass legislation that prevents any future challenges to Tribal justice. However, this paper argues that incrementalism is not going to work in a system that is doing precisely

<sup>142</sup> The U.S. has signed them but not ratified them. Regarding the U.S.'s failure and need to ratify CEDAW, see Rangita de Silva de Alwis & Melanne Vermeer, "*Time Is A-Wasting*": *Making the Case for CEDAW Ratification by the United States*, COLUM. J. OF TRANSNAT'L L. (2021) at 1.

Regarding the failure to ratify ICESCR, see Ann M. Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us.*, 13 THE SCHOLAR: ST. MARY'S L. REV. ON RACE AND SOC. JUST. 231 (2022).

<sup>143</sup> In June 2025, the Inter-American Court of Human Rights released the first international Tribal decision upholding "care" as a human right. It also urged parties to provide comprehensive reproductive healthcare. See *I/A Ct. H.R., Case of Chirinos Salamanca et al. v Venezuela, Preliminary Objections, Judgment of Aug. 21, 2025, Series C No. 562*.

<sup>144</sup> This has been particularly evident in the current administration's recent approach to war and intervention in the sovereignty of other nations. See e.g., Allen S. Weiner, *Stanford's Allen Weiner on the Constitutional and International Law Questions Raised by the Iran Attack*, SLS (Mar. 3, 2026), <https://law.stanford.edu/2026/03/03/stanfords-allen-weiner-on-the-constitutional-and-international-law-questions-raised-by-the-iran-attack> [<https://perma.cc/9G5D-JXNR>].

<sup>145</sup> FLEUR TE AHO, Violent "Care" and the Law: The Overrepresentation and Harm of Tamariki Māori in State Care, *Legal* 32 (2022).

what it was designed to do, which is to remove Indigenous children to assimilate them and secure the Western patriarchal paradigm that is threatened by the gynarchy that exists in Indigenous societies. Not to mention, there have already been many reports and academic literature published providing recommendations to improve laws and policies and the issue remains. Staying true to the Indigenous feminist stance of this paper, it is calling for abolition of child welfare systems as we know them by applying abolition feminism. Abolition feminism is the only way to truly protect Indigenous children and mothers from the abusive father that is the State. Settler colonial States were founded by the patriarchy and have imposed violent carceral paternalistic structures on Indigenous women and families. Abolition feminism is the only approach that can address the harm that has caused.<sup>146</sup>

As mentioned above, both New Zealand and the U.S. have amended and introduced legislation, often under the guise of efforts to keep Indigenous children with their families.<sup>147</sup> However, no matter how drastic these measures have been, they have continually failed to keep children with their Indigenous mothers. Federally recognized Tribes in the U.S. have recognized sovereignty and legislation that should protect Tribal children. At the face of it, this should be a structure that works. However, despite the measures taken or what is adopted in Western legal systems, they will never properly protect Indigenous children because it has never been what the systems were designed to do. The only real way to address the issue of child removal is to abolish the systems, reaffirm sovereignty and jurisdiction to Tribes/iwi/hapū, give financial grants to fully meet the needs of Tribes in a non-paternalistic way,<sup>148</sup> put protections in place to prevent future litigation that threaten sovereignty over child welfare cases, and provide all necessary resources to keep children with their mothers and family groups.

Alongside reaffirming sovereignty and jurisdiction, as well as the financial and legal support that comes with it, a new system should be developed to improve Indigenous health and social outcomes. I propose a model Indigenous health system that absorbs family law and services so that they come under a health umbrella of “family wellness”. A by Indigenous, for Indigenous model. The goal would be to take Indigenous approaches to family wellness and health by removing individualistic punitive models and focusing on helping families succeed by wrapping support around them.<sup>149</sup> This approach centers the empowerment of Indigenous midwives and health professionals, Tribes/iwi/hapū,

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<sup>146</sup> See generally ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, *Abolition. Feminism. Now.* (Haymarket Books 2022).

<sup>147</sup> Except for the repeal of section 7AA of the Oranga Tamariki Act, which was a direct affront to Māori children and families.

<sup>148</sup> Looking to the Alaska Native Health system/contracts/compacts.

<sup>149</sup> This includes traditional methods of health such as rongoā Māori and Indigenous midwifery, as well as recognizing the benefit of wider family groups raising children and including our connection with Mother Earth to be well. Donna Kerridge, *A Holistic Approach to Healing Through Rongoā Māori*, YouTube (Ora New Zealand), <https://www.youtube.com/watch?v=JM2BLIIqv1>.

and Indigenous family support workers to deliver trauma-informed, culturally grounded care that supports and protects Indigenous mothers and families.<sup>150</sup>

### CONCLUSION

Settler colonialism brought with it a violent patriarchal imposition that set out to strip Indigenous women of all that was dear to them. It attempted to erase culture and knowledge that once formed sophisticated Indigenous societies because it was threatened by matriarchal structures. The insidious treatment of Indigenous women has left many women trapped in a carceral state that controls reproductive justice for Indigenous women. It is a breach of Indigenous women's rights, international declarations, and laws. This can be situated within a broader settler-colonial context as both New Zealand and the U.S. have longstanding histories of removing Indigenous children from their mothers under similar circumstances. Both countries continue to have overrepresentation of Indigenous child removal and negative outcomes for Indigenous mothers. This essay hopes to contribute towards abolition of child welfare systems in settler colonial States where Indigenous children are being removed from their families. It instead calls for Tribes/iwi/hapū to have control over family wellness to ensure Indigenous women can flourish. It is also a call to action for further research and publishing in the area of reproductive justice for Indigenous mothers. "In a world where no women are locked up, the sound of music, laughter, parades, & the popping sound of popcorn will fill the streets."<sup>151</sup>

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<sup>150</sup> Including putting resources into increasing Indigenous representation in medicine and health sciences.

<sup>151</sup> DAVIS et al., *supra* note 145, at 87.

