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Detinue and *Replevin*: Arresting Children to Enforce Private Parenting Orders in New Zealand Family Court

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DETINUE AND *REPLEVIN*: ARRESTING CHILDREN TO ENFORCE PRIVATE PARENTING ORDERS IN NEW ZEALAND FAMILY COURT

Carrie Leonetti[*]

ABSTRACT

This Article argues that the seizures of children authorized by the New Zealand Care of Children Act to enforce private custody orders are unlawful and unjustifiable arrests. These seizures lack in either the substantive limitations of necessity or the procedural protections that should attach to such an intrusive and violent restriction on children's liberty. It argues that their issuance violates children's rights under the New Zealand Bill of Rights Act 1990 and international human rights law. It canvasses the history of these arrest provisions and argues that they function as a mechanism for detinue and replevin of children, harkening back to a time when children's status under the law was that of chattel. It documents how these arrest warrants have increasingly played a central role in the broader problem of the use of Family Court processes by family violence perpetrators to extend their coercive control over their victims and argues that these warrants have become a tool of social entrapment for victims.

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I. INTRODUCTION

In New Zealand, guardianship, custody, and visitation disputes between parents are governed by the Care of Children Act 2004 ("CoCA"). Section 72 authorizes the Family Court to issue warrants for the seizure of children to "enforce" its custody orders.[1]

[1] This Article uses "child" to describe all people under the age of eighteen, consistent with its usage in international law. It uses "seizure," "detention," and "arrest" interchangeably to describe any significant deprivation of liberty, consistent with international law. *See, e.g.*, R v. Fukushima CA 128/04, September 13, 2004 (N.Z.). In New Zealand, under CoCA, custody is called "care," and visitation is called

Section 73 authorizes the Court to issue warrants for the seizure of children to "enforce" its visitation orders.[2] Under sections 72 and 73, any person who is "entitled" to have custody or visitation with a child under a parenting order can apply to the Family Court for a warrant authorizing a constable or any other person named in the warrant "to take the child (using reasonable force if necessary) and to deliver the child" to them.[3] Section 75 authorizes a constable or other person executing an arrest warrant issued under section 72 or 73 to enter and search any premises "by force if necessary" to "take possession of the child" whose arrest has been authorized.[4] Section 68 authorizes the Court to "consider making an order or issuing a warrant" for the arrest of a child as a "response" to a party's "contravention" of a parenting order.[5] Under section 68, therefore, children's arrests appear to be a punitive measure to remedy a perceived serious breach of a court order by one of their parents and/or a mechanism for reclamation of purloined property.

This Article argues that the seizures authorized by CoCA §§ 68, 72, and 73 are unlawful and unjustifiable arrests, lacking in either the substantive limitation of necessity or the procedural protections that should attach to such an intrusive and violent restriction on children's liberty. It argues that it is the regular practice of the Family Court to issue these warrants when children are neither in danger nor posing a danger to anyone else, often in situations in which children are resisting forced visits with an abusive parent. It argues that their issuance violates children's rights under the New Zealand Bill of Rights Act 1990 ("BoRA") and international human rights law. It canvasses the history of sections 72 and 73 and argues that they function as a mechanism for detinue and replevin of children, harkening back to a time when children's status under the law was that of chattel. It documents how these arrest warrants have increasingly played a central role in the broader problem of the use of Family Court processes by family violence ("FV") perpetrators to

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"contact." This Article uses the more common terminology of "custody" and "visitation" typically employed by American courts and in the scholarly literature.

[2] *Id.*

[3] Care of Children Act 2004, ss 72(2)-73(2) (N.Z.).

[4] *Id.* s 75(1)-(2).

[5] *Id.* s 68(2).

extend their coercive control over their victims and argues that these warrants have become a tool of social entrapment for FV victims.

II. EUROPEAN HISTORY

Presumptions governing child custody after parental separation have changed over time, beginning with a presumption in favor of paternal custody, which gradually gave way to a presumption of maternal custody of young children, which finally was replaced with a facially gender-neutral "best interests" standard.

A. The *Pater Familias*

Traditionally in European law, wives and children were the property of their husbands and fathers. Men had near total dominion over their children with absolute rights to them as chattels.[6] Fathers were not required to feed, clothe, or house their children, they could sell them into indentured servitude, they could inflict any non-lethal corporal punishment on them, and there were no legal consequences for sexual abuse of them.

Under Roman law, every member of the household was a subject of the *pater familias*, and the family was defined by his power in *potestate* over its other members.[7] The household included wives, children, slaves, and the rest of the estate.[8] The concept of the *pater familias* was a crucial foundation of the Roman law of persons, property rights, and business transactions.[9] Only the *pater familias* had the capacity to own property.[10] Fatherless boys and childless men

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[6] *See* JAMES HADLEY, INTRODUCTION TO ROMAN LAW 105 (1873); *see also* FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 364-65 (1895).

[7] *See* Ulpianus, On the Edict, Book XLVI, 50 THE ENACTMENTS OF JUSTINIAN: THE DIGEST OR PANDECTS, tit. 16, §195(2); EVA CANTARELLA, PANDORA'S DAUGHTERS 115 (1986); FLORENCE DUPONT, DAILY LIFE IN ANCIENT ROME 103 (1993).

[8] *See* Richard P. Saller, Pater Familias, Mater Familias*, and the Gendered Semantics of the Roman Household*, 94 CLASSICAL PHILOLOGY 182, 184 (1999).

[9] *See id.* at 184-86.

[10] *See id.* at 184.

qualified as *pater familias* by virtue of being male if they were not under the *potestas* of another man.[11]

With the establishment of the common law, the English legal system borrowed principles and rules from the Roman legal system.[12] This borrowing included the doctrine of *pater familias*.[13] The English common law recognized the "rule of the father," which vested legal authority over and custody of legitimate children in their father, to the exclusion of the mother regardless of the children's welfare.[14] The father had a proprietary interest in any economic interest of the children.[15] Fathers had no legal duty to support their children.[16]

English common law also recognized the doctrine of "coverture," pursuant to which "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing . . . ."[17] Under coverture, all married women's property belonged to their husbands.[18]

The rule of the father, in conjunction with the doctrine of coverture, meant that fathers' dominion extended to custody determinations for children if parents separated.[19] Because, under the doctrine of coverture, married women lost their independent legal status and stood under their husbands' authority, on divorce, fathers had a nearly absolute right to custody of their children over their mothers. Because, under the rule of the father, fathers had the right to

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[11] *See* Ulpianus, Institutes, Book I, 1 THE ENACTMENTS OF JUSTINIAN: THE DIGEST OR PANDECTS, tit. 6, §4.

[12] *See* CARLETON ALLEN, LAW IN THE MAKING 262-64 (1961); Fritz Pringsheim, *The Inner Relationship Between English and Roman Law*, 5 CAMBRIDGE L.J. 347 (1935).

[13] Saller, *supra* note 8.

[14] N.V. Lowe, *The Legal Position of Parents and Children in English Law*, SING. J. LEGAL STUD. 332, 334 (1994).

[15] *See* Hall v. Hollander (1825) 107 Eng. Rep. 1206 (KB); *see also* John Eekelaar, *Family Law and Social Control*, *in* OXFORD ESSAYS IN JURISPRUDENCE 127-28 (John Eekelaar & John Bell eds., 3rd ed. 1987).

[16] *See* John Eekelaar, *The Emergence of Children's Rights*, 6 OXFORD J. LEGAL STUD. 161, 165 (1986).

[17] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1765).

[18] The doctrine of coverture was finally curtailed by the Married Women's Property Act 1870 (U.K.) and the Married Women's Property Protection Act 1880 (N.Z.).

[19] *See* P.H. Petit, *Parental Control and Guardianship*, *in* A CENTURY OF FAMILY LAW: 1857-1957 57, 59 (Ronald Harry Graveson & Francis Roger Crane eds., 1957).

benefit economically from their children's labor and household services, they had the right to custody and even to prevent mothers from having contact with children after separation.[20] For example, in *Agar-Ellis v. Lascelles*,[21] a father had custody of his sixteen-year-old daughter and denied the mother any contact or communication with her. The court upheld the mother's lack of contact on the ground that allowing the mother to communicate with the daughter might "alienate" her affection for the father. Cotton LJ cautioned:

> When by birth a child is subject to a father it is for the general interest of children and really for the interest of the particular infant that the Court should not, except in extreme cases interfere with the discretion of the father but leave to him the responsibility by exercising that power which nature has given by the birth of the child.[22]

Even if a father died, the mother would be denied custody and guardianship of the children if the father had appointed someone else as their testamentary guardian.[23] Children's welfare was simply not a consideration during this era.[24]

B. Georgian and Victorian Era Reforms

During the Georgian and Victorian eras in England, there was a wave of legal reform to promote children's welfare, some of which curtailed the previously absolute and superior rights of fathers.[25]

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[20] *Id.*
[21] Agar-Ellis v. Lascelles (1883) 24 Ch D 317.
[22] Lowe, *supra* note 14, at 335 (footnote omitted). It was not until the Guardianship of Infants Act 1925 (U.K.) that fathers and mothers were deemed to have equal claims to the custody and upbringing of the child.
[23] *See* Ward v. St. Paul (1789) 29 Eng. Rep. 320; Mellish v. De Costa (1737) 26 Eng. Rep. 405; Dillon v. Mount-Cashell (1727) 2 Eng . Rep. 207, 211; Petit, *supra* note 19, at 59-60.
[24] *See* Lowe, *supra* note 14, at 336.
[25] *See* Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Parental Custody*, 99 COLUM. L. REV. 1344, 1356, 1381-91 (1999).

Increasingly, courts could interfere with paternal custody rights if the father inflicted severe cruelty or abandoned his children and refused to support them.[26] Otherwise, consistent with the rule of the father and the doctrine of coverture, a father's right to custody and guardianship in relation to the mother during his lifetime remained intact unless he was extremely abusive, immoral, or negligent. It was during this period that child abuse came to public attention as a social phenomenon.[27]

These child-welfare reforms were not spurred by concern for children's well-being, but rather by concerns about the social ills inflicted on society by abandoned, mistreated street urchins. Ostensibly protective legislation was predicated on the idea that children were victims but also simultaneously threats to the established social and moral order.[28] As Harry Hendrick explains, child "victims were rarely allowed to reap the benefits of sympathy for their condition without the suspicion of what they might become . . . ."[29] The children's welfare reforms were part of the broader social movement that arose out of the study of eugenics and the belief that genetically inferior poor people were breeding excessively and spawning a generation of degenerates and imbeciles who would pollute the superior English genetic pool.[30]

In keeping with these concerns, courts began to interfere with paternal custody not just when the father abused or neglected children, but also if he married a woman who was socioeconomically inferior or to prevent his children from becoming destitute and therefore a burden on the State.[31] In 1774, in *Blisset's Case*, Lord Mansfield awarded custody of Children to Mother, but only because Father was financially unable to provide for them. Lord Mansfield explained: "The natural right is with the father; but if the father is a bankrupt, if he contributed nothing for the child or family, and if he be

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[26] *See* Petit, *supra* note 19, at 64-65.
[27] *See* Kieran Walsh, *Complicating the Duality: Reconceptualising the Construction of Children in Victorian Child Protection Law*, 33 J. HIST. SOCIO. 263, 263 (2020).
[28] *See id.* at 265.
[29] *Id.*; HARRY HENDRICK, CHILD WELFARE: ENGLAND 1872-1989 8 (1994).
[30] *See* Sybil Wolfram, *Eugenics and the Punishment of Incest Act 1908,* CRIM. L. REV. 308 (1983).
[31] *See* Roach v. Garvan (1748) 27 Eng. Rep. 954, 956; *see also* Lord Shipbrook v. Lord Hinchinbrook (1778) 21 Eng. Rep. 383, 383.

improper . . . the Court will not think it right that the child should be with him."[32]

Conversely, in 1804, in *De Manneville v. De Manneville*,[33] Mother filed an application for a writ of habeas corpus against Father for the return of eight-month-old Child whom Father had taken after their separation. Father came to Mother's house at night, removed Child from Mother's breast, and carried her away nearly naked in an open carriage in inclement weather. The Chancery Court refused Mother's application for custody even though Mother was in a far superior financial position to Father. The Court rejected Mother's argument that she should be awarded custody based on Child's best interests, ruling that Father was entitled "by law to the custody of his child."[34]

In 1824, in *Ex parte Skinner*,[35] the Court of Common Pleas held that a child in the physical "possession" of a father could not be removed and given to the mother, irrespective of the father's unfitness or how the father came to have the child in his custody, unless there was evidence that the father had engaged in extreme ill treatment of the child.

In 1827, in *Ball v. Ball*,[36] Father seized and hid Child, who had primarily been living with Mother. Mother, recognizing that custody was impossible, applied for a court order granting her contact with Child. The Court denied her application, lamenting that the legal "authorities" did not give him the power to do so.[37]

In 1836, in *R. v. Greenhill*,[38] Lord Denman reiterated that "proper custody" was "undoubtedly" the "custody of the father."[39] Lord Denman later lamented about his decision in *Greenhill*: "I believe that there was not one judge who had not felt ashamed of the state of

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[32] Blisset's Case (1774) 98 Eng. Rep. 899 (KB).
[33] De Manneville v. De Manneville (1804) 32 Eng. Rep. 762 (Ch).
[34] *Id.*
[35] Ex parte *Skinner* (1824) 27 Rev. Rep. 710.
[36] Ball v. Ball (1827) 57 Eng. Rep. 703.
[37] *Id.*
[38] King v. Greenhill (1836) 111 Eng. Rep. 922 (KB).
[39] *Id.* at 927-28.

the law and that it was such as to render it odious in the eyes of the country."[40]

It was not until an Act to Amend the Law Relating to the Custody of Infants Act 1839 ("Talfourd's Act") (U.K.) that mothers were given the legal right to petition for custody of children under the age of seven and for contact with older children unless the mother committed adultery. Talfourd's Act gave rise to the "tender years" doctrine, which presumed that young children should be placed with their mothers.[41] Even then, fathers' natural rights to custody were not abolished, but rather courts were merely given the discretion to abrogate their rights in egregious cases leading to "grievous wrong."[42] Talfourd's Act did not have a significant impact on paternal rights to possession of children on separation generally.[43] Even though the tender-years doctrine was presumably based on the assumption that it was in the best interests of young children to be in the care of their mothers, Talfourd's Act did not authorize or lead to a general consideration of the best interests of children in custody determinations. For example, in *In re Flynn*,[44] decided almost a decade after the amendment of the Custody of Infants Act, the court awarded custody to Father despite finding that he was mentally unstable because the court lacked the discretion to interfere with the rule of the father.

In 1867, the English Parliament passed the Neglected and Criminal Children Act (N.Z.) ("NZNCCA"), which gave courts the power to commit children to industrial schools. The preamble to the NZNCCA indicated that its purpose was to "provide for the care and custody of 'neglected' and 'convicted' children and to prevent the commission of crime by young persons."[45]

By the end of the welfare-reform era, children remained the chattel of their parents, but there were limitations on how parents

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[40] JOHN WROATH, UNTIL THEY ARE SEVEN: THE ORIGINS OF WOMEN'S LEGAL RIGHTS 50 (1998).
[41] Paul Millar & Sheldon Goldenberg, *A Critical Reading of the Evidence on Custody Determinations in Canada*, 21 CANADIAN FAM. L.Q. 425 (2004).
[42] Martha J. Bailey, *England's First* Custody of Infants Act, 20 QUEEN'S L.J. 391, 405-06 (1995).
[43] *See id.* at 406.
[44] In re Flynn (1848) 2 De.G. & Sm. 457.
[45] Neglected and Criminal Children Act 1867 (N.Z.).

could treat them. Under the Custody of Infants Act 1873 (U.K.), parental agreements about custody arrangements could not be enforced if the court did not think that they were for children's benefit.[46] The Guardianship of Infants Act 1886 (U.K.) required courts for the first time to have regard to children's welfare when deciding their custody arrangements.[47] The Prevention of Cruelty to, and Protection of, Children Act 1889 (U.K.) ("PCPCA") radically changed the laws relating to parental child abuse and neglect by criminalizing the ill-treatment, neglect, and abandonment of children[48] and permitting children to be taken into State care.[49] In the debates in the House of Lords over the adoption of the PCPCA, one Member of Parliament lamented that its purpose was granting children "almost the same protection that we give under the Cruelty to Animals Act and the Contagious Diseases Act for domestic animals" and cautioned that the Act should not be taken to "interfere with the legitimate conduct of parents."[50]

By the turn of the twentieth century, therefore, children in England (and English colonies) had roughly the same rights that pets and livestock have today. They were unquestionably not fully human, but they could not be gratuitously or cruelly mistreated or neglected. Private custody proceedings largely remained an issue of the rights of parents over their property, subject only to the canon of property law forbidding waste.[51]

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[46] The Custody of Infants Act 1873, 36 & 37 Vict. c. 12 (Eng.).
[47] Guardianship of Infants Act 1886, 49 & 50 Vict. c. 27 (Eng.).
[48] *See* Prevention of Cruelty to, and Protection of, Children Act 1889, 52 & 53 Vict. c. 44, § 1.
[49] *See id.* § 5.
[50] Walsh, *supra* note 27, at 270.
[51] Waste is an ancient common law writ dating back to the twelfth century. *See* MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 56.02 (8th ed. 2022). The Statute of Gloucester provided that a landlord could recover treble damages against a tenant for committing waste. The doctrine of waste applies when two or more individuals have interests in property, but at least one of them is not in possession – e.g., landlord and tenant. *See* Thomas W. Merrill, Melms v. Pabst Brewing Co. *and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1056 (2011). Waste is an action by the individual not in possession of the property to prevent the individual with possession from injuring the absent owner's interest in the property. *See id*. at 1056.

C. *Tikanga* Māori

The traditional English treatment of children stands in stark contrast to the place of *mokopuna* (children) in *tikanga* Māori (Māori customary law).[52] In pre-colonial *tikanga*, children were *taonga* (treasures), and to harm them was to harm the *atua* (gods).[53] Unlike in Victorian Britain, in pre-colonial Aotearoa (New Zealand), violence against children was almost entirely absent.[54]

When England colonized Aotearoa in 1840, English law was grafted onto New Zealand.[55] Legal practice in New Zealand regarding child welfare followed English legal practice, including statutes governing divorce, guardianship, and custody of children.[56]

Unfortunately, the cherished status of *tamariki* Māori, (Māori children) like so many other aspects of *tikanga*, was disrupted and decimated by colonialism. The breakdown of traditional *whānau* (family group) structures damaged the environments traditionally required for the safe upbringing of children for some *whānau*.[57] The loss of the structure of the *whānau* removed some of the protective factors that helped *tamariki* Māori thrive prior to colonization.[58]

D. Post-Victorian Child Welfare Law

In 1908, the New Zealand Parliament enacted the Infants Act.[59] It criminalized anyone "having the custody, control, or charge of a child" ill-treating, neglecting, or abandoning them.[60] It also authorized the issuance of "place of safety" warrants to search for, take, and detain

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[52] *See* Emily Keddell et al., *A fight for legitimacy: reflections on child protection reform, the reduction of baby removals, and child protection decision-making in Aotearoa New Zealand*, 17 KŌTUITUI: N.Z. J. SOC. SCIS. ONLINE 378 (2022).
[53] *See id.* at 384-88.
[54] *See id.* at 384.
[55] *See* B.J. Cameron, *Family Law Reforms in New Zealand*, 4 FAM. L.Q. 167 (1970).
[56] *See* B.D. INGLIS, SIM AND INGLIS FAMILY COURT CODE xx-xxiv (1983).
[57] *See* Rawiri Taonui, *Trends in Māori Child Abuse and Homicide*, *in* FUTURE CHALLENGES FOR MĀORI: HE KŌRERO ANAMATA 155 (Selwyn Katene & Malcolm Mulholland eds., 2013).
[58] *See* Leonie Pīhama et al., *Te Pā Harakeke: Whānau as a Site of Wellbeing*, *in* ETHNOGRAPHIES IN PAN PACIFIC RESEARCH 251 (R.E. Rinehart et al. eds., 2015).
[59] Infants Act 1908 (N.Z.).
[60] *Id.* s 28.

children who were being ill-treated or neglected.[61] This was the precursor to section 39 of the Oranga Tamariki Act 1989 ("OTA").[62]

The concept of the best interests of the child did not enter English law until 1925. The Guardianship of Infants Act 1925 (U.K.) provided that, in deciding issues concerning the care or upbringing of children, courts were to regard children's welfare as the first and paramount consideration.[63] The best-interests standard was not introduced out of concern for child welfare but rather to stymie feminist demands for equality of parental rights.[64] For example, in *Parsons v. Parsons*, Judge Smith found that the welfare of a male child, "in all ordinary circumstances" would be furthered by having "the care and guidance of its father" and "it would be better that the husband should have the custody of the child."[65]

E. Legislative History: The Guardianship Acts and CoCA

Sections 72 and 73 are not new. They are vestiges of the time when children were property. Child-custody laws were originally derived from the laws of inheritance and property ownership.[66] The language of "custody" and "access" demonstrates children's status as property under the law. "Custody" is what an owner or bailor has over a chattel, an item of personal property. "Access" is what an owner, renter, or temporary possessor of land has to it.

The arrest provisions contained in CoCA §§ 72 and 73 date back to the Guardianship Act 1968 ("GA"). GA § 19 read:

> (1) Where any person is entitled to the custody of a child, whether pursuant to this Act or to the order of a

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[61] *Id.* s 32.
[62] Oranga Tamariki Act 1989 (N.Z.).
[63] The Guardianship of Infants Act 1925, 15 & 16 Geo. 5 c. 45 (Eng.).
[64] *See* SUSAN MAIDMENT, CHILD CUSTODY AND DIVORCE 131-40 (1984).
[65] Parsons v. Parsons [1928] NZLR 477 (NZSC) at 479 (N.Z.).
[66] *See* PEREGRINE BINGHAM, THE LAW OF INFANCY AND COVERTURE 159 (Edmund Hatch Bennett ed.,1824); EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON (17th ed., 1817); FRANCIS HARGRAVE & CHARLES BUTLER, NOTES ON LORD COKE'S FIRST INSTITUTE, OR COMMENTARY UPON LITTLETON (1794).

> Court, the Court may at any time, on the application of the person so entitled to custody, issue a warrant authorising any constable or Child Welfare Officer or any other person named in the warrant to take possession of the child and to deliver him to the person entitled to custody . . . .
> (2) The Court may at any time, on the application of the person entitled to access to a child pursuant to an order of the Court, issue a warrant authorising any constable or Child Welfare Officer or any other person named in the warrant to take possession of the child and deliver him to the person entitled to access in accordance with the order.
> (3) The powers conferred on a Court by subsections (1) and (2) of this section may, if the Court thinks fit, be exercised on the making of the order.
> (4) For the purpose of executing any warrant issued under subsection (1) or subsection (2) of this section, any constable or Child Welfare Officer or any other person named in the warrant, may enter and search any building, aircraft, ship, vehicle, premises, or place, with or without assistance and by force if necessary . . . .
> (9) . . . [I]n considering an application under subsection (1) or subsection (2) of this section, or any other application to enforce a right of custody or access, the Court shall not grant the application contrary to the wishes of the child if the child is of or over the age of sixteen years unless the child is under the age of eighteen years and the Court is satisfied that his moral welfare so requires.[67]

In 1993, New Zealand ratified the United Nations Convention on the Rights of the Child ("UNCRC").[68] In 2004, the New Zealand Parliament repealed the GA and replaced it with CoCA. In doing so,

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[67] Guardianship Act 1968, s 19 (N.Z.).
[68] Convention on the Rights of the Child, *ratified* Apr. 6, 1993, 1577 U.N.T.S. 3 [hereinafter UNCRC].

they modernized much of the law involving the care of children. One significant set of changes involved terminology. Where the old GA regulated "custody" of and "access" to children,[69] the new CoCA regulated "care" of and "contact" with children.[70] These were no mere scriveners' amendments. The changes were meant to signify a deeper philosophical shift, through which children were recognized as human beings with human rights and parents were recognized as having obligations to children rather than rights of ownership over them. They were meant to recognize children's humanity and bring New Zealand in line with its obligations under the UNCRC. As the Honorable David Benson-Pope, the Associate Minister of Justice who moved for the new CoCA's second reading, explained: "[M]any people see the current terminology as treating children as a commodity—an outdated approach that is at odds with the rise of children as participants in, rather than the subjects of, proceedings."[71]

Unfortunately, however, whoever cut and paste GA § 19 into new CoCA §§ 72 and 73 missed the forest for the trees. The CoCA amendments divided GA § 19 in two and changed its terminology, but they made no substantive changes to its contents. They removed the term "possession" and changed "custody" and "access" to "care" and "contact" in keeping with the overall amendments to CoCA. Otherwise, they essentially took a section of the GA that authorized the arbitrary and unlawful arrest of children to enforce a parent's rights to custody or access and replaced it with new sections of CoCA that authorize the arbitrary and unlawful arrest of children to enforce a parent's rights to care or contact. The language changed, but the underlying violation of children's basic human rights remained.

There were 379 submissions to Parliament when they considered the new CoCA in 2004.[72] Only a handful of submissions addressed the use of police "to pick up and deliver a child to the party

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[69] *See, e.g.*, Guardianship Act 1968, s 18 (N.Z.).
[70] *See, e.g.*, Care of Children Act 2004, s 4(1)(b) (N.Z.).
[71] (21 Oct. 2004) 621 NZPD 16415.
[72] MINISTRY OF SOC. DEV., SUMMARY ANALYSIS OF SUBMISSIONS IN RESPONSE TO THE DISCUSSION PAPER: RESPONSIBILITIES FOR CHILDREN: ESPECIALLY WHEN PARENTS PART § 8.6 (2001), https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/2001-summaryofguardianship.pdf [hereinafter *Summary Analysis*].

entitled to access or custody" as an enforcement mechanism "where one parent does not follow the agreed arrangement for access."[73] While the submissions did not agree about whether the police were the best mechanism for "delivery," no submitter objected in principle to using an arrest warrant for a child to punish a parent who was perceived to be violating a parenting order or as a form of "enforcement" of a custody or visitation order.[74]

III. CURRENT PRACTICE

CoCA §§ 72 and 73 continue to authorize an "enforcement" mechanism for the seizure and delivery of children to a person with a proprietary claim over them. Unlike the controversial "place of safety" uplift warrants that Oranga Tamariki (Child, Youth, and Family Services) ("OT") seeks,[75] a parent wanting the Family Court to arrest their child and hand them over under CoCA does not have to show that the child is in danger. They only need to show that the child is not in the place at the time ordered by the Court.[76]

Under CoCA § 64, the Family Court is supposed to consider whether issuing one of these warrants "would serve the welfare and best interests of the child who is the subject of the parenting order concerned,"[77] but, in practice, the Court does not engage in a best-interests analysis prior to issuing these warrants (because, of course, it is essentially never going to be in a child's best interests to be forcibly arrested and delivered by police to a custodian). CoCA § 64 prohibits the Court from issuing a warrant contrary to the child's views under CoCA §§ 72 and 73 for a child over the age of sixteen but is silent as to what the Court must do with younger children's views.[78]

Under CoCA § 6, the Court should presumably also ascertain and give weight to the child's views before issuing one of these warrants, given that CoCA § 6 applies to all proceedings involving

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[73] *Id.*
[74] *See id.*
[75] Oranga Tamariki Act 1989, s 39 (N.Z.).
[76] Care of Children Act 2004, ss 72, 73 (N.Z.).
[77] *Id.* s 64(1).
[78] *Id.* s 64(3).

custody of and visitation with a child.[79] This should not only entail ascertaining whether the child wants to be arrested and forcibly delivered to the person who seeks their seizure (which would almost never happen), but it should also entail ascertaining *why* the child is not going to the custody or visitation that the Court ordered. It is the child's reasons for failing to comply with the Court order that are crucially important in determining the weight to be given to them. In practice, however, the Court does not notify children that these warrants are being considered and rarely gives weight to the reasons why they have refused the contact being enforced before their issuance.

The way that the courts discuss these warrants demonstrates that the primary focus of the practice is on the rights of the parent who is being denied their court-ordered visits with a child and/or the Family Court's need to ensure its authority rather than on the rights or welfare of the children being arrested. For example, in *BDD v. IBG*,[80] the Family Court Judge, discussing his denial of Father's application for an arrest warrant for eleven-year-old Child, noted: "On his application, this Court had the discretion whether or not to issue the warrant and to deliver the child to him, thereby enabling him to exercise *his right to contact* . . . ."[81] In weighing whether to grant Father leave to appeal denial of the warrant, he noted that "*the father's entitlement to contact* in terms of the current Court order has been prejudiced and that has to be a relevant factor."[82] These comments are contrary to the paramountcy principle in CoCA § 4. The "right to contact" belongs to the child, not to the "eligible person."[83]

The ease and frequency with which these arrest warrants issue also demonstrate that they are about the rights of the *pater familias* rather than the welfare of children. A parent who wants their child arrested to force them to have court-ordered visitation can simply click a link on the New Zealand Ministry of Justice website and tick the box

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[79] *Id.* s 6(1)(a).
[80] *BDD v. IBG* [2006] NZFLR 862.
[81] *Id.* at [15] (emphasis added).
[82] *Id.* at [44] (emphasis added).
[83] *See* UNCRC, *supra* note 68, art. 9(3); Haslett v. Thornton [2000] NZFLR 200 at [44]; Y v. Z (1994) 12 NZFLR 192 (FC) at [196]; S v. D-GSW [1991] NZFLR 89 at 91.

labelled "issue a warrant" in a pre-filled form.[84] The parent must offer evidence in support of the application for the warrant, but CoCA does not require the parent to show that the child is in danger or that the arrest is otherwise in the child's welfare and best interests. According to Official Information Act data provided by the Ministry of Justice, between July 1, 2016, and June 30, 2022, the Family Court granted between 500 and 650 applications for what the Court calls "Warrants to Enforce" (i.e., arrest warrants for children under CoCA §§ 72 and 73) annually.[85]

Incredibly, the warrant for the child's arrest is often sought by the "lawyer for the child." For example, in *Armstrong v. Mann*,[86] the lawyer for the child "submitted that a warrant under s[ection] 73 of the Care of Children Act should be issued and it should lie in the Christchurch Family Court for enforcement by a social worker or police officer."[87]

In June 2022, the New Zealand Law Society hosted a three-day continuing legal education program for lawyers for the child.[88] One of the presentations by two experienced lawyers for the child addressed their recommended practice for when a child refuses contact with a parent whom the child believes is "unworthy and in some cases abusive" and the other parent "[d]oes not believe that child is safe in care of rejected parent" and has "tried their best to convince the child to go, but they don't want to and they can't be forced."[89] In that situation, the presenters recommended a court-ordered "change of residence" (from the protective parent's residence to the feared parent's residence) facilitated by transitional "foster care" and

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[84] *Care of Children*, MINISTRY JUST., https://www.justice.govt.nz/family/care-of-children (last visited Feb. 5, 2023).
[85] Ministry of Justice, Official Information Act Request: Sections 72 and 73 of Care of Children Act 2004 (CoCA), O.I.A. 98475 (Sept. 30, 2022) (on file with author).
[86] Armstrong v. Mann [2020] NZFC 1319.
[87] *Id.* at [174].
[88] *Lawyer for Child 2023*, N.Z.L. SOC'Y CONTINUING LEGAL EDUC., https://www.lawyerseducation.co.nz/shop/IntroductoryLevel2023/23LFC.html (last visited Feb. 5, 2023).
[89] Pip Cobcroft & Catherine Townsend, *The Role of Lawyer for Child in Cases with Resist-Refuse Alienation Dynamics*, *in* ADVANCED LAWYER FOR CHILD 2022, 40–41 (N.Z.L. Soc'y Continuing Legal Educ. ed., 2022).

enforced by police.[90] The presenters recommended this strategy even though they acknowledged: "In a few reported cases, children traumati[z]ed by change [sic]."[91] In other words, the Law Society trained lawyers for the child that, when a child resists having visitation with a violent parent, the "solution" is to force the child to live with the parent full-time and the change in custody should be enforced with an arrest warrant issued under CoCA § 72.

The Family Court issues these warrants prophylactically, as a threat to parents whom it views as obstructing its custody and visitation orders. For example, in *Malone v. Auckland Family Court*,[92] Mother had concern for the welfare of two-year-old Child.[93] The Family Court Judge issued an interim parenting order requiring Child to have weekly overnight visits with Father.[94] Mother opposed the overnight visits, which were a substantial change from Child's prior custody arrangements.[95] Prior to the court order, Mother had always been Child's primary caretaker.[96] Child became distressed when Mother handed him over to Father.[97] Child's general practitioner ("GP") diagnosed Child with "extreme separation anxiety" arising out of his overnight visits with Father.[98] The GP recommended that Mother take Child to a psychotherapist.[99] The psychotherapist offered affidavits in support of Mother's application to suspend Child's overnight visits with Father.[100] She testified that Child was too young to manage the new overnight visits with Father and recommended that they be suspended until Child was resilient enough to handle them.[101] The GP offered evidence that Child was experiencing

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[90] *Id.* at 44-45.
[91] *Id*. at 44.
[92] Malone v. Auckland Family Court [2014] NZHC 1290.
[93] *Id.* at [2].
[94] *Id*. at [5].
[95] *Id.*
[96] *Id*. at [13].
[97] *Id*. at [12].
[98] *Id.* at [7].
[99] *See id.*
[100] *See id.* at [12].
[101] *See id.*

separation anxiety because of the new custody arrangements, particularly the overnight visits with Father.[102]

Father sought to have the court's visitation orders "enforced by warrant."[103] The judge rejected the evidence of Child's GP and psychotherapist.[104] He issued "escalating orders, backed with warrants" to force Mother's compliance with the overnight visitation regime.[105] He ordered that Child was to have overnight visits with Father every weekend.[106] If overnight visits did not occur as ordered, visitation was to be extended for a longer period the following weekend.[107] He ordered: "Warrants shall issue to enforce these orders on every occasion for the next six weeks."[108] He further ordered: "In the event that a contact period does not occur and the additional contact is engaged, [Father's barrister] may advise the Registrar who shall issue a warrant without further process."[109] He made no findings that the "escalating orders," let alone issuing arrest warrants for a toddler, were in Child's best interests and delegated to Father's barrister the authority to trigger execution of the warrants. The escalating visits and warrants appear to have been issued solely to coerce Mother into dropping her opposition to overnight visitation.

This is not the only example of the Family Court advocating the use of child custody as a tool to punish parents whom it perceives are not "abiding" by decisions. In a 2009 editorial, then-Family Court Judge Dale Clarkson described the "sanction of losing primary care" as a "very motivating" tool to punish parents who disobey Family Court orders.[110] She insisted that forcing parents to abide by the Court's orders and modeling "respect for the Rule of Law" was "absolutely" in all children's best interests.[111] This is a disturbing understanding of the welfare and best interests of children. CoCA § 5

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[102] *See id.*
[103] *Id.* at [10].
[104] *See id.* at [12].
[105] *Id.* at [14].
[106] *See id.* at [15].
[107] *See id.*
[108] *Id.*
[109] *Id.*
[110] Dale Clarkson, *Contempt – Does the Family Court Finally Have Teeth?*, 6 N.Z. FAM. L.J. 187, 188 (2009).
[111] *Id.*

sets forth the relevant considerations in determining those interests, including children's rights to safety and continuity of care. The suggestion that a child should be ripped from the care of one parent and placed in the custody of another as a mechanism to penalize the custodial parent, with no consideration of the child's safety and stability, appears to be more about the best interests of the Court than the child whom Judge Clarkson advocates treating as an "incentive" to get parents to respect the Court's powers.

These practices make sense only if the children who are being repossessed by court order are property not people. The dog catcher does not ask a dog why it has run away or whether it wants to be returned to its owner; the Family Court does not ask a child who is refusing contact with a parent why they are resisting the court-ordered visits or whether they want to be forcibly delivered into it by police.

IV. REPLEVIN OF CHILDREN

A. "Taking" and "Delivering" Children to the "Entitled"

CoCA §§ 72 and 73 are striking because it is rare for the law to authorize one private citizen to seek the arrest of another private citizen, particularly in matters that are civil in nature. On the contrary, the civil law has a presumption in favor of legal remedies and disfavors equitable remedies like injunctions. One traditional exception to this preference is the writ of *replevin*. An action in *replevin* allows a property owner to recover misappropriated property instead of merely its monetary value.[112] When an individual with an inferior legal right of possession over an item of personal property refuses to return it to an individual with a superior right of possession, when the item of property is unique, non-fungible, and sentimental in nature, the law permits the individual with the superior right of possession to seek a writ of *detinue* and *replevin* – a court order authorizing the police to seize and return the property to them.[113]

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[112] *See* ELIZABETH H. DOW, ARCHIVISTS, COLLECTORS, DEALERS, AND REPLEVIN: CASE STUDIES ON PRIVATE OWNERSHIP OF PUBLIC DOCUMENTS (2012).
[113] *See id.*

The use of *replevin* in English law traces back to at least the middle of the thirteenth century.[114] *Replevin* can be maintained not only for the unlawful taking but also for the unlawful detention of property.[115] In order to institute an action in *replevin*, the plaintiff must demonstrate that: (1) they have a legal right of possession in the property; (2) the defendant lacks the legal right to possess the property; and (3) the property did not leave the plaintiff's custody as the result of an adverse legal action.[116]

A plaintiff seeking *replevin* of property must demonstrate a possessory interest in the goods or chattels being detained.[117] It is "the right to possession that usually beats at replevin's heart."[118] Typically, establishing a possessory interest requires a demonstration that the defendant wrongfully came into possession of or retained the contested property.

For example, in *Koerner v. Nielsen*,[119] a woman brought an action in *replevin* against her former partner for possession of their dog.[120] The court explained that she bore the onus of proving that she was entitled to lawful possession of the dog, her former partner wrongfully detained the dog (violating her possessory interest), and he refused to deliver the dog to her.[121]

If an action in *replevin* is successful, the court orders the police to secure and deliver (*detinue* and *replevin*) the property to the party entitled thereto. A writ of *replevin* includes the subsidiary rights of the police to enter private property to seize the misappropriated item and to use reasonable force to secure its seizure and delivery, if necessary,

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[114] *See id.*
[115] *See* J.E. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN AS ADMINISTERED BY THE COURTS OF THE UNITED STATES 37 (1890).
[116] *See* MENZI L. BEHRND-KLODT, NAVIGATING LEGAL ISSUES IN ARCHIVES 169 (2008).
[117] *See* Johnson v. Am. First Fed., Inc., 133 So. 3d 559, 561 (Fla. 1st DCA 2014); SEIU Healthcare Nw. Training P'ship v. Evergreen Freedom Found., 427 P.3d 688, 695 (Wash. Ct. App. 2018); COBBEY, *supra* note 115, at 52.
[118] Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and de Homine Replegiando*, 37 GOLDEN GATE U.L. REV. 219, 246 (2007).
[119] Koerner v. Nielsen, 8 N.E.3d 161, (Ill. App. Ct. 2014).
[120] *See id.*
[121] *Id.* at 164.

usually enforced by the issuance of a search and seizure warrant for the missing property.

The language and procedures of CoCA §§ 72 and 73 are the language and procedures of *replevin*. They authorize a person who is "eligible" because they are "entitled" to care of or contact with a child to apply for a warrant authorizing a constable to "take" and "deliver" the child to them. The language of CoCA § 75, which governs the execution of these arrest warrants, supports this interpretation. Section 75 repeatedly describes the seizure of the child by the police as taking "possession of the child."[122]

Replevin has been used in other contexts as a legal remedy to recover people who did not have recognized legal status as humans. For example, in the United States, prior to the passage of the Fugitive Slave Act 1850, *replevin* was one mechanism by which "owners" of enslaved people could recover them when they were possessed or harbored by someone with a lesser possessory interest in their fugitive "property."[123] Enslaved people in the United States in the eighteenth and early nineteenth centuries had the same double status that children have in New Zealand today—they were, "on the one hand, property, meant to be returned to their rightful owners, and, on the other, people, capable of committing and being held responsible for crimes."[124]

B. Legislative History

There is surprisingly little legislative history to CoCA §§ 72 and 73, likely because the provisions originated in the GA 1968. The little legislative history that exists supports the claim that they authorize what is essentially an action in *replevin* for children.

In August 2000, the Associate Minister of Justice, the Honorable Margaret Wilson, and the Minister of Social Services and Employment, the Honorable Steve Maharey, released a discussion paper entitled *Responsibilities for Children: Especially When Parents Part – The Laws About Guardianship, Custody and Access*, raising questions

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[122] Care of Children Act 2004, s 75(2) (N.Z.).
[123] Alice L. Baumgartner, *Enforcing the Fugitive Slave Acts in the South: Federalism, Irony, and the Conflict of Jurisdictions, 1787-1861*, 88 J. S. HIST. 475, 482 (2022).
[124] *Id.* at 486.

concerning the law on guardianship and custody of children.[125] In 2001, the Ministry of Social Development released a summary analysis of the submissions received in response to the discussion paper. The provisions in the GA relating to "enforcement" of parenting orders occupied only about one page at the end of the lengthy document.[126] The summary analysis described the primary "enforcement" issue as being the ability of one parent "to have *their rights enforced*" when a child's other parent "does not follow the agreed arrangement for access."[127] It described the Family Court's existing enforcement powers as including issuing a warrant to authorize the police "to pick up and deliver a child to the party entitled to access or custody."[128] It notes: "The majority of submissions addressing this area were concerned with the situation in which a custodial parent was not complying with the access arrangements set out in a court order."[129] This discussion is the opposite of child centered. It focuses on the "rights" of the parent who seeks the warrant and the non-compliance of the parent who has physical custody of the child, and it discusses the child only as an object whose legal possession is being contested.

The only reference in the entire document that comes close to contemplating the humanity of the children being arrested is a six-word reference to a single comment: "Use of the police is upsetting."[130] It is unclear, however, whether even this single reference to the potential trauma stemming from these enforcement arrests contemplates trauma to the children being seized, the parent from whom they are seized, or the police. It is clear, therefore, that, prior to enacting CoCA, Parliament contemplated the arrest-warrant provisions of the GA before including them in CoCA, but it appears that no submissions even raised the question of whether these warrants violated children's human rights.

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[125] Margaret Wilson, *Responsibilities for children – especially when parents part*, N.Z. GOV'T (Aug. 15, 2000), https://www.beehive.govt.nz/speech/responsibilities-children-%E2%80%93-especially-when-parents-part.
[126] *Summary Analysis*, *supra* note 72.
[127] *Id.* (emphasis added).
[128] *Id.*
[129] *Id.*
[130] *Id.*

V. THE LAW OF ARREST

Because the seizure provisions of CoCA §§ 72 and 73 treat children like they have traditionally been treated, as contested property rather than human beings, the Family Court has never addressed the nature of these search and seizure warrants for children or what justifications or limitations might be required to order the arrest of a human being, beyond the provisions of CoCA §§ 68 through 75. Although the Court fails to recognize it, these seizures are "arrests" as that term has developed and been understood over centuries of common law and international human rights law. Furthermore, they are arrests that lack sufficient legal justification—in other words, they are arbitrary and unlawful detentions.

Arrest, as that term is understood in international law, need not involve a formal arrest as defined under domestic law.[131] An arrest occurs whenever a person, acting under legal authority, seizes another person under circumstances that indicate that the seized person is not free to leave or refuse to go where directed.[132] Arrests include detentions effectuated through a threat or show of authority.[133] For example, handcuffing suspects and moving them away from the scene of a crime for observation constitutes a detention.[134] The test for when an individual is arrested has both subjective and objective components: a person has been arrested when they reasonably believe, based on the circumstances, that they are not free to decline the show of authority, leave, or otherwise terminate the encounter.[135] Even if children acquiesce in their detentions, their acquiescence does not change their involuntary nature. An individual has been detained whenever they would not be permitted to leave if they tried to do so.[136]

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[131] *See* UN Hum. Rts. Comm., *General Comment No. 35: Article 9 (Liberty and security of person)*, ¶ 13, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter HRC *General Comment No. 35*].
[132] *See* R v. P (1996) 3 NZLR 132 (CA) at 136 (N.Z.); John Dawson, *Powers to Detain*, *in* HEALTH LAW IN NEW ZEALAND 457 (P. D. G. Skegg & Ron Paterson eds., 2015).
[133] *See* R v. M (1995) 1 NZLR 242 (HC) at 245 (N.Z.).
[134] *See* Dunlea v. Attorney-General (2000) 3 NZLR 136 (CA) (N.Z.).
[135] R. v. Goodwin (No 2) (1993) 2 NZLR 390 (CA) at 393 (N.Z.).
[136] R. v. Bournewood Cmty. & Mental Health NHS Trust (1998) 3 All ER 289 at 306-07 (Eng.).

An arrest is an act of State-sanctioned violence. The conduct underlying an arrest—entering a private home, laying hands on another person, detaining them, and taking them away against their will—are actions that, but for legal authority, would be serious crimes: trespassing, burglary, assault, and kidnapping. What differentiates an arrest from assault or kidnapping is legal authorization—either by statute or judicial warrant. The Crimes Act 1961 (N.Z.) creates specific defenses for individuals who use force during arrests.[137]

Terminology is immaterial. An arrest is not an arrest because a statute labels it an "arrest" or because police, when executing a warrant, say, "You are hereby under arrest." An arrest is an arrest because it has the components described above: show of official authority, seizure, inability to reasonably decline, detention, and restriction on freedom of movement. If the Government could avoid the restrictions on its power to arrest through creative renaming, there would be a lot of suspects headed to police cells in a compulsory conga line.

Traditionally, there have been two types of limitations on the Government's ability to seize and detain people: substantive limitations and procedural limitations.[138] The substantive limitations on arrests relate to the sufficiency of the justification(s) for the restrictions on the person's liberty. The procedural limitations stem from the due process requirements of notice and a right to be heard. Increasingly, there is a third type of requirement that falls in between this traditional dichotomy: the requirement that custodial arrest be the least restrictive intervention to accomplish the substantive justifications for the arrest, even if the arrest is substantively justified.

There are two primary substantive justifications for the State's power of arrest: public safety and *parens patriae*. The public-safety rationale allows the State to detain people when it is necessary to do so for the protection of the public. Public safety is what allows police to arrest people who have committed serious crimes and courts to remand them to pretrial detention awaiting trial; detain people with serious mental illness when they pose a serious danger to the health or safety of other people;[139] and detain young persons when they might

[137] Crimes Act 1961, s 26 (N.Z.).
[138] Neilsen v. Attorney-General (2001) 3 NZLR 433 (CA) at 441 (N.Z.).
[139] *See* Mental Health Act 1992, s 2 (N.Z.).

commit further offences, destroy evidence, or tamper with witnesses.[140] The public-safety rationale derives from the harm principle—the idea that the only purpose for which the State can legitimately interfere with the liberty of an autonomous individual is to prevent harm to others.[141]

The *parens patriae* rationale allows the State to detain people when it is necessary to do so for their own protection. Under the Mental Health Act 1992 (N.Z.) ("MHA"), *parens patriae* allows the courts to detain people with serious mental illness when they pose a serious danger to their own health or safety or their mental illness seriously diminishes their capacity for self-care.[142] It also allows courts to detain children and place them in foster care when they are unsafe in their homes.[143]

Neither of these justifications apply to the typical situation in which a child is detained under CoCA §§ 72 or 73. Under CoCA, the child is being arrested as an enforcement mechanism, not to protect them or others from harm.

Even when sufficient justification exists to detain an individual using the power of arrest, there are still procedural requirements that must be met. Generally, the person whom the State seeks to detain must first be given notice of the grounds for the arrest and an opportunity to respond. The requirements of notice and a right to be heard prior to detention can only be dispensed with if there are exigent circumstances such that advanced notice and the time to respond would themselves create a risk of harm to the public or the person whose restraint is being sought.

For example, OT can only seek a "place of safety" warrant for a child on an *ex parte* basis if giving notice prior to removal would place the child at risk of further harm.[144] This is why the Family Violence Act 2018 (N.Z.) authorizes the Family Court to issue temporary protection orders without notice to the FV perpetrator—so that the perpetrator does not harm the applicant in the response period. It is also why the police do not notify criminal suspects that they are going to be arrested

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[140] *See* Oranga Tamariki Act 1989, ss 208, 214 (N.Z.).
[141] *See* JOHN STUART MILL, ON LIBERTY 14 (1859).
[142] *See* Mental Health Act 1992, s 2 (N.Z.).
[143] *See* Oranga Tamariki Act 1989, ss 39, 40 (N.Z.).
[144] *Id.* s 220.

before it happens—so that they cannot flee, violently resist, or harm the public. Notice and response can be curtailed in these circumstances because of their emergency nature. No such comparable emergency exists to justify dispensing with providing notice and an opportunity to be heard to a child prior to the Court authorizing their custodial arrest as a delivery mechanism to enforce a parenting order.

Furthermore, even in emergency situations, the restrained person eventually gets an opportunity to be heard, albeit after the initial detention. For example, when children are seized and removed from their homes due to concerns about their safety, they have a right to judicial review of their removal and placement in foster care within five days.[145] Children who are arrested pursuant to CoCA §§ 72 and 73 have no right to challenge the lawfulness of their arrest and detention because they are viewed as contested property rather than the human subjects of arrest.

The limitations on the State's power to arrest exist because arrests occur in situations in which there are significant countervailing interests. On the one hand, the arrestee has weighty interests in freedom of movement and freedom from arbitrary restraint. On the other hand, the public has an interest in safety and preventing individuals from committing acts of self-harm. These countervailing interests are sometimes categorized as negative rights (the right to be free from arbitrary detention) and positive rights (the rights to life, safety, and health). When an individual poses a danger to others or they themselves are in danger, the harm done to the person and their rights by the arrest is outweighed by the harm that would occur if they were not detained.

The final requirement, even when an arrest is justified and an individual has been given notice and a right to respond, is that the arrest is the least restrictive method by which the safety of that person or the community can be secured. This is the reason why the MHA prefers community treatment when individuals are subject to civil commitment,[146] and the Protection of Personal and Property Rights Act 1988 (N.Z.) ("PPPRA") requires courts "to make the least restrictive intervention possible in the life of" individuals who lack

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[145] *See id.* s 45.
[146] *See* Mental Health Act 1992, s 28(2).

decision-making capacity with regard to their personal care and welfare.[147] It is also the reason why OT recently agreed to curtail its use of "uplift warrants" under the OTA: just because they can arrest children to get them to a place of safety does not mean that they should, particularly if less traumatic methods are available. Unfortunately, neither the New Zealand Parliament nor the New Zealand Family Court has placed a limitation on the Court's use of arrest warrants for children under CoCA by requiring that they be issued only to protect a child subject to a CoCA parenting order from harm when the Court has no other less restrictive method through which to do so.

VI. THE TRAUMA OF ARREST

Arrests are inherently violent and traumatic experiences for anyone. The trauma is heightened for vulnerable children because they differ from adults in their physical and psychological development.[148] Arresting a child has the potential to create lasting traumatic stress.[149] When a child is arrested, the resulting confusion can cause them to lose trust in the people and institutions that they are supposed to trust, such as teachers, police officers, judges, and even adults in general.[150]

The New Zealand Parliament has recognized the traumatic and rights-violative nature of unnecessary arrests, particularly of children, and has limited the situations in which they can occur. The OTA severely limits the powers of police to arrest children when they are suspected of criminal behavior.[151] For example, it requires that "unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an

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[147] Protection of Personal and Property Rights Act 1988, s 8 (N.Z.).

[148] *See* UN Comm. on Rts. of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system*, ¶ 2, U.N. Doc. CRC/C/GC/24 (Sept. 18, 2019) [hereinafter CRC *General Comment No. 24*].

[149] *See* Andrea Ball et al., *'She looks like a baby': Why do kids as young as 5 or 6 still get arrested at schools?,* CTR. FOR PUB. INTEGRITY (Feb. 10, 2022), https://publicintegrity.org/education/criminalizing-kids/young-kids-arrested-at-schools.

[150] *See id.*

[151] *See* Oranga Tamariki Act 1989, s 208.

alternative means of dealing with the matter."[152] The police can arrest children who have been found committing offences or are reasonably suspected of committing offences without a warrant, but only if a summons would be ineffective or an arrest is necessary to ensure the appearance of the child before a court, to prevent the child from committing further offenses, or to prevent the loss or destruction of relevant evidence or interference with a witness.[153]

The Family Court does not appear to recognize the traumatic effect that arrest can have on a child. For example, in *CLS v. DCDS*,[154] the court addressed Father's complaint that the lawyer for the child had opposed the execution of an arrest warrant for Children to deliver them to Father for visits.[155] The judge indicated that executing arrest warrants for children was "a remedy of last resort because of the impact it has on children's willingness to comply with a contact order" and was "counterproductive" as a means of "encourag[ing] compliance."[156] Similarly, in *PW v. CM*,[157] the Family Court exercised its discretion to decline to issue a "Warrant to Enforce" Father's visitation with fourteen-year-old Child under the GA because issuing the warrant would only "create a greater reluctance" in Child to visit Father and reduce the "possibility of future reconciliation."[158] Neither judge expressed any recognition that an arrest was violent, traumatic, or an infringement on children's human rights or that arrests should be a last resort because of the effect that they have on children's physical and emotional wellbeing, rather than merely their future willingness to comply with court orders.

VII. CHILDREN'S HUMAN RIGHTS

These arrests impose a significant restriction on children's freedom of movement. The limitations on the State's powers of arrest

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[152] *Id.* s 208(2)(a).
[153] *Id.* s 214.
[154] CLS v. DCDS [2012] NZFC 8084.
[155] *See id.* at [48].
[156] *Id.* at [50].
[157] PW v. CM, FC FAM-2000-019-1379, 21 September 2004 (N.Z.).
[158] *Id.* at [39].

exist to uphold rights and freedoms enshrined in BoRA and international human rights agreements that New Zealand has ratified.

The arrests authorized by CoCA §§ 72 and 73 violate significant rights that all people in Aotearoa New Zealand, including children, have under BoRA,[159] the International Convention on Civil and Political Rights ("ICCPR"),[160] and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").[161] They also violate special rights that children have under international law by virtue of their vulnerable status as children under the UNCRC. The ICCPR, the CAT, and the UNCRC have binding force under international law on the Contracting States, including New Zealand.

A. Unjustifiable Restriction on Liberty

The arrests authorized by CoCA §§ 72 and 73 are an unjustifiable restriction on children's liberty and security, protected by BoRA, the ICCPR, and the UNCRC. BoRA § 22 guarantees the rights to liberty and freedom from arrest and arbitrary detention and the right to be detained by the State only according to law. Article 9(1) of the ICCPR and Article 37(b) of the UNCRC also guarantee freedom from arbitrary detention. This freedom applies to all deprivations of liberty, not just those related to criminal cases.[162] Deprivation of liberty includes involuntary transportation.[163]

An arrest or detention may be authorized by New Zealand's domestic law and nonetheless be arbitrary.[164] "Unlawful" detention includes both detention that violates domestic law and detention that is incompatible with the requirements of the ICCPR.[165] The notion of "arbitrariness" therefore should not be equated with "against the law" but rather must be interpreted more broadly to include elements of

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[159] New Zealand Bill of Rights Act 1990, s 23(1)(c) (N.Z.).
[160] International Convention on Civil and Political Rights, *ratified* Dec. 28, 1978, 999 U.N.T.S. 171 [hereinafter ICCPR].
[161] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *ratified* Dec. 10, 1989, 1465 U.N.T.S. 85 [hereinafter CAT].
[162] *See* HRC *General Comment No. 35*, *supra* note 131, ¶ 4.
[163] *See id.* ¶ 5.
[164] *See id.* ¶ 12.
[165] *See id.* ¶ 44.

inappropriateness, injustice, and lack of predictability and due process, as well as reasonableness, necessity, and proportionality.[166]

The right to security of person protects individuals against the intentional infliction of bodily or mental injury, regardless of whether they are detained.[167] It protects interests in bodily and mental integrity.[168] These arbitrary detentions of children for the purpose of delivering them to unsafe parents are themselves life-threatening and violate both the rights to personal liberty and personal security and the right to protection of life.[169]

The European Court of Human Rights ("ECtHR") has explained, in interpreting section 5 of the European Convention on Human Rights:

> [The right to liberty and security] is of the highest importance "in a democratic society" within the meaning of the Convention.
> All persons are entitled to the protection of this right, that is to say, not to be deprived, or continue to be deprived, of their liberty . . . save in accordance with the conditions specified in paragraph 1 of Article 5.
> The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one . . . and only a narrow interpretation of those exceptions is consistent with the aim of that provision.[170]

The ECtHR also explained:

> The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its

[166] *Id.* ¶ 12.
[167] *See id.* ¶ 9.
[168] *See id.* ¶ 56.
[169] *See id.* ¶ 55.
[170] Medvedyev et al. v. France, App. No. 3394/03, Eur. Ct. H.R. ¶¶ 76-78 (2010).

> application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.[171]

Everyone who is arrested or detained has the right to have the validity of their detention determined without delay and to be released if the arrest or detention is unlawful.[172] The ICCPR confers the right of anyone deprived of liberty by arrest or detention to challenge the lawfulness of their detention in court and to be released if the detention is unlawful.[173]

BoRA and the ICCPR also confer the right to freedom of movement.[174] For example, the police preventing a person from proceeding along a road because they might frustrate an unfolding police inquiry is a breach of the freedom of movement.[175] Arrest clearly limits the subject's freedom of movement.[176] Arresting children for exercising their fundamental rights to safety and freedom of movement constitutes unlawful and arbitrary detention.

B. Ill Treatment

BoRA § 9 and ICCPR Article 7 confer a right not to be subjected to torture or to cruel, degrading, or inhuman treatment or punishment. "Torture," as defined by the CAT, includes any act of physical or mental pain or suffering inflicted for punishment with the acquiescence of an official authority.[177] Torture under BoRA does not

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[171] *Id.* ¶ 80.
[172] *See* New Zealand Bill of Rights Act 1990, s 23(1)(c) (N.Z.).
[173] *See* ICCPR, *supra* note 160, art. 9(4).
[174] *See* New Zealand Bill of Rights Act 1990, s 18(1) (N.Z.); ICCPR, *supra* note 160, art. 12(1).
[175] *See* R v. Allison, HC Auckland T0024811, 9 April 2003 (N.Z.); Kerr v. Attorney-General [1996] 4 HRNZ 270.
[176] *See* McMahon v. R [2009] NZCA 472 (CA) at [69] (N.Z.).
[177] *See* CAT, *supra* note 161, art. 1(1).

require that ill treatment be deliberate.[178] The ECtHR has held that ill-treatment is degrading if it "humiliates or debases an individual, showing a lack of respect for, or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking the individual's moral and physical resistance . . . ."[179] Seizing, detaining, and transporting children against their will into the court-ordered custody of parents whom they fear meets this definition. These arbitrary detentions create risks of torture and ill-treatment for the children subjected to them.

The CAT obligates New Zealand to take effective legislative, administrative, and judicial measures to prevent acts of torture in any territory under its jurisdiction.[180] It obligates New Zealand to prevent other acts of cruel, inhuman, or degrading treatment or punishment that do not amount to torture when they are committed with the consent or acquiescence of an official authority.[181] It obligates New Zealand to review the treatment of persons subject to arrest or detention under its jurisdiction to prevent them from experiencing torture or cruel, inhuman, or degrading treatment.[182] It also obligates New Zealand to ensure that any individual who alleges that they have been subjected to torture or cruel, inhuman, or degrading treatment has rights to complain, to have a prompt review of their allegations, and to seek redress and rehabilitation.[183] The failure to display the required diligence to prevent the recurrence of FV against a victim and allowing an offender to continue to inflict violence with impunity can amount to ill treatment.[184]

The CAT imposes obligations on State parties, not individuals. New Zealand therefore bears international responsibility for the acts and omissions of anyone acting in official capacity or on behalf of the State, in conjunction with the State, under its direction or control, or

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[178] *See* Attorney-General v. Zaoui, SC CIV 13/2004, 25 November 2004 at [14] (N.Z.).
[179] Pretty v. United Kingdom, App. No. 2346/02, Eur. Ct. H.R. ¶ 71 (2002).
[180] *See* CAT, *supra* note 161, art. 2(1).
[181] *Id.* art. 16(1).
[182] *Id.* art. 11, 16(1).
[183] *Id.* art. 13, 14, 16(1).
[184] *See* Opuz v. Turkey, App. No. 33401/02, 50 Eur. Ct. H.R. 28 (2009).

otherwise under color of law.[185] Accordingly, New Zealand is obligated to prohibit, prevent, and redress torture and ill-treatment in all contexts in which the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.[186]

Since the failure to exercise due diligence to intervene to stop, sanction, and provide remedies to victims of ill treatment enables non-State actors to commit acts prohibited by the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.[187] The Committee has applied this principle to States parties' failure to prevent and protect victims from FV.[188] If a person is transferred or sent to the custody or control of an individual known to have engaged in torture or ill-treatment, the State can be held responsible for ordering, permitting, or participating in the transfer contrary to its obligation to take effective measures to prevent ill treatment.[189]

The CAT specifically obligates New Zealand to protect marginalized individuals or populations especially at risk of ill-treatment.[190] It must ensure the protection of vulnerable members of groups, including children, by fully prosecuting and punishing all acts of violence and abuse.[191] Returning a child to the custody of a parent in which they face a substantial likelihood of abuse may amount to inhuman treatment prohibited by Article 7 of the ICCPR.

C. Due Process

BoRA § 27 guarantees the right to the observance of principles of due process and natural justice to all people. This right extends to children who are arrested under Family Court orders.[192]

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[185] *See* U.N. Comm. Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT *General Comment No. 2*].
[186] *See id.*
[187] *See id.* ¶ 18.
[188] *See id.*
[189] *See id.* ¶ 19.
[190] *See id.* ¶ 21.
[191] *See id.*
[192] *See* Medvedyev et al. v. France, App. No. 3394/03, Eur. Ct. H.R. ¶ 21 (2010).

The rights that children have under BoRA (the freedom from unjustifiable restrictions on their liberty, the freedom from cruel and inhuman treatment, and the right to due process and natural justice) can be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[193] Every child who is seized and detained under CoCA §§ 72 or 73 is entitled, at a minimum, to challenge the lawfulness of their detention, including through the prompt assistance of counsel of their choosing.[194] Under the UNCRC, children have a right to be heard in relation to any decision regarding a deprivation of liberty, and the procedures employed should be child-appropriate.[195]

D. Children's Special Rights

Children also have special rights under the UNCRC and ICCPR, to which Aotearoa New Zealand is a party. The UNCRC recognizes the special status of children and reaffirms the application of the standards in the core UN human rights instruments to individuals under the age of eighteen.[196] Article 2 prohibits children from being punished because of the activities of their parents. Article 3 requires courts to treat the best interests of children as their primary consideration. Article 12 requires courts to provide children with the opportunity to be heard and have their views given due weight in matters affecting them. Article 16 protects children from arbitrary or unlawful interference with their privacy, family, or home. Article 19 protects children from physical or mental violence, injury, abuse, or maltreatment. Article 37 prohibits depriving children of their liberty unlawfully or arbitrarily. It specifically requires that arresting children "shall be used only as a measure of last resort" and that any child

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[193] *See* New Zealand Bill of Rights Act 1990, s 5 (N.Z.).
[194] *See* UNCRC, *supra* note 68, art. 37(d); *Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, UN Doc. A/HRC/30/37 (July 6, 2015); *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, COUNCIL EUR., at 27 (Nov. 17, 2010), https://rm.coe.int/16804b2cf3 [hereinafter COUNCIL EUR. *Guidelines*].
[195] *See* HRC *General Comment No. 35*, *supra* note 131, ¶ 62.
[196] UNCRC, *supra* note 68, art. 1.

deprived of liberty be given the right to challenge the legality of the deprivation.[197] Article 24 of the ICCPR requires the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by Article 9 for everyone.[198]

The UN Committee on the Rights of the Child emphasizes that States parties to the UNCRC should recognize the right of adolescents to make decisions in respect of applications in family courts.[199] The Committee notes that children in States parties are entitled to protection from all forms of abuse.[200] The Committee recommends that "no child be deprived of liberty, unless there are genuine public safety or public health concerns" and "State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age."[201] The Committee emphasizes that "[r]estraint or force can be used only when the child poses an imminent threat of injury to himself or herself or others . . . ."[202]

The arrests authorized by CoCA §§ 72 and 73 breach all these international human rights obligations, particularly as they are currently used in the Family Court. These warrants turn New Zealand's special obligations to children on their head. Unlike the special restrictions on arresting children contained in the OTA, CoCA creates a procedure for inflicting special harm only on children with none of the traditional limitations on arrest that apply to the detention of adults. Children do not need to be in danger or pose a danger to be arrested. They simply need to be in the wrong place at the wrong time (and have a parent unwilling to duct-tape them and stuff them into the trunk of a minivan if they refuse to go willingly to their court-assigned location).

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[197] *Id.* art. 37(b).
[198] *See* ICCPR, *supra* note 160, ¶ 24(1).
[199] *See* UN Comm. on Rts. of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence,* ¶ 39, U.N. Doc. CRC/C/GC/20 (Dec. 6, 2016) [hereinafter CRC *General Comment No. 20*].
[200] *See id.* ¶ 40.
[201] CRC *General Comment No. 24*, *supra* note 148, ¶ 89.
[202] *Id.* ¶ 95(f).

These arrest practices are inconsistent with children's rights to have their custody arrangements determined in accordance with their best interests. As the ECtHR explained in *Sahin v. Germany:*[203]

> Article 8 [of the European Convention on Human Rights] requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.[204]

E. Necessity and Reasonable Limitations

The lawfulness of restrictions on most rights under BoRA depends on their reasonableness under BoRA § 5. The right to be free from torture is absolute; torture can never be justified.[205] An arbitrary detention cannot be reasonable.[206] It would be incompatible with the object and purpose of the ICCPR for a State Party to reserve the right to engage in arbitrary arrests and detentions.[207]

In determining whether CoCA §§ 72 and 73 constitute a reasonable limitation on the rights to freedom of movement and freedom from detention under BoRA § 5, therefore, the lack of necessity for these special arrest mechanisms should be a consideration. When the Family Court issues a parenting order under CoCA, it has the force of any other court order. Contempt is remedied by sanctions—usually admonishment, fines, or litigation consequences.[208] In extreme cases, contempt of court can be punished

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[203] Sahin v. Germany, App. No. 30943/96, 2003-VIII Eur. Ct. H.R. (2003).
[204] *Id.* ¶ 66.
[205] *See* Fitzgerald v. R [2021] NZSC 131 at [78], [160], [241] (N.Z.); A v. Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC (HL) 68 (UK); CAT *General Comment No. 2*, *supra* note 185, ¶ 5.
[206] *See* HRC *General Comment No. 35*, *supra* note 131, ¶ 66.
[207] *See id.* ¶ 68.
[208] *See* Contempt of Court Act 2019, s 16 (N.Z.).

by arresting the contemptor, but only after the contempt has been proven in a proceeding in which natural justice and due process have been accorded to the accused.[209] If a party willfully violates a parenting order, therefore, they can be held in contempt of court—if willful contempt can be proven. By contrast, these "enforcement" warrants for children often issue in situations in which there is no proof that any party is in contempt of a court order. They allow children to be violated and harmed in situations in which there is insufficient evidence to demonstrate that their protective parents have done anything other than be unwilling to force them physically into the custody of a parent whom they fear.

VIII. INTERNATIONAL PRACTICE

The child-arrest practices of the New Zealand Family Court are extreme by international standards. While other common-law jurisdictions have mechanisms to enforce custody and contact orders, and some have child-arrest provisions that resemble New Zealand's on paper, other jurisdictions have reined in this archaic practice either by statute or case law.

A. Australia

On paper, Australia has a provision authorizing the arrest of children as a mechanism to enforce parenting orders like New Zealand's.[210] In practice, however, the Australian Family Court takes FV into consideration in deciding whether to issue or enforce these "recovery orders." For example, in *Pollard v Nordberg*,[211] Mother retained Children because Father was a FV perpetrator, and she did not think that it was safe to return them to his custody. Father successfully obtained an *ex parte* recovery order for Children. Mother appealed, and the Family Court of Australia quashed the recovery order, explaining:

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[209] *See id.* § 16(4).
[210] *See Family Law Act 1975* (Cth) ss 67Q-U (Austl.).
[211] *Pollard v Nordberg* [2019] FamCA 365 (Austl.).

> If I dismiss the mother's appeal, the recovery order will operate in such a way that the children are physically, and if necessary, forcibly, returned by police to the father in Victoria. If the allegations of family violence are proved at trial, that means I will order the children to be returned to a violent environment. It must not be overlooked that the mother has alleged that the father has been violent to the children, independently of the allegations of his violent behaviour towards the mother. I refuse to make an interim order returning the children to the father in circumstances where the father may at trial be found to have engaged in family violence. In my judgment this court must act protectively towards the children and remove them from any risk associated with family violence.[212]

B. Canada

The Canadian provinces also have statutory provisions for police enforcement of parenting orders,[213] but Canadian courts are even more restrained in using them, limiting their issuance through case law. For example, in *Kerfoot v Pritchard*,[214] the Saskatchewan Queen's Bench admonished: "Respectfully, I do not think the imposition of the police laying hands on [the child] in order to accomplish weekend access is likely to enhance his relationship with his daughter."[215] In *Lee v Cathcart*,[216] the Court explained: "It is not in the best interests of a child, particularly a child as young as [Child] to be forcibly removed from one parent's home and delivered to the other parent. Children are traumatized by these events."[217]

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[212] *Id.* ¶ 115.
[213] *See, e.g.*, Children's Law Reform Act, R.S.O. 1990, c. C.12, § 36 (Can.).
[214] Kerfoot v. Pritchard, [2005] S.J. 66 (Can. Sask. Q.B.).
[215] *Id.* ¶ 14.
[216] Lee v. Cathcart, [2010] S.J. 123 (Can. Sask. Q.B.).
[217] *Id.* ¶ 10.

1. Ontario

In *Patterson v Powell*,[218] the Ontario Superior Court of Justice admonished: "As in the case before me, many lawyers and parties seem to regard such requests as both perfunctory and harmless."[219] The Court noted:

> Some embattled parents might be quite content to call the police for every timesharing exchange. They may perceive dialling 911 as being faster, cheaper, and more emotionally satisfying than returning to court. Is that potential abuse of community resources – not to mention abuse of the children themselves – something we want to leave to the discretion of relentless litigators? Surely [the enforcement warrant statute] is intended to be a *protection* for children, not a *weapon* for disgruntled parents.[220]

The Court explained that police enforcement had "an understandable appeal" in "convey[ing] a strong message that court orders have teeth; that they cannot be ignored" but noted that it was also predicated on the "questionable" presumption that "every single deviation from a court order is to be instantly deemed an act of bad faith, deserving of immediate sanction."[221] The Court noted: "Children really do sometimes become sick, uncooperative or headstrong."[222]

The Court found that the "fundamental questions" that these warrant applications invoked included: "[R]emembering again that we're dealing with children – how do we ensure that the benefit of enforcing an order is not outweighed by the emotional and psychological trauma to the child, when police are urgently summoned to highly volatile family disputes?" and "How do we

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[218] Patterson v. Powell, [2014] O.J. No. 985 (Can. Ont. S.C.J.) (QL).
[219] *Id.* ¶ 17.
[220] *Id.* ¶ 26.
[221] *Id.* ¶¶ 71, 72.
[222] *Id.* ¶ 73.

punish parental non-compliance without punishing the child?"[223] The Court explained:

> Requests for ongoing police enforcement clauses typically arise in high conflict families. Inevitably, children in such families have already been through enough – and often seen enough of police in their home – long before the first court order is issued. These are likely damaged, frightened, emotionally vulnerable children, already sensitized to the presence of police as signifying that one or both parents are out of control again.[224]

The Court held:

> [W]hen *emergency* police enforcement is ordered . . . , the existing danger or risk of harm or abduction is usually sufficiently clear that immediate safety concerns must be given priority. Police enforcement may be absolutely essential for a one-time retrieval of a child from a dangerous or inappropriate situation, where time is of the essence.
> But when ongoing police enforcement clauses are requested as a long-term compliance strategy in temporary or final orders, courts should insist that parties take available time to fully canvass less destructive and more creative (perhaps even therapeutic) alternatives. Before considering a long-term or permanent police enforcement clause (presuming the latter is even available as an option) courts should require evidence of the potential positive and negative impact of police intervention on *each* member of the family unit – most particularly, the children themselves.[225]

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[223] *Id.* ¶ 19.
[224] *Id.* ¶ 20.
[225] *Id.* ¶¶ 23-24.

The Court listed factors to be considered prior to issuance of enforcement warrants, including how the child is "likely to perceive or react to future police involvement," whether there had "been previous police calls to the home relating to other complaints, such as domestic violence," whether there was "any history of either party making unfounded complaints to police or other community agencies, for malicious or strategic purposes," and whether police enforcement would "be used to manipulate children, instill fear, or garner sympathy."[226]

In *Mackie v Crowther*,[227] the Court laid out its reasons for denying a request for police enforcement of visitation:

> a. If our goal is to protect children, why would we select an enforcement mechanism which will inevitably *harm* the child?
> b. Police involvement in dynamic parenting disputes never helps. Nothing could be more upsetting for a child caught between waring parents than to have police officers descend on an already inflamed situation.
> c. Children derive no benefit from witnessing their parents getting into trouble with the law. They perceive police as being there to deal with "bad guys." No child wants to think of their parent as being a "bad guy." And no parent should place a child in such an emotionally conflicted position.
> d. If the objective is to prevent or discourage inappropriate parental behaviour, we must create sanctions which scare offending parents *without scaring the child*.[228]

In *Lucas v Nash*,[229] the Court described police enforcement of parenting orders as "regressive in the circumstances," expressing concern that "the children are under enough emotional strain as it

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[226] *Id.* ¶ 24.
[227] Mackie v. Crowther, 2019 CarswellOnt 18298 (Can. Ont. S.C.J.) (WL).
[228] *Id.* ¶ 14.
[229] Lucas v. Nash, 2010 CarswellOnt 583 (Can. Ont. S.C.J.) (WL).

is."[230] In *M.M. v. D.Y.*,[231] the Court noted: "[T]he use of uniformed police officers to apprehend a child from the care of the custodial parent and delivery of that child to an access parent, especially when the parents are hostile to each other, is undesirable from any child's point of view, especially from that of a young child." In *Wentzell v. Schumacher*,[232] the Court explained that it was "not prepared to authorize police intervention for access enforcement in this case: it is not required for public safety, has a negative impact on [the child], and is an undesirable tactic to give either parent."

2. British Columbia

Similarly, in *S.M.M. v. J.P.H.*,[233] the British Columbia Supreme Court admonished that "having the police involved in enforcing access will only further damage these children who are already the victims of their parents' conflict."[234] In some cases, courts have not only declined to order police enforcement of child visitation but have prohibited it. For example, in *Mitchell v. Mitchell*,[235] the British Columbia Supreme Court ordered: "Both parties are directed not to contact the police to deal with difficulties involving access to [Child], and not to threaten to do so."[236]

3. Police Discretion

The police in Canada exercise their discretion not to execute the warrants even when they issue. The policy of the Royal Canadian Mounted Police ("RCMP") is that they will attend custody handovers, but they will only seize the child if they are in danger (in which case the Child is placed in the care of social services).[237] In the event of

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[230] *Id.* ¶ 19.
[231] M.M. v. D.Y., [2004] O.J. No. 4983, ¶ 25 (Can. Ont. C.J.) (QL).
[232] Wentzell v. Schumacher, 2004 CarswellOnt 1825, ¶ 15 (Can. Ont. S.C.J.) (WL).
[233] S.M.M. v. J.P.H., [2012] B.C.J. No. 2551 (B.C.S.C.) (QL).
[234] *Id.* ¶ 47.
[235] Mitchell v Mitchell, [2012] B.C.J. No. 713 (B.C.S.C.) (QL).
[236] *Id.* ¶ 134.
[237] *See* Patterson v. Powell, [2014] O.J. No. 985, ¶ 68 (Can. Ont. S.C.J.) (QL).

"apparent non-compliance" with a parenting order, however, the RCMP will not arrest the child.[238]

C. The United States

In the United States, the physical arrest of a child to enforce a custody or visitation order is permissible only when the child is in imminent danger of harm and the arrest is the least intrusive method available to secure the Child's safety. Under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"), which has been ratified by the individual states in their family law codes, an eligible party can seek a "warrant to take physical custody of a child" (a "pickup order") only "if the child is likely to suffer serious imminent physical harm or removal from this State" and "a less intrusive remedy is not effective."[239]

D. The United Kingdom

The UK has no mechanism by which a child can be arrested to enforce a visitation order. Courts can issue an "enforcement order" if they find beyond a reasonable doubt that a visitation order has been broken "without a reasonable excuse."[240] The enforcement order requires *the breaching parent* to perform community service.[241] In determining whether to issue an enforcement order, the courts must consider, inter alia, the reasons for non-compliance, the wishes and feelings of the child, risk management, and child welfare.[242]

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[238] *Id.*
[239] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT § 310, 9(1A) U.L.A. 657 (1999).
[240] Children Act 1989, § 11J (UK); *Applications related to enforcement of a child arrangements order*, HM CTS. & TRIBUNALS SERV., https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714177/cb5-eng.pdf (last visited Nov. 3, 2022).
[241] *See* Children Act 1989, § 11J (UK).
[242] *See* Ministry of Just., PD 12B – Child Arrangements Programme (Fam.), 2022, ¶ 21.1 (UK).

E. Europe

Guidelines promulgated by the Council of Europe prohibit the use of arrest powers to enforce family court orders, explaining:

> In many cases, and in particular in civil cases, the judgment does not necessarily mean that the conflict or problem is definitely settled: family matters are a good example . . . . In this sensitive area, there should be clear rules on avoiding force, coercion or violence in the implementation of decisions, for example, visitation arrangements, to avoid further traumatisation. Therefore, parents should rather be referred to mediating services or neutral visitation centres to end their disputes instead of having court decisions executed by police. The only exception is when there is a risk to the well-being of the child.[243]

IX. FAMILY VIOLENCE

The failure of the New Zealand Family Court to respond appropriately to FV is well documented.[244] Academic research documents how the court minimizes, excuses, and fails to recognize FV or protect women and children who have experienced violence from future harm.[245] Social scientists have documented the court's "pro-contact ideology," which causes it to prioritize children's unsupervised contact with both parents regardless of their safety or their views.[246]

In 2019, in response to pervasive criticisms of the court's inadequate responses to FV, an Independent Panel appointed by the

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[243] COUNCIL EUR. *Guidelines*, *supra* note 194, at 91.
[244] *See* Carrie Leonetti, *Endangered by Junk Science: How the New Zealand Family Court's Admission of Unreliable Expert Evidence Places Children at Risk*, 43 CHILD.'S LEGAL RTS. J. 17 (2022).
[245] *See id.*
[246] *Id.* at 18.

Minister of Justice released its report.[247] The Panel documented common criticisms of the court, including that "professionals in the Family Court do not understand the dynamics of family violence"; the Court does not "fully underst[an]d or acknowledge[] the harm caused to children and their carers by family violence"; and "contact with a violent parent was prioritised over considerations of children's and their parent's safety."[248] The Panel noted: "Amongst the issues most often raised was the Family Court's response to allegations of family violence and its relevance to children's safety."[249] The Panel's "key findings" included: "Knowledge of family violence in all its forms is still not widespread and its impact on children, including on their safety, is still poorly understood."[250] It explained: "It's important that children's views about contact with a parent where there has been family violence are heard and inform decisions about that contact."[251]

The UN Committee on the Rights of the Child has recognized the right of children to freedom from all forms of violence, recommending:

> Investigation of instances of violence, whether reported by the child, a representative or an external party, must be undertaken by qualified professionals who have received role-specific and comprehensive training, and require a child rights-based and child-sensitive approach . . . Towards this end, all parties are obliged to invite and give due weight to the child's views.[252]

Unfortunately, arrest warrants issued under CoCA §§ 72 and 73 play an integral role in the Family Court's poor responses to

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[247] *See* ROSSLYN NOONAN ET AL., TE KOROWAI TURE Ā-WHĀNAU: THE FINAL REPORT OF THE INDEPENDENT PANEL EXAMINING THE 2014 FAMILY JUSTICE REFORMS (2019) [hereinafter Ministerial Panel Report].
[248] *Id.* ¶¶ 99, 120.
[249] *Id.* ¶ 103.
[250] *Id.* at 6-7.
[251] *Id.* ¶ 38.
[252] UN Comm. on Rts. of the Child, *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence*, ¶ 51, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011).

children's reports of abuse. For example, in *C v. B*,[253] Mother sought sole custody of Children, alleging that Father was abusive toward them. Instead, the Family Court ordered joint custody. Son disclosed that Father sexually abused him to Mother, a church counsellor, and a teacher. The teacher reported Son's disclosure to Child, Youth and Family Services. Mother applied for sole custody of Son. The court initially issued interim orders restricting Father's visits with Son to supervision but later found that the sexual abuse was "unproven" and that "there was no real risk to the children's safety" in Father's care.[254] Mother again sought custody of Children with supervised visits with Father, claiming that Father was continuing to abuse Children physically and sexually. The court again found that that the abuse was "not proved."[255] The court scolded Mother for getting counselling for Son. The court noted: "In taking [Son] to Family Works she has provided an opportunity for [Son] to repeat his disclosure, in [Mother]'s presence."[256] The court granted sole custody of Children to Father and restricted Mother's visits to alternating weekends.[257]

The Family Court issued final orders, awarding custody of Children to Father and severely limiting Mother's visitation. The court found that Children's disclosures of child abuse were not "reliable evidence" and rejected the claim that Children felt like the Court was not listening to their concerns.[258] Mother appealed to the High Court, and the justice found no error in the Family Court's legal or factual findings and denied her appeal. Shortly after the High Court decision, Mother refused to return Children to Father after they disclosed additional episodes of physical and sexual violence. Following its standard practice, the Family Court issued a warrant authorizing the arrest of Children to effectuate their "return" to Father.[259]

Research documents how FV perpetrators use the Family Court's (hopefully unwitting) allegiance as an instrument to continue to inflict violence on victims after separation, including through child

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[253] C v. B [2018] NZCA 322.
[254] *Id.* ¶ 9.
[255] *Id.* ¶ 21.
[256] *Id.* ¶ 32.
[257] *See id.* ¶ 9.
[258] *Id.* ¶ 9.
[259] *Id.* ¶ 12.

custody proceedings.[260] Australian research suggests a direct connection between FV and applications for recovery warrants. A 2022 study sponsored by the Australian Government Department of Social Services found that FV and safety concerns were common drivers behind non-compliance with parenting orders, including unilaterally removing children from the other parent's custody.[261] It also found that threats of enforcement litigation can form part of a pattern of control by perpetrators.

The ever-present threat of a Family Court warrant to arrest their children is one of the many arrows in an abusive parent's quiver. The threat of arrest not only exposes children to state-sanctioned violence but also damages their relationships with their protective parents, which the psychological literature demonstrates is the most important "protective factor" determining whether children who experience FV will suffer long-term negative consequences.[262] Protective parents are forced into an impossible dilemma: risk having their children arrested (and stripped from their custody entirely) or become the instruments of their children's betrayal by forcing them against their will to have visits with their violent parent to avoid the greater harms of forcible arrest and longer periods of unsafe visitation.[263]

X. TRAGIC HISTORY

In 1993, Christine Bristol left her husband Alan.[264] She sought a restraining order backed by evidence of Alan's years of physical, psychological, and sexual abuse.[265] Alan filed preemptively for

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[260] *See* Vivienne Elizabeth, *Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation*, 25 FEMINIST LEGAL STUD. 185 (2017).
[261] *See* RACHEL CARSON ET AL., COMPLIANCE WITH AND ENFORCEMENT OF FAMILY LAW PARENTING ORDERS: FINAL REPORT (2022).
[262] Sarah Fotheringham et al., *Speaking for Themselves: Hope for Children Caught in High Conflict Custody and Access Disputes Involving Domestic Violence*, 28 J. FAM. VIOLENCE 311 (2013).
[263] *See* BACKBONE COLLECTIVE, ALL EYES ON THE FAMILY COURT (2017).
[264] *See* Ruth Busch & Neville Robertson, *I Didn't Know Just How Far You Could Fight: Contextualising the Bristol Inquiry,* 2 WAIKATO L. REV. 41 (1994).
[265] *See* Kirsty Lawrence, *Faces of Innocents: Dad's killing of three daughters becomes a force for law change*, STUFF (July 23, 2016, 10:59 PM),

custody of their three young girls, who were appointed a lawyer for the child. The lawyer for the children recommended that the Family Court not consider Christine's evidence of Alan's violence.[266] She insisted that it was "obvious" and inevitable that the Bristols would end up with joint custody and that acknowledging Alan's violence would only increase the parents' "polarisation" and interfere with Alan's rights to contact with the girls.

Most people in New Zealand know the final chapter of the *Bristol* saga: that Alan murdered the girls by suffocating them with car exhaust in the family garage while they were in his court-ordered custody.[267] Fewer people know the middle chapters. When it became apparent that the Court was not going to protect the girls and might punish her if she continued to ask, Christine entered into a consent agreement with Alan.[268] She essentially agreed to give him custody of their oldest daughter in exchange for custody of the younger two. This must have been an unimaginable choice, having to leave one daughter in the custody of a FV perpetrator to get the other two to safety. At the custody handovers (when they would temporarily swap children), Alan continued to abuse Christine.[269] Christine took the two younger girls and left town to stay with a family friend.[270] She was not in violation of the Family Court's orders when she left with the girls as long as she returned before Alan's next court-ordered visit.[271] Nonetheless, Alan sought and was awarded custody of the girls and obtained an *ex parte* arrest warrant for the girls to enforce the "custody reversal."[272] In support of his application for the warrant, he affirmed that Christine was attempting to flee. Christine had no chance to respond before the Court issued the arrest warrant for her children. She surrendered the girls at a police station to spare them the trauma

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https://www.stuff.co.nz/national/faces-of-innocents/81543472/faces-of-innocents-dads-killing-of-three-daughters-becomes-a-force-for-law-change.

[266] *See* Busch & Robertson, *supra* note 264.

[267] *See* Mark Henaghan & Ruth Ballantyne, *Legal Responses to Violence in the Home in New Zealand*, 33 UNIV. NEW S. WALES L.J. 870, 876 (2010); Lawrence, *supra* note 265.

[268] *See* Busch & Robertson, *supra* note 264.

[269] *See* Lawrence, *supra* note 265.

[270] *See* Busch & Robertson, *supra* note 264.

[271] *Id.*

[272] *See id.*; Henaghan & Ballantyne, *supra* note 267.

of a violent arrest.[273] That was the last time that the girls were in her custody before their murder.[274] Given the high-profile nature of the Bristol murders and the resulting criticism of the Family Court's lack of understanding of the risk that Alan's history of intimate partner violence against Christine posed to their children in his custody, it is noteworthy that public and academic commentary on the case rarely mentions Alan's use of the Family Court's power to issue arrest warrants for children as one of the areas in need of reform.

XI. GUIDING PRINCIPLES

A. Children's Best Interests

Children's welfare and best interests are supposed to be the paramount principles in all decisions that the Family Court makes under CoCA.[275] Section 64 specifically reiterates that the Court must consider whether issuing a warrant under sections 72 or 73 "would serve the welfare and best interests of the child who is the subject of the parenting order concerned" in determining whether to do so.[276] This requirement is reiterated in the UNCRC, which requires courts to treat the best interests of children as their primary consideration.[277] Children's best interests must always be considered in combination with their other rights, including the right to be heard and the right to be protected from FV.[278]

The Family Court's child-seizure practices honor these principles in their breach. The Court did not consider the welfare and best interests of the children that it ordered the police to seize and deliver prior to issuing warrants for their arrest in any of the cases described in this Article. Instead, the Court issued the warrants to "enforce" its parenting orders and often to punish the perceived transgressions of the parent in whose custody the child was residing.

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[273] *See* Busch & Robertson, *supra* note 264.
[274] *See id.*
[275] *See* Care of Children Act 2004, s 4 (N.Z.).
[276] *See* s 64(1).
[277] *See* UNCRC, *supra* note 68, art. 3.
[278] *See* CRC *General Comment No. 20*, *supra* note 199, ¶ 22.

B. Children's Views

The principle of participation—that children have the right to speak freely and express their views in all matters that affect them—is one of the guiding principles of the UNCRC. While the UNCRC does not require adherence to children's views in all circumstances, their opinions must be seriously considered and given due respect, according to their age, maturity, and the circumstances of the case.

The Ministerial Panel documented common criticisms of the New Zealand Family Court, including that "children's views are often not heard or taken into account when considering contact where violence has been alleged or established."[279] The Panel noted: "Some studies show that children are believed when they say they want contact with a violent parent, but they are more likely to be ignored or over-ruled if they say they do not want contact."[280] This failure to heed children's voices extends to not ascertaining, let alone placing due weight on, children's views prior to issuing a warrant for their arrest to enforce parenting orders to which they are subject.

The Family Court recently defended its practice of not seeking children's views in matters that affect them if the court deems the matter to be "procedural" rather than "substantive" in the High Court case of *J v. Family Court*.[281] In *J*, Mother applied for judicial review of a decision of the Family Court at Auckland making a temporary protection order ("TPO") against her in favor of Father and Children.[282]

Mother obtained a TPO against Father to protect her and Children.[283] She also obtained an interim parenting order giving her custody of Children and allowing Father only supervised visits.[284] Mother applied to make the protection order against Father permanent and for supervision of Father's contact with Children to continue.[285]

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[279] Ministerial Panel Report, *supra* note 247, ¶¶ 99, 120.
[280] *Id.* ¶ 121.
[281] *See* J. v. Family Court at Auckland [2021] NZHC 831.
[282] *See id.* [1].
[283] *See id.* [6].
[284] *See id.*
[285] *See id.* [7].

Father opposed both applications.[286] At the conclusion of the contested hearing on Mother's applications, the judge granted Mother's application for a final protection order against Father but also issued a TPO against Mother on behalf of Father and Children on her own motion.[287] The court did so without ascertaining or considering Children's views.[288] Mother sought judicial review of the order in part based on Children's rights to be given a reasonable opportunity to express their views on the making of the TPO and to have those views taken into account.[289]

Initially, the Family Court, the titular First Respondent in the High Court, indicated that it would abide by the High Court's decision,[290] which is standard practice when a court's decision is subject to judicial review.[291] Subsequently, however, the Family Court sought and was granted leave to offer further evidence in the form of an affidavit from Principal Judge Jacqueline Moran regarding the court's usual practice in relation to the duty to take into account children's views under CoCA § 6(2).[292] The affidavit as filed, however, went significantly beyond the topic for which the High Court had granted leave to offer new evidence.[293] In addition to canvassing the Court's practices on obtaining the views of children regarding protection orders, Judge Moran's affidavit also canvassed the Family Court's practice of not obtaining children's views prior to ordering psychological evaluations and her views regarding why obtaining children's views was unnecessary.[294]

In her affidavit, Judge Moran attested that the obligation to take children's views into account under CoCA § 6(2) had "almost invariably been interpreted as meaning that children's views [were] ascertained in circumstances where there [were] 'substantive' matters affecting them."[295] She claimed that, if children's views were sought in

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[286] *See id.*
[287] *See id.* [8].
[288] *See id.* [158].
[289] *See id.* [12].
[290] *See id.* [2], [25].
[291] *See* Secretary for Internal Affairs v. Public Charity [2013] NZCA 627, [27]-[28].
[292] *See* J., [2021] NZHC [15]-[17].
[293] *See id.* [18].
[294] *See id.*
[295] *Id.* [164].

relation to pretrial or procedural decisions, an "inevitable consequence" would be greater delay.[296] The Family Court's official position, therefore, is that children's views should not be sought or considered when determining whether to subject them to psychological evaluations or whether to issue protection orders that might protect them and have the effect of preventing their contact with the restrained person. This distinction between "substance" and "procedure" and the sweeping definition of "procedure" that Judge Moran adopted, if followed to its logical extension, could also justify the Court's practice of not seeking the views of children before ordering them arrested and transported against their will into the custody of abusive parents. Such an interpretation would contravene Article 37 of the UNCRC, which guarantees to children the right to challenge any detention to which they are subject.

C. Dignity, Safety, and Deprivations of Liberty

Children should be treated with care, sensitivity, fairness, and respect in the Family Court, with special attention for their personal situation, well-being, and specific needs and full respect for their physical and psychological integrity. Respecting dignity is a basic human rights requirement, underlying many international instruments. It is particularly important to respect the dignity and special interests of children who have experienced FV.[297]

Children have a special need for protection when their perpetrators are parents or other caretakers. They should be protected from harm, including intimidation, reprisals, and secondary victimization. Any form of deprivation of liberty of children should be a measure of last resort. Deprivation of liberty should never be motivated by or based solely on a perceived need for an enforcement mechanism for court orders.

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[296] *Id.* [165]. The High Court found that the issuance of the TPO "was not an order that affected the children's care" and, therefore, was "not a matter 'affecting the child.'" *Id.* [168]-[69]. The court concluded that Children's views did not have to be obtained under CoCA s 6(2). *See id.* [169].

[297] *See* Economic and Social Council Res. 2005/20, at III(8)(a), I(6) (July 22, 2005).

XII. CONCLUSION

CoCA §§ 72 and 73 are vestiges of an era when children were the property of their "custodians." These arrests treat children like chattel, constitute unlawful arrests, and have become instruments by which abusive parents dominate and control children who are exercising self-help to secure their safety. They are an unconscionable breach of these kids' human rights.

It is unacceptable to punish a child who fails to comply with a parenting order to which they are subject (or whose protective parent fails to facilitate their compliance), particularly when the non-compliance occurs for safety reasons. Sanctioning a protective parent by punishing their child focuses attention away from the unsafe parent's abuse, rewards the violent parent for their violence, and discourages children and protective parents from taking steps to maintain their safety. Particularly given the Family Court's chronic failures to protect children who have experienced parental child abuse and neglect from further violence, the law should recognize the necessity of a self-help remedy in cases in which children's safety is threatened. It certainly should not authorize arbitrary and unlawful detentions as a further consequence for children whose right to safety has already been breached by the Family Court in the first instance.

As Justice Quinn of the Ontario Superior Court of Justice succinctly put it: "When parties involve police in their access disputes, they might as well climb onto the roof of their house, straddle the peak, and, with outreached arms, proclaim to the heavens that they have failed as parents and as human beings."[298] When the New Zealand Family Court involves the police in enforcing its orders against traumatized children, it is declaring that it has failed in its obligations to protect their safety and act in their best interests.

[298] Stirling v. Blake, 2013 CanLII 5216, 28 n.14 (Can. Ont. S.C.).