

Don't Look Down: The Carcerality of The U.S. Foster Care System

Kayla E.L. Ybarra

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Dr. Marisol LeBrón

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***Dedication:** To my sister, Briana, and to all those “siblings” I met during my youth. I hope they are all surviving and doing the best they can with what they have. To all the children living in the system today, there are better things outside of those agency walls. — KY*

As feminist theorists, reformers, and abolitionists seek to define “the carceral state” and all its entails, many academics agree that the origins of European settler colonialism remains the foundational source of ideology and paradigm when it comes to the establishment of policy and institutions within the United States. One of the institutions most entrenched in settler colonial practice is the U.S. Child Protective Services (CPS) agencies, also referred to as the foster care system within this paper. Instances of legal abuses, stripping of rights, and educational, personal, and professional disparities experienced by foster youth points to the foster care system as a site of carceral violence and a continuation of the settler project. The dominating explanations of these social trends place the trauma experienced by foster youth prior to the government’s involvement as the main factor in the major disadvantages to foster youth. Previous data relies heavily on the statistics of mental and emotional disabilities as the result of family-based trauma and the lack of mental health resources for foster youth. The National Conference of State Legislatures reports that “up to 80% of children in foster care have significant mental health issues,” and that “factors contributing to the mental and behavioral health of children and youth in foster care includes the history of complex trauma, frequently changing situations and transitions, broken family relationships, inconsistent and inadequate access to mental health services and the over-prescription of psychotropic medications.”¹ While this is undoubtedly a source of difficulty for foster youth and creates several barriers, this paper aims to argue that historically, the U.S. foster care system and CPS have been a site of social abuse. Additionally, due to its carceral nature, CPS practices actually further traumatic experiences and are responsible for many obstacles foster children face during their time in the system and upon their aging out of it. The foster care system should be subject to strenuous scrutiny if its aim is to

¹ National Conference of State Legislatures. n.d. “Mental Health and Foster Care.” National Conference of State Legislatures.

better the lives of abused and neglected children while it fails to set up foster youth for success after they exit government placements. In this paper, I will be analyzing current statistics on the outcomes of foster children and correlating that data with today's policy and programs (with a focus on California state law) aimed towards caring for abused and neglected children and giving historical context to the origins of foster care and adoption in the United States to connect current child welfare praxis with those of settler colonial practices. With this analysis, I aim to make conclusive that Child Protective Services leave a carceral legacy.

There is no question that child welfare social workers have one of the most difficult occupations in the country, dealing directly with deeply traumatized children who have suffered various forms of abuse and neglect; For the context of this paper, it is imperative to note that each state follows federal guidelines for child removal and states and counties may have different procedures to carry out their specific child welfare policies. California Child Protective Services will get involved when "children are victims of, or at risk of, abuse, neglect, exploitation, or parental absence." It is also important to note that California law defines child abuse as any the following: "a child is physically injured by other than accidental means, a child is subjected to willful cruelty or unjustifiable punishment, a child is abused or exploited sexually, a child is neglected by a parent or caretaker who fails to provide adequate food, clothing, shelter, medical care or supervision." These general outlines are the guide for child removals from homes, but have not always been there historically. There, of course, are legal procedures for wrongful removals, but state and county agencies may have different and more specific definitions for exactly what "adequate childcare" means.² The great majority of social workers want to make a difference for these children and aspire in supporting them in leading healthy, fulfilling lives. Sadly, the personal, professional, and educational outcomes for foster children are dismal across

² State of California. n.d. "Child Protective Services." California Department of Social Services.

the board in the United States; The National Foster Youth Institute (NFYI) reports that “high school dropout rates are 3x higher for foster youth, less than 10% obtain a degree, [and] over 40% of school-aged children in foster care have educational difficulties.” The NFYI has compiled research that points to foster youth having a large gap in educational success across the board in the United States.³ Even when it comes to high school completion, foster children still remain far behind their peers of the general population, and they beat several statistics if they are able to maintain the resources to just remain housed and out of prisons; According to national statistics from the Alternative Family Services (AFS) agency, “In the first four years after aging out of foster care, approximately 20% of former foster youth will experience homelessness.” This percentage jumps up to 43% for American Indian young adults according to the National Youth in Transition Database. The AFS agency has also compiled several other concerning data points on homelessness for California foster youth specifically, reporting that “in California, close to 31% of transition-age foster youth experience homelessness.”⁴ People like myself tend to have a sense of survivor’s guilt for having even minute personal and professional opportunities. The day before Easter Sunday in 2009, I was placed with my sister into the foster care system of the state of Wisconsin. I was placed with a family who had minimal-to-no knowledge of our cultural heritage, personal experiences, or religious beliefs, despite their best efforts to raise us. My sister and I, along with other foster children who were in and out of the home, were subjected to experiencing and watching this family's apparent struggles with controlling their own violent and abusive parental behaviors; It is nearly impossible to retrieve data on the reports of abuse faced at the hands of foster care placements due to the purposeful

³ Chapin Hall at the University of Chicago. “Midwest Evaluation of the Adult Functioning of Former Foster Youth Outcomes at Age 26.” 2011.

⁴ Alternative Family Services. 2022. “35 Foster Youth Homelessness Statistics You should know.” Alternative Family Services.

lack of reporting and silencing of abuse survivors. One example I was able to find was that

The Children's Bureau of the U.S. Department of Health and Human services reported that there were 276 cases of foster abuse in the state of California in 2013. However, an investigation by the Los Angeles Times uncovered that the state underreported foster abuse cases to meet the national standard of 0.32%. In fact, they purposely filed reports for only $\frac{3}{4}$ of the year and have since made no effort to correct the issue.⁵

The LA Times article referenced, "Private foster care system, Intended to save children, endangers some," reported that the "calculations showed that rate of abuse committed by foster parents was higher in privately run homes than in government-run homes, but the margins differed considerably from 29% to 54%."⁶ These numbers are disturbing when the instances of abuse upon foster care placements should be nonexistent. I was certainly grateful not to be split up from my sister (I was told constantly that we were quite 'lucky' for this), but this was made evident to me to be the result of a consensus that my mentally disabled and nonverbal sister would have less problem behaviors if I were with her to help manage them. Though I am thankful that the government took us out of our abusive family home, the foster care system's carcerality was clear to me even at my young age. As a child I understood this to mean adults couldn't be trusted. Upon my placement, I was immediately put into mandatory counseling sessions with a local child's therapist. I remained uninformed about the lack of confidentiality I received until the court hearings, later responsible for my permanent placement out of state, recounted my remarks from sessions which were shared directly with the state, my social worker, and my foster parents; Foster children do, in fact, have rights outlined in state legislation explicitly stating that they have the right to confidentiality when receiving mental/emotional healthcare but this legislation is new and retains loopholes. The state/county may obtain the notes from counseling sessions to be used in court hearings if the foster child consents to its

⁵ Booth Law. 2013. "Abuse in The California Foster Care System." Booth Law.

⁶ Therolf, Garrett. 2013. "Private Foster Care System, Intended to Save Children, Endangers Some." Los Angeles Times.

usage, but if this consent is neither asked for nor does a child receive explicit notice of their legal rights to privacy, these rights can easily be stripped from them.⁷ This lack of privacy and confidentiality is common for many foster children within the various U.S. foster systems. Despite my appreciation that the system saved my sister and I from one abusive environment, it was deeply unfortunate that our future placements remained unequipped, poorly trained, and sites of further abuse and traumatization. I know that our story is shared by many. While all foster children have different complexities and unique circumstances, we all share the experiences of over-surveillance, lack of privacy and data collection, and the emotional/behavioral scrutiny by child welfare agencies. Through this all, I remember my social worker being a beacon of light through very difficult experiences and I understood that she only wanted stability and wellbeing for my sister and myself. When it is so clear that those working for the state have children's best interests at heart, why is the aftermath for foster children so disadvantaged? The average foster child in the United States has to straddle several carceral institutions—family, school, and particularly the Human and Family Services Agencies—and mustn't look down if they want any chance at survival. Through my research, I have concluded that the United States' settler colonial history and legacy of native genocide is responsible for the same Child Protective Services institutions today and there hasn't been nearly enough policy nor restructuring to truly change the lives of American foster children for the better. By looking at the historical trajectory of child welfare policy and programs and by comparing early settler colonial practices with the praxis of today's child welfare, it is clear that child protective agencies are still a site of carceral violence and continue to forward the settler project.

⁷ San Diego State University School of Social Work. n.d. "Foster Youth Mental Health Bill of Rights." Academy for Professional Excellence; Wisconsin Department of Health Services. "Client Rights: Minors."

Historically, Indigenous, Black, and migrant children of color—who seek social mobility—are seen as enemies of the state because they threaten the foundation under which the river of capital flows. The first government-sanctioned “foster care” and “adoption” programs were founded upon assimilative practices such as family separation, stripping Native children of their rights to land and inheritance, as well as absorption, assimilation, and deculturation—the complete and total removal of native children from their cultural ties. This was all in an aim to separate Indigenous children from their cultural identities which would’ve naturally given them the social means to demand things of the government if not completely rejecting settler jurisdiction altogether. Children have been used as pawns under the carceral state to further carry out the “settler project” of Indigenous extermination. The origins of the foster care and adoption systems go back to the forced institutionalization of Native American children. The government funded off-reservation “Carlisle Indian Industrial School” spearheaded by Civil War veteran Lt. Col. Richard Henry Pratt in 1879 was the first step in an attempt to break up Indigenous families after much Native refusal to cooperate with U.S. legal systems; During the 1800s, Native tribes across America were in fervent disapproval of the settler state and took action during battles such as the Seminole Wars. The goal of the settler government was to use law as a means to eradicate any Native power. The U.S. Department of State, Office of the Historian paints a particular history, nonetheless admitting to the intentions of the U.S. Office of the President: “From a legal standpoint, the United States Constitution empowered Congress to ‘regulate commerce with foreign nations, and among the several States, and with the Indian tribes.’ In early treaties negotiated between the federal government and the Indian tribes, the latter typically acknowledged themselves ‘to be under the protection of the United States of America, and of no other sovereign whosoever.’ When Andrew Jackson became president (1829–1837), he decided

to build a systematic approach to Indian removal on the basis of these legal precedents.”⁸ With this historical trend of the U.S. government, they were in full support of Pratt’s efforts as “the [U.S.] Army transferred Carlisle Barracks, a military post not in regular use, to the Bureau of Indian Affairs for use as a boarding school.” In Vox’s “How The US Stole Thousands of Native American Children,” the real stories of these boarding schools were illustrated by the Native people who were taken from their homes and put into them. Those who were forced into these schools recounted how dehumanizing and traumatizing their experiences were there. Their stories are visceral and deeply heartbreaking, having to witness and endure profound physical and mental torture, survivors even reporting the burials of their young peers.⁹ The ideological basis for these schools were entrenched in settler colonial thought, a slogan coined by Pratt—“kill the Indian, save the man”—and he popularized his schools via a media campaign of propaganda, convincing white settlers that these schools were civilizing the ‘savage Indian children.’ The goals of these boarding schools were to “shed all native culture and customs and assimilate [native children] fully into white American culture.”¹⁰ When Native boarding schools slowly phased out, the next most cost-effective settler colonial institution was the “Indian Adoption Project.” “Administered by the Child Welfare League of America and funded by a federal contract from the Bureau of Indian Affairs and the U.S. Children’s Bureau, the Indian Adoption Project lasted from 1958 through 1967,” where an approximate 50 public and private adoption agencies were involved and nearly 400 children were taken and placed out of native homes and into white ones.¹¹ To further the erasure of indigenous populations, white settlers used this “adoption” and family separation as continued assimilative practices of Native absorption

⁸ U.S. Department of State. "Indian Treaties and the Removal Act of 1830." Office of The Historian.

⁹ Chakraborty, R. 2019. “How the US stole thousands of Native American children.” Vox.

¹⁰ The Carlisle Indian School Project. "Richard Henry Pratt Carlisle Indian School: Past." Carlisle Indian School Project.

¹¹ Herman, E. 2012. “Indian Adoption Project. Adoption history: Indian Adoption Project.”

and cultural suppression—Native American Sociologist and President of the Salish Kootenai College, Luana Ross, defines “cultural suppression” as “a legal process that involves deculturation—eradication of the indigenous people’s original traditions—followed by indoctrination in the ideas of the dominators so the colonized may themselves assist the colonial project.”¹² The U.S. ratified into law the stealing of Native children from their families and essentially their sale into white settler homes. In the documentary film “*Native Americans recall era of forced adoptions*,” BBC journalist, Anna Bressanin, tells viewers “In the decades after World War II hundreds of Native American children in the US were taken from their communities and given to white families through adoption or foster care. The idea behind the Indian Adoption Project was to help them assimilate into “white culture” and live what authorities viewed to be a safer and happier life.” Denise Altvater, from the Passamaquoddy tribe in Maine, who was removed from her family and adopted when she was seven years old, told her story, ““All of us, who have been taken away from our homes as children, still as adults, we don’t feel like we have a place where we belong.”” The legacy of the Indian Adoption Project is a horrifying history of legal kidnapping and theft of culture and family.¹³ Not only was mass Native adoption much cheaper than the costs of running boarding schools, the white savior propaganda campaign—as well as the economic incentives—was a successful play at involving white citizens in the settler project of native extermination. This desire by the United States government to separate and destroy native families has never ceased. While legislative bodies, aims, and policies change, the effects of the settler project are still felt today, where Native and Black children are statistically more likely to be placed into the foster care system and experience the termination of parental rights. According to the U.S. Department of Health and

¹² Ross, Luana K. 2000. “Inventing the savage: The Social Construction of Native American Criminality.” University of Texas Press.

¹³ Bressanin, A. 2012. “Native Americans recall era of forced adoptions.” BBC News: US & Canada.

Human Services, research published in the National Library of Medicine reports that “American Indian and Alaska Native children are 2.7 times more likely than White children to ever experience the termination of both parents’ rights, and African American children are 2.4 times more likely than White children to experience the termination of parental rights.”¹⁴ There was so much of a racial disparity of Native child foster placement that the Indian Child Welfare Act (ICWA) was ratified into law in 1978. The Bureau of Indian Affairs outlines that “the purpose of the Indian Child Welfare Act (ICWA) is

...to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture...(25 U.S. C. 1902). ICWA provides guidance to States regarding the handling of child abuse and neglect and adoption cases involving Native children and sets minimum standards for the handling of these cases.¹⁵

While ICWA was ratified in order to alleviate the destruction to Native American communities by the U.S. government, the disappointing truth is that social welfare services still work from paradigms of European-ignorance and despite legal training, child welfare agencies prove incompetent in following the law when it comes to ethnic minorities. According to research from the U.S. Children’s Bureau,

Administrative data on race and ethnicity may be incorrectly assumed by the recorder. Without detailed assessment guidelines, recorders may rely on their own judgment when determining an individual's race or ethnicity—a scenario that can invite error. One study comparing the self-report race and ethnicity data of hospital patients against observational data found discrepancies in roughly two-thirds of cases (Polubriaginof et al., 2019). Identification during CPS intake can be especially problematic when determining whether children are American Indian or Alaska Native and thereby eligible for the Indian Child Welfare Act (ICWA) (Luth, 2016). Caseworkers often do not know to or do not routinely ask about Tribal affiliation, or they make assumptions about ancestry based on physical attributes (van Straaten & Buchbinder, 2011).¹⁶

¹⁴ Wildeman, Christopher, Fiona R. Edwards, and Sara Wakefield. "The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016." *Child Maltreatment* 25, no. 1 (2020): 32-42.

¹⁵ "Bureau of Indian Affairs - Indian Child Welfare Act (ICWA)." Bureau of Indian Affairs - Office of Indian Services, U.S. Department of the Interior, n.d.

¹⁶ Children's Bureau, U.S. Department of Health & Human Services. "Child Welfare Practice to Address Racial Disproportionality."

The vast amounts of discrepancies with data-gathering by CPS is unacceptable and isn't just a matter of incompetence or lack of resources. These kinds of heinous practices when it comes to data gathering speak to the settler colonial legacy and a continuation of the settler project, by absorption especially. These practices follow a through-line of carceral ideology that continues to plague native communities.

One of the ideological progenies of the U.S. carceral state is that children are often regarded as property rather than autonomous individuals. Children have historically gotten the short end of the stick when it comes to protections under the law. In the process of my research, I was concerned with making an account of the chronology of legislative and landmark activities related to child welfare services. It was to my horror to learn that the first ever policy regarding child welfare was the formation of "The Society of the Prevention of Cruelty to Children," which was modeled after "The Society for the Prevention of Cruelty to Animals"—a program created an entire decade prior.¹⁷ This makes it less difficult to understand how it was only in 1938 that The Fair Labor Standards Act was the first time in the United States that children were being addressed as a class of people who deserve economic legal protections per child labor laws.¹⁸ The timeline of child welfare policy is very troubling. When it came to out-of-home placements for children, there seemed to be a historical pattern of children getting taken by the state without the establishment of state and county formal welfare programs first or the ratification of policy outlining the processes for placement, family management, and reunification (if at all). Federal laws and programs were established, but it took years and even decades for federal policy to mandate the establishment of state programs. While federal laws and programs were created throughout the 60s and 70s, California took until 1982 to require counties to institute child

¹⁷ State of California. "Child Welfare Services Chronology." California Department of Social Services.

¹⁸ "Wages and the Fair Labor Standards Act." U.S. Department of Labor.

welfare programs.¹⁹ Even today, our country has streamlined yet problematic policy when it comes to adoption and children who experience the loss of parental rights from their biological parents and are denied rights like privacy and inheritance. According to the U.S. Department of Health and Human Services, “Generally, the court decree that finalizes the adoption ends the legal relationship between the birth parent.” This is the same legal termination as when parental rights are terminated between a foster child and their birth parent. In the state of California, “Once an adoption is made legal, adopted children can no longer inherit from their biological parents,” because they automatically get the legal rights as being their adoptive parents’ biological heirs. This legal juncture would then require biological parents to create a will if they wanted their biological children to still be heirs. As with any case, adoptive or biological child, parents can still write their heirs out of their wills, which makes the history of the Indian Adoption Project and the legacy of Black adoption all the more alarming.²⁰

It’s clear how rooted Child Protective Services are within the settler colonial project, so policing is naturally very entangled in the processes. Perhaps as expected, law enforcement is a key component to the structure and execution of child welfare programs and policies. Law enforcement plays such a big role throughout the foster care system that the U.S. Department of Health and Human Services have been creating manuals specifically outlining law enforcement’s expectations and responsibilities in the process of removals, placements, and data collection since 1979. The first manual, “The Role of Law Enforcement in The Prevention and Treatment of Child Abuse and Neglect,” was created within the same decade that The National Foster Parents Association was established (1971) as well as the ratification of the Child Abuse

¹⁹ (Chronology 3)

²⁰ U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. 2016. "Inheritance and the Child Welfare System." Child Welfare Information Gateway.

Prevention and Treatment Act (1974).²¹ There is an undeniable connection between foster children and later incarceration. It is arguable that this connection is correlative with these children being targeted due to their exposure to the system and data gathering. Data gathering regarding foster children and their biological families actually begins long before their removal from their family home. As detailed in every manual on law enforcement's role in response to child abuse dating back to 1979, data is to be gathered by law enforcement via interviews and observations of the families in question, including but not limited to the families' mental health histories, drug use, prior convictions, as well as occupation, income, and personal and familial relationships.²² Additionally, the mere absence of fundamental resources for foster children poses the constant risk of what has now been coined the "foster care to prison pipeline." Research from the University of Illinois and Cal State LA, "Juvenile delinquency in child welfare: Investigating group home effects," found that "youth placed in group homes are 2.5x more likely to become involved with the justice system than their counterparts placed with foster families," while a shocking "90% of youth with 5+ foster placements will enter the justice system."²³ When you look at the institutionalization of foster children, it shouldn't be surprising that their prior experience with federal and state agencies results in their later experiences with incarceration. Foster children have state and federal records detailing their personal histories with abuse as well as any behavioral "issues" before reaching legal adulthood. In NPR's "Throughline," episode "American Police," Harvard Professor Khalil Gibran Muhammad, pointed out the significance of

²¹ "Federal Public Law 92-247 mandates states to establish child abuse reporting laws, define child abuse and neglect and determine when juvenile/family courts can take custody of a child," (California Department of Social Services).

²² Broadhurst, D. D., and J. S. Knoeller. 1979. "The Role of Law Enforcement in The Prevention and Treatment of Child Abuse and Neglect." National Center on Child Abuse and Neglect, Children's Bureau, Administration for Children, Youth and Families, Office of Human Development Services, U.S. Dept. of Health and Human Services.

²³ Haight, Wendy L., Emily J. Putnam-Hornstein, Barbara Needell, and Melissa Jonson-Reid. "Juvenile delinquency in child welfare: Investigating group home effects." *Children and Youth Services Review* 31, no. 5 (2009): 541-546.

surveillance and punishment, explaining “the tying together early on, the surveillance, the deputization essentially of all white men to be police officers or, in this case, slave patrollers and then to dispense corporal punishment on the scene are all baked in from the very beginning.”²⁴ This prime example of historical carcerality—the paradigms surrounding surveillance, data collection, and removals, are rooted in U.S. chattel slavery and is ever present in how police systems operate today. When it comes to the rights of children, who are in the care of the state, it is curious that such carceral practices end up being used against these children after they hit adulthood.

As historical context and current policy makes clear, foster children are very often stripped of their rights and subjugated as second-class citizens via the encompassing institutionalization of the carceral state. Due to the origin of the foster care and adoptions systems in the United States—that is the inherent ties to native genocide and the destruction of family units within Black communities by way of the legacy of chattel slavery, Jim Crow laws, and continued institutional abuse—we can see that the U.S. Department of Health and Human Services agencies that exist today still operate in accordance with their founding carceral paradigms. The most prominent ideologies affected by the U.S. foster care systems include American individualism, survival of the fittest, capitalistic ideas surrounding property and inheritance, the punitive (and not rehabilitative) praxis of the state, and an emphasis on over-surveillance and a lack of humanity for children. There are undeniable links between foster children and incarceration, homelessness, and a vastness of disparate outcomes for the lives of former foster youth. All signs point back to the state and its carcerality. Our hope could be in reform and restructuring of child welfare policy and services, but that reform has been happening

²⁴ NPR. *Throughline*. "American Police." February 20, 2020. Podcast.

for decades and foster children deserve better now. Khalil Gibran Muhammad put it best with his “vision for the future...turning the tides of racialized criminality,” by simply stating that “white people are going to have to define a different political marketplace that rewards a different kind of country.”²⁵

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