



CONDUCTING ANTI-TRAFFICKING WORK USING A RACIAL JUSTICE LENS

A Response to The Department of State's Request for
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The Sunita Jain Anti-Trafficking Initiative (SJI) at Loyola Marymount University Loyola Law School (LLS) builds upon the school’s legacy of research, policy innovation, and inclusion in the law. SJI is part of LLS’s Anti-Racism Center and Loyola Social Justice Law Clinics. SJI is an evidence based community informed think tank that intentionally fills gaps in human trafficking prevention with an intersectional approach through systemic change and policy innovation.

A core value of SJI is that policy recommendations must be guided by the lived experiences of trafficking survivors. Therefore, SJI supports survivor consultants whose intersectional trafficking experience reflect SJI’s core values of racial justice, climate justice, immigrant justice, economic justice, and government accountability. The survivor consultants have written letters and provided video testimony on what racial equity means to them in the context of human trafficking.

Please visit our updated website on

www.lls.edu/AntiTrafficking



WHAT DOES RACIAL EQUITY MEAN IN THE CONTEXT OF HUMAN TRAFFICKING?

SJI applauds the U.S. government in its intent to understand the difficult realities on the intersection of race, vulnerable populations, and the current anti-trafficking policy regime.

In order to fully understand the depth and breadth of racial equity issues in contemporary anti-trafficking policy, it is necessary to first understand the equity issues in the origins of the anti-trafficking movement and Trafficking Victims Protection Act (hereinafter “TVPPRA”). The historical and racialized exploitation of people of color that developed during slavery, colonization, and U.S. immigration law directly impact our contemporary cultural expectations and beliefs about human trafficking survivors and the nature of exploitation. These societal constructs in turn inform the allocation of resources towards the prevention, protection, and prosecution of human trafficking in the U.S.

Historical Understanding

The roots of the contemporary anti-trafficking movement originated in the passing of the Thirteenth Amendment. The Thirteenth Amendment prohibits chattel slavery, peonage, involuntary servitude, and other forms of unfree labor with the intent “to overcome the structural forces that maintain race-based economic subordination.”⁽¹⁾ Although state-sanctioned slavery was prohibited, newly freed slaves and immigrant workers remained subjected to subordination via Black Codes and and peonage

(1) Kathleen Kim, “The Thirteenth Amendment and Human Trafficking: Lessons and Limitations,” 36 Georgia State Law Review 1005 (2020); See also Kim, Kathleen, The Coercion of Trafficked Workers, 96 Iowa Law Review 409 (2011); Kim, Kathleen, Beyond Coercion, 62 UCLA Law Review 1558 (2015).



contracts. Post-reconstruction antislavery efforts turned to “white slavery,” drawing attention towards the forced prostitution of European women and away from the more complex realities of trafficking.² It is irrefutable that from post-reconstruction to today, Black Americans continued to endure state-sanctioned violence as well as systematic exclusion and discrimination in the economic, political, and social facets of American society. As discussed infra, the legacy of systemic and structural racism and roots of forced labor permeate everyday life, especially for black and brown Americans whose identity intersects with LGBTQI or immigration issues.

Furthermore, the roots of the U.S. government’s immigration laws have consistently preferred white migrants to non-white migrants. Our nation’s very first immigration law passed in 1790 where only “free white persons” qualified, which excluded women, Native Americans, indentured servants, and both enslaved and free Black people from access to citizenship. In 1882, Congress passed the first of three Chinese Exclusion Acts, banning additional Chinese immigration and was not repealed until 1942. By the latter half of the 20th century, the forces of global labor migration and the demand for cheap labor in the U.S. meant that migrant workers of color from impoverished and unstable regions found themselves in forced labor situations. Whether it be the concentration of policing actions disproportionately on Asian massage workers³ or the Biden Administration’s current designation of temporary protected status for Ukrainians but not Cameroonians⁴, these racial preferences are still being felt today among the most vulnerable immigration populations.

Moreover, the racial origins of weak labor protections for disaster relief workers have historically always been overlooked. Black men and migrants have routinely been

(2) Julie Dahlstrom, “The Elastic Meaning(s) of Human Trafficking,” 108 *California Law Review* 379 (2020)

(3) <https://www.vice.com/en/article/m7a8p3/atlanta-shooting-cop-raids-wont-protect-sex-workers-massage-spa-workers>

(4) <https://undocublack.org/press-releases/2022/2/28/the-undocublack-network-stands-in-solidarity-with-black-migrants-facing-mistreatment-and-discrimination-in-ukraine>



forced (sometimes at gun point at the behest of the U.S. government) to undertake exceptionally hazardous and dangerous work in the aftermath of a natural disaster. In 1900, black men were forced at gunpoint by white soldiers to perform grotesque disaster restoration⁵, including dumping corpses into the sea. In 1928, 75% of deaths from the Great Okeechobee Hurricane in Florida were migrant agricultural workers, many of them black⁶. Although the structure of the disaster relief industry has transformed in both the private and public sector, ultimately the exploitation and lack of meaningful protection of black and brown essential workers endures.

Lastly, the expansion of criminal and immigration enforcement systems and their exacerbating overlap have only further subjected black, brown, and non-citizen communities to a greater risk of vulnerability, state-sanctioned surveillance, and exploitation.

It was at this historical juncture that the TVPRA was enacted with the intent to criminalize forced labor and sex trafficking, provide benefits to victims, and expand protections for those that experienced nonviolent, psychological coercion. It is heralded as one of the most comprehensive domestic anti-trafficking legislative frameworks in the world. However, negotiations leading up to the passage of the TVPRA from neo-abolitionist, evangelical advocates, and sex work feminists lead to a three pronged “layered definitional approach” (1) operative and non-operative definitions of trafficking; (2) differing criminal statutes for sex trafficking and labor trafficking; and (3) a distinct definition of victims of “severe forms of trafficking in persons” that applied only to federal protections.

(5) <https://www.npr.org/2018/05/19/612583891/al-roker-writes-about-the-deadliest-flood-in-american-history>

(6) <https://www.pbslearningmedia.org/resource/amex3lts-soc-evergladeshhurricane/impact-of-1928-hurricane-on-everglades-migrant-workers-the-swamp/>



As discussed *supra*, the historical roots of the anti-trafficking movement coupled with the layered definitional approach has disparately harmed the most vulnerable communities in the U.S.

A MESSAGE FROM SJI CONSULTANT ADRIANNA GRIFFITH

“ When private slavery was outlawed our county shifted to a model of slavery that we still use today known as Incarceration. This is important to acknowledge and must be uplifted when discussing racial equity in any context but especially when talking about human trafficking. Today's realities are the direct result of past AND present political choices that continue to marginalize communities and in effect create both the victim and the offender. For far too long, questions about what to do when it comes to the intersectional issues surrounding and perpetuating human trafficking have been focused on law enforcement and the prosecution of those who have caused harm. In that same stretch of time, we have learned that incarceration does not help communities, does not offer healing support to survivors, and does not prevent new harms from occurring. Therefore we must invest as much as we can in community CBOs and intersectional prevention programs that speak to the root issues of harm. **Our country cannot incarcerate its way out of the problem because the problem is embedded into our current systems.** From medical care to education and from housing to the environment, our systems are corrupted by racism and the political choice to determine that only some are worthy of being acknowledged as a victim. ”



An Intersectional Approach to Racial Equity by SJI in an Anti-Trafficking Framework.

SJI believes that an understanding of racial equity in anti-trafficking policy and any proposed solution must be non-carceral, intersectional, and rooted in SJI's five pillars. Achieving racial equity through these five pillars means acknowledging and rectifying the following:



Racial Justice:

- 1 Systemic racism has made black, brown, and non-citizen communities more vulnerable to trafficking in the U.S. Those with more intersecting identities (disability, LGBTQIA, etc.) are at even greater risk of trafficking.
- 2 Black, brown, and non-citizens survivors are more likely to encounter the criminal legal system and be treated as criminals and not victims due to the failures of law enforcement agencies (LEA). As a result, they are excluded from the protections and benefits they are lawfully entitled to under the TVPRA.
- 3 These communities are more likely to face harsher penalties in the criminal and immigration legal systems without meaningful access to post-conviction relief in comparison to their white counterparts.



Climate Justice:

- 1 Current federal disaster relief strategies have had a disparate impact on low-income and marginalized communities, rendering them vulnerable to trafficking in the U.S.
- 2 The "resilience force" undertaking disaster reconstruction work in the aftermath of a climate disaster is simultaneously vulnerable to trafficking and heightened surveillance by criminal and immigration law enforcement.



- 3 Climate migrants and climate defenders qualify for immigration status in the U.S. and should be granted a pathway to citizenship.



Immigrant Justice:

- 1 The consistent failure of the U.S. government to provide equal resources and prioritization to labor trafficking has failed to both protect survivors who are non-citizens and from communities of color as well as survivors who rely on the informal economy for their livelihood.
- 2 Non-citizen survivors who are subjected to MPP, detention, and in removal proceedings are not able to meaningfully access the protections they have been extended under the TVPRA.



Economic Justice:

- 1 The U.S. government's carceral approach to anti-trafficking (and subsequent focus on the criminal as opposed to civil legal system) has resulted in the lack of worker protections for laborers in informal and formal economies, who are primarily from communities of color.
- 2 A focus on the criminal legal system has meant that coercion based trafficking claims are not adequately identified, investigated, or prosecuted, which directly harms non-citizen labor trafficking survivors.
- 3 The lack of a federal vacatur remedy for criminalized survivors (which in turn serves as a model for state vacatur) creates a barrier for survivors with convictions to enter the formal economy and renders them vulnerable to re-exploitation. Criminalized survivors are more likely to be from communities of color.



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Government accountability:

- 1** The disparate impact of appropriating more funds to sex trafficking than labor trafficking despite data from service providers and HHS indicates a willful refusal to acknowledge the limitations of a carceral approach.
- 2** Federal law enforcement officials should not be the primary entity tasked with identifying potential survivors since the limited public data available underscores that they arrest sex workers and labor trafficking survivors while failing to identify many victims and/or traffickers. Also, they have physically and sexually harmed survivors upon civil and criminal arrest with impunity.
- 3** The Attorney General's Office, DOJ, and FBI must follow through on the TVPRA mandates to produce data on the arrest, investigation, and prosecution of traffickers as well as service provision to victims.



WHAT DOES A RACIALLY EQUITABLE ANTI-TRAFFICKING FRAMEWORK LOOK LIKE, PARTICULAR FOR THE FOLLOWING?

LEA Response →

The U.S. government gains an understanding based on decades of quantitative and qualitative data that criminal and civil law enforcement agencies are not the appropriate entity to identify survivors.⁷ There is a shift in resources away from LEAs for survivor identification to community-based organizations (“CBOs”)⁸ that are trusted by vulnerable populations. The involvement of an LEA at any point is at the complete discretion of the survivor.

Prosecution Response →

The Department of Labor (DOL), U.S. Equal Employment Opportunities Commission (EEOC), other civil agencies, and CBOs are provided more resources and directives to report, investigate, and prosecute labor trafficking. This shift occurs because there is an understanding that a carceral-LEA based approach systemically harms communities of color, labor trafficking is under-investigated in the U.S. and that criminal law is ill equipped to prosecute “coercion” based trafficking claims. To date, neither of these government agencies have received specialized funding to prevent human trafficking.

(7) An example of a mismatch between a racially equitable anti-trafficking framework and the U.S. government’s approach is a statement in the National Action Plan (NAP) that “victims are heavily conditioned to remain loyal to the trafficker and to distrust law enforcement.” pg. 9. While accurate, the statement also completely ignores the reality that victims from communities of color may distrust LEAs for reasons distinct from their trafficking experience, such as the ongoing legacy of violence and discrimination by LEAs against communities of color.

(8) CBOS specifically means they are run, operated, and staffed by people with lived experiences on these issues in the community that they serve.



Victim Assistance →

The idea of victim assistance expands to a survivor's experience before, during, and after trafficking. It is not limited, as it is now, to focus on the point of identification. Before being potentially trafficked, vulnerable populations are provided with targeted awareness campaigns developed by and specific to their community. During their victimization, survivors are identified without being criminalized, are provided multiple avenues aside from the criminal legal system to address their victimization. They are entitled to a victim's rights attorney. Finally, at all points, survivors can meaningfully and expediently access the benefits and protections Congress extended to them under the TVPRA, even if they are incarcerated.

Prevention Strategy →

The ideology of preventing human trafficking is synonymous with preventing poverty from an intersectional lens, which requires an investment into the economic, political, and social equity of historically marginalized communities. "Prevention" also addresses contemporary issues like the lack of regulation of misinformation on social media. True prevention of trafficking should not be conceptualized to begin at the point of trafficking, but rather when an individual is experiencing a societal ill that makes them vulnerable to trafficking.

ARE THERE SPECIFIC CONSIDERATIONS FOR RESPONDING TO SEX TRAFFICKING AND TO LABOR TRAFFICKING, INCLUDING FORCED LABOR?

SJI believes that the bifurcation of sex and labor trafficking into separate criminal provisions has had disparate effects on trafficking survivors. Trafficking victims can be both labor and sex trafficked and do not choose how they are victimized. By failing to invest in intersectional systems that focus on the elements of “force, fraud, and coercion,” the U.S. government has not been able to formulate an effective framework to investigation and prosecute a wide range of trafficking.⁹

(9) (E)racing Childhood: Examining the Racialized Construction of “Childhood” and “Innocence” in the Treatment of Sexually Exploited Minors. 62 UCLA L. Rev. 1586 (2015).

WHAT RACIAL INEQUITY HAS RESULTED FROM A FEDERAL ANTI-TRAFFICKING POLICY/PROGRAMS?

Racial Justice →



The historical, structural, and systemic marginalization of communities of color as a result of poverty, homelessness, and educational inequity puts them at a higher risk of victimization. The Center for American Progress recently determined that while Latinas represent 18.1 percent of all women in the U.S. population, they constitute 27.1 percent of women in poverty. Similarly, Black women represent 22.3 percent of women in poverty but make up only 12.8 percent of all women in the U.S. population. Black girls in particular disproportionately live in impoverished communities, experience sexual abuse, enter foster care, and endure draconian school discipline at a higher rate and younger age than their white counterparts¹⁰.

Survivors from communities of color are more likely to be arrested than their white counterparts for two reasons. First, federal and state governments have provided mandates and funding to LEAs to identify survivors, which means survivors are subjected to the explicit or implicit racial bias of police officers in addition to their pre-conceived notions of trafficking¹¹. As a result, black girls are statistically treated as criminals and not victims in comparison to any other racial group. They are arrested at exorbitantly higher rates for prostitution, have their cases adjudicated through the

(10) Black Girls Matter: Overpoliced and Underprotected (with Kimberlé Crenshaw Jyoti Nanda 2015).

(11) (E)racing Childhood: Examining the Racialized Construction of “Childhood” and “Innocence” in the Treatment of Sexually Exploited Minors. 62 UCLA L. Rev. 1586 (2015)



juvenile justice system, and are more likely to be detained in a locked facility than their white counterparts.¹² They are systemically denied the benefits and protections under the anti-trafficking policy regime. Additionally, black non-citizens are more likely to remain in detention longer than other migrants, pay significantly higher bonds for release, and make up 24% of all solitary confinement detentions even though they make up only 4% of those in ICE custody.¹³

Also, racial profiling proliferates non-citizen arrests made by local LEAs and ICE, with the added burden that an arrest can trigger placement in removal proceedings or immigration detention. An intersectional lens towards the AAPI massage business workers underscores how the racial roots of immigration; gendered ideas of prostitution, and implicit bias of LEAs come together.¹⁴ AAPI massage workers are routinely targeted by ICE and local LEAs for prostitution and unlicensed massage based arrests, yet are rarely screened for victimization.

Climate & Economic Justice →



The U.S. government and the anti-trafficking policy regime has failed to accurately address (if at all) the correlation between the rise of climate change induced natural disasters in the U.S., the rapidly growing need for resilience workers, and the racial breakdown and vulnerabilities of these workers.

Resilience workers are individuals who work in disaster restoration, primarily in the industries of construction, debris clean up efforts, hospitality, and maid service industries. Disaster restoration work requires “a labor force that is instantly mobile and open to arduous and dangerous work.”¹⁵ The limited data from Hurricane Katrina, Irma, and Harvey highlight that the vast majority of resilience workers identify as Latino or Hispanic

(12) Id.

(13) <https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline>

(14) Un-licensed, Asian Migrant Massage Licensure and the Racialized Policing of Poverty by Red Canary Song

(15) <https://www.newyorker.com/magazine/2021/11/08/the-migrant-workers-who-follow-climate-disasters>



and are undocumented. Several human rights organizations and investigative journalists have documented the extensive intersectional issues resilience workers face because they are undocumented¹⁶, rely on their employer for basic needs like food and water since they are uniquely in a disaster zone, and in dire need of economic security.

Current anti-trafficking policies around resilience workers and disaster relief are problematic from a racial equity standpoint in four ways:

1. There is a misconception that the exploitation of resilience workers is solely because of the natural disaster and not the underlying structural and systemic inequity.

The general prioritization on preventing trafficking and exploitation in resilience forces is on supply chains and corporate accountability. However, not all resilience force workers enter the U.S. on H-2A/H-2B visas for the purpose of doing disaster relief work. This continued focus on supply chains and corporate accountability is presumably based on available data from Hurricane Katrina, where 77% of undocumented workers were not originally from the Louisiana area¹⁷. Although there is little quantitative data, the narratives collected from investigative journalists and CBOs interacting directly with workers highlight that they were already living in the U.S. without immigration status prior to becoming resilience workers¹⁸.

However, the U.S. government has not prioritized what made undocumented migrant workers vulnerable to exploitations in the first place. For example, prior to Hurricane Katrina, worker rights were virtually non-existent. Wages in Louisiana were far below the national average in the U.S. ... there existed no state minimum wage or overtime laws, employers were not required to provide lunch or rests breaks, and employee benefits

(16) Id.; see generally L. McCallum, 'Reflections from the Field: Disparate responses to labour exploitation in post-Katrina Louisiana', *Anti-Trafficking Review*, issue 15, 2020, pp. 21-41, <https://doi.org/10.14197/atr.201220152>

(17) (18) Id.



were discretionary.”¹⁹ There was no wage/hour claim unit because there was no minimum wage law.

Most protective measures that existed were on the federal level and were suspended by the federal government.

Neither the state nor federal DOL and/or EEOC have been funded or prioritized in a way that would enable them to investigate, prosecute, and protect labor trafficking issues before or after a natural disaster. In the disaster-relief aftermath of Hurricane Katrina, there was one Spanish-speaking interpreter for the entire state agency.²⁰ This is despite the fact that there were nine successful civil litigations on behalf of undocumented resilience workers and zero criminal cases.

2. The U.S. government’s continued reliance on ICE/DHS to serve resilience workers who have been trafficked, expect workers to report their victimization to ICE/DHS, while simultaneously conducting heightened immigration enforcement during disaster restoration efforts is unrealistic.

It is puzzling why the U.S. government continues to believe that undocumented workers will readily report their victimization to an immigration enforcement agency that is charged with conducting arrests and raids for their very detention, deportation, and separation from their families. It is also puzzling to think that ICE should succeed in identify trafficking survivors when historically they have arrested labor trafficking survivors without screening them since their inception in 2003. The U.S. government has willfully ignored the documented failure of workplace raids in assisting communities of color. It is alarming that the U.S. government continues to prioritize ICE for survivor identification knowing that employers use this realistic fear of law enforcement and immigration retaliation to subject undocumented immigrants to labor trafficking when that is exactly what ICE does.

(19) (20) Id.



Most major natural disasters have created a simultaneous need for cheap labor for dangerous work, which can be supplied by undocumented immigrants and an increase in DHS, ICE, and other LEA surveillance and enforcement. In the aftermath of Hurricane Katrina, DHS announced it deployed 750 officials to the Gulf Coast, which included Detention and Removal Staff as a “security effort” to enact a “zero tolerance policy” towards migrant workers. Black and immigrant laborers have repeatedly reported harassment on the street while working from law enforcement throughout multiple disasters. This situation was only exacerbated when law enforcement was deputized by ICE to undertake immigration enforcement. During Hurricane Michael, the Bay County Sheriff’s Office staged a series of undercover sting operations where resilience workers were arrested for felony charges of “contracting without a license during a state of emergency,” and turned over to ICE.²¹

Government agencies continue to use words like “mistrust” and “hesitation” in describing why resilience workers fail to approach ICE for help. It highlights a complete lack of understanding of the lived experiences of undocumented workers in the U.S. Specifically, agencies have ignored explicit and implicit bias of ICE officers, the violence undocumented communities have faced at their hands, the minimal due process rights afforded to immigrants upon arrest, and the inhumane realities of immigration detention and removal proceedings- all without the right to legal counsel. More importantly, it highlights that U.S. policy prioritizes immigration enforcement over worker rights while expecting brown migrant workers to readily comply with the very enforcement priorities that harm them.

3. The publically available human trafficking trainings for FEMA do not reflect the experiences or needs of resilience workers.

Although SJI applauds FEMA for being trained on human trafficking issues, there are several issues that lead to a racial inequity in understanding the vulnerabilities of migrant workers in disaster reconstruction work. First, the 30-minute training is done by DHS and is a general

(21) <https://www.newyorker.com/magazine/2021/11/08/the-migrant-workers-who-follow-climate-disasters>



overview of what trafficking is and is not specific to resilience workers and disaster relief work. It does not focus on the issues of subcontracting from larger disaster relief firms backed by private equity initiatives, the physical health issues they face as a result of disaster relief work, the trust they place in worker rights organization and CBOs, their fear of government agencies, etc. Lack of information about resilience workers and the nuances of their exploitation make it highly unlikely that FEMA will be able to identify resilience workers and fill gaps in their trafficking prevention work that are applicable.

Immigration Justice (Remain in Mexico/Migrant Program Protocol) →



1. MPP has directly led to more incidents of trafficking within the U.S.

Several immigration advocates across the country have shared a similar fact pattern with SJI: individuals were placed into MPP, subjected to horrific violence and inhumane conditions in Mexico, and recruited via force, fraud, and coercion into sex and/or labor trafficking in Mexico, and then brought into the U.S. (undetected by CBP) by their traffickers for continued exploitation. Although they have escaped their traffickers, these survivors remain in removal proceedings with pending applications for T Nonimmigrant Status. But for MPP, these individuals would not have been made so vulnerable and readily exploitable for trafficking into the U.S.

Furthermore, DHS maintains that unaccompanied children are not subject to MPP, it is estimated that hundreds of children have become unaccompanied as a direct result of this policy.²² SJI has spoken to three organizations that specialize in immigrant youth, all have confirmed having at least four cases each in which a child rendered unaccompanied by

(22) <https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf>, <https://www.the-youngcenter.org/stories/2019/12/12/the-migrant-protection-protocols-are-harming-children-and-must-end>



MPP was subjected to trafficking in the U.S. For more information on these cases, please contact SJI directly.

2. MPP has rendered survivors with “attempted trafficking” claims ineligible for T Nonimmigrant Status in violation of the Administrative Procedures Act.²⁴

In order to qualify for T Nonimmigrant Status, an applicant must be considered “physically present in the U.S. on account of trafficking.” If they have left the U.S., they are no longer considered eligible for T Nonimmigrant Status with few exceptions. By default, MPP forces survivors who have valid attempted trafficking claims to return to Mexico and renders them ineligible for T Nonimmigrant Status. SJI has spoken to one immigration advocate whose client was being actively trafficked during their attempted border crossing. The survivor asked the CBP officer for help and said they were a prisoner being held against their will and the traffickers had her documents and cell phone. She found herself returned to Mexico with their traffickers.²⁵ These results directly contravene Congressional intent in establishing attempted trafficking as well as undermine the core tenants of the TVPRA itself. For more information on these cases, please contact SJI directly.

3. MPP has created conditions that foster exploitation and trafficking in Mexico.

NAP listed particular factors that make individuals vulnerable to trafficking such as “difficult economic conditions, instability in housing, substance abuse issues, lack of family support to isolate victims and make them wholly dependent upon their traffickers.” **MPP has irrefutably created these exact conditions.** There are a plethora of reports describing children “living in crude shelters on the street, parents struggling to feed their families and using up limited savings for the chance to apply for asylum.” Since President Biden took



office, Human Rights First has documented at least 8,705 public reports of violent attacks – including rape, kidnapping, and murder – against people blocked from requesting protection at the U.S. border and/or expelled to Mexico under the Title 42 policy. SJI has spoken directly to six individuals who were trafficked in Mexico as a result of MPP and their vulnerability in border camps. For more information on these cases, please contact SJI directly.

MESSAGE FROM SURVIVOR A.Z. (translated from Spanish)

“ I fled my home country with my three-year-old son because my family was openly and visibly participating in political protests against the corrupt government. The paramilitary came to our home more than once and beat me. I tried to tell the officer at the border what happened to us, but instead I was put into the MPP program. It is hard to put into words how awful the border camps were. Someone at the border camp offered me a job as a mechanic, which I accepted because I wanted to be independent and provide for my son. Instead, I was forced to work by drug cartel members who threatened to sell my son on the black market for \$50,000 if I disobeyed them in anyway. For three months, I worked 20 hours a day against my will for no pay and in fear for my son's life. I should have been allowed to fight my case and keep my son safe. MPP only made it more dangerous for us. I want the U.S. to know that they did this to us. ”



4. Asylum seekers with trafficking specific or related asylum claims are unable to meaningfully pursue the legal remedies guaranteed to them under U.S.'s treaty obligations.

As detailed by Freedom Network (FN), CAST, CGRS, and others, asylum seekers who have been subjected to trafficking in their home countries are unable to pursue trafficking-specific claims. This government policy discriminates against immigrants who have been recruited into gangs and forced into labor trafficking via forced criminality. Additionally these survivors are unable to pursue trafficking-specific claims for deferred action under Withholding of Removal or Convention Against Torture. Although it is not officially a delineated particular social group, an asylum seeker who has experienced forced commercial sex, sexual slavery, or human trafficking is still potentially eligible for the aforementioned immigration relief depending on the circuit.²³

Government Accountability →



1. SJI calls for the release of the Attorney General's Report to Congress and Assessment of U.S. Government-Activities to Combat Trafficking (AG).

A racially equitable framework for government accountability requires data on the racial breakdown of who is benefitting and excluded from US government's anti-trafficking efforts as well as who is being prosecuted. Although the AG Report is mandated by the TVPA, the U.S. government has not produced this report for the past three years. There is no way for the U.S. government to assess the racial equity issues within it's own legal framework if it does not produce and reflect on the data itself.

(23) https://cgrs.uchastings.edu/sites/default/files/Asylum_from_Trafficking_Knight_Immigration_Briefings_7_07.pdf



2. The U.S. Government continues to prioritize LEAs for survivor identification though the data indicates that they fail to do so and despite the prevalence of reports of officers engaging in physical and sexual abuse of trafficking survivors.

LEA operations and stings are not successful at identifying survivors or traffickers. Freedom Network, ACLU, and CAST have submitted information on this at length. USC's International Human Rights Clinic's Report on LEAs and sex trafficking underscores that LEAs simply arrest large numbers of sex workers who are primarily black women. For example, in California, statewide operations in 2020 resulted in the arrest of 190 commercial sex workers and 266 sex buyers, but the arrest of only 27 pimps and the identification of 87 juvenile and adult victims. There is no data available on if those victims were provided case management services. In 2020, the LAPD made 90 arrests of commercial sex workers and 49 sex buyers, but the arrests of only 7 pimps and the identification of 7 juvenile and adult victims. It is unclear if the LAPD screened for labor trafficking at all. Similarly, it is irrefutable that ICE has failed to screen for trafficking survivors in places of potential exploitation.

A racially equitable approach to anti-trafficking would undertake reflective studies on the abuse by LEAs to arrestees from marginalized communities and the subsequent impunity. Physical and sexual abuse by LEAs to arrestees from marginalized and intersectional communities (particularly black, non-citizen, and LTBQIA) is well documented, particularly towards sex workers.²⁴ For example, Human Rights Watch has extensively documented abuses by U.S. border officials who are in charge of making fear determinations of the very people they are violating. Investigative journalists have detailed the flagrant sexual misconduct of undercover agents who are still extended protection under qualified immunity even though they are not police officers.²⁵ CBOs have also reported how state and

(24) <https://theintercept.com/2018/05/12/tennessee-ice-raid-immigration-postville-iowa/>; <https://www.usatoday.com/story/news/nation/2019/08/17/mississippi-ice-raid-more-than-40-charged/2040080001/>

(25) <https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price>



local LEAs engage in abuse during investigations of AAPI massage parlors.²⁶

3. SJI calls for the government to gather quantitative and qualitative data on the effectiveness of its general trafficking awareness campaign in identifying trafficking survivors.

The U.S. government has several awareness campaigns that rely on an individual to make a determination of whether or not someone is a victim or trafficker. Many of these campaigns are in areas of mass transportation. However, a racially equitable approach to these campaigns would include an understanding that there is an implicit racial bias in identification. As stated in FN 2022 TIP report, “there have been limited or no evaluations to ensure that the campaigns are effective in any respect, and to ensure that the campaigns do not cause harm. In fact, there have been numerous examples of trained airline personnel causing harm by accusing interracial families of being engaged in trafficking.” As the Department of Transportation (DOT) considers its awareness campaign, we urge DOT to work with survivor consultants who have been criminalized by misidentifications.

(26) Mackensie Shulman, et al, AP News, Documents: Federal Agents Engaged in Sex Acts with Victims, 5/11/202



A MESSAGE FROM NON-CITIZEN SURVIVOR CONSULTANT POLINA OSTRENKOVA

“ My name is Polina Ostrenkova and I am a survivor of labor trafficking. I would like to address the question of inequity and unfairness that I have experienced being approached by a police agency. Actual victims receive no help from police agencies and try to help themselves. They either must go back doing an illicit work because of predicaments they are facing or deal with consequences by the court order.

I have been arrested and incarcerated for crimes that I was obligated to commit for my exploiter. I did not know my rights, neither I knew who to go to seek for help. I wanted to stay in New York because I am an immigrant. I did not feel safe going back to my country but I was undocumented. I had meetings with prosecutors where I was intimidated and threatened to be imprisoned. English is not my first language, and I was not provided with an interpreter, when I felt bullied into cooperating with a police agency. I was treated poorly and experienced jokes/offences from detectives. Having negotiations with the prosecutors, I was prohibited to have my lawyer with me, and a Russian police officer was performing the work of an interpreter. I told everything I knew and was strongly afraid that my exploiter will find me and punish for that. As a result, I was charged with high-level felony charges and was facing deportation. I also was given a bail of the sum that I could not afford to pay. No one believed that I was a victim. ”

WHAT CAN THE EXECUTIVE BRANCH DO TO REDUCE THESE BARRIERS?

Racial Justice →



SJI applauds the historic and unprecedented efforts the Biden Administration has taken in openly addressing racial inequity and taking an intersectional approach to racial justice. SJI recommends President Biden take a similar stand by using his executive power for federal clemency for trafficking survivors who have served or are serving sentences in federal prison for crimes that are connected to their trafficking experience. Although clemency has been granted for criminalized survivors on the state level (recently Bresha Meadows and Cynthia Brown), we have yet to see trafficking-specific clemency initiatives on the federal level. The president is the only one who can free trafficking survivors from federal prison.

This would send a strong message of visibility and inclusion to criminalized survivors all over the country and redirect the narrative of trafficking in the U.S. to be reflective of the lived experiences of survivors from marginalized communities.

Although exact numbers of criminalized survivors serving federal sentences are unknown, approximately 82% of survivors served by The Human Trafficking Clemency Initiative are women are color.²⁷ Many of the survivors were trafficked by their intimate partners, involved in the commercial sex industry and trafficked into prostitution multiple times, and sex crime victims themselves. Lastly, these survivors face steep barriers in finding housing and employment post-sentencing because of they must register as sex offenders. As confirmed in NAP, these conditions can render already vulnerable

(27) Clemency for War Criminals but not Survivors of Trafficking and Violence? The Gender Policy Report (May 30, 2019) (with Leigh Goodmark)



populations even more exploitation. The President can set an example for local and state jurisdictions to follow by using his clemency power to commute the sentences of survivors currently in prison and pardon those who have already completed their sentences.

Economic Justice →



SJI commends NAP 2.2.23 for explicitly citing the need for a federal vacatur remedy to serve as a model for states. However, a racially equitable approach to a federal vacatur remedy would understand the need to include more than federal law enforcement officials and federal prosecutors in this working group. It is unclear why the agencies that failed to identify the survivor, convicted them of crimes connected to their trafficking experience, and subjected them to prolonged incarceration are solely the ones in charge of identifying and correcting the harm they created.

Survivor consultants, federal defenders, and criminal-immigration specialists should be included in this working group. The burden of proof for federal vacatur cases must be realistic and accessible for the parties actually putting forward the motion to vacate. Moreover, criminal-immigration specialists must be included in these brainstorming sessions because non-citizens face the additional burden of proving that their vacaturs were not rehabilitative or for immigration purposes.

A MESSAGE FROM SJI CONSULTANT ADRIANA GRIFFITH

“ I was arrested alongside my trafficker, charged for perpetuating harm to the very communities I come from, and was incarcerated – all in multiple systems that failed to believe I was a survivor. I served my time for what I did but I still cannot vacate my convictions. I have been accountable to the laws of this country but the laws of this country have not been accountable to me. That is something that needs to change for every survivor in every state across this country. ”



Immigration Justice →



SJI applauds the Biden Administration’s explicit authorization for prosecutorial discretion and administrative closure for trafficking survivors. However, in creating a racially equitable approach for non-citizen survivors in removal proceedings, SJI asks the Executive Branch to clarify Section 2.2.2 in NAP to ensure that survivors do not carry an unfair and almost impossible burden in removal proceedings, especially given that they are not guaranteed legal representation. NAP 2.2.2 states that survivors “should not be removed absent serious factors” and that ICE officers will “receive regular training on immigration options to assist officials to encounter such victims during removal proceedings.” SJI asks for four specific clarifications:

1. In NAP 2.2.2, ICE is vaguely assigned to “assist” officials when they “encounter” survivors. Why ICE and what does this “assistance” look like?

SJI believes that clarification on NAP 2.2.2. is necessary to protect survivors. An ICE Attorney is not a police officer; they are opposing counsel in an adversarial setting. In SJI experience, ICE officers joined in on only one out of eleven motions for administrative closures for clients with a pending T Visa during the Biden Administration; directly contravening the spirit of the Prosecutorial Discretion Memo.

A racial equity lens would ask vulnerable immigrant communities (primarily those who have been criminalized) on what role they want ICE to play in this procedural posture, if at all. Also, what does this “assistance to officials” actually look like? Is it to request the expediency of bona fide determination on behalf of the government? Is it to submit a prosecutorial discretion memo to the immigration judge? Is it a mandate to release a detained survivor? These clarifications are necessary to effectuate the spirit of intent in the TVPRA.



2. If ICE Attorneys remains assigned, what is the burden of proof required to show eligibility of trafficking?

SJI believes that clarification on NAP 2.2.2. is necessary to protect survivors. An ICE Attorney is not a police officer; they are opposing counsel in an adversarial setting. In SJI experience, ICE officers joined in on only one out of eleven motions for administrative closures for clients with a pending T Visa during the Biden Administration.

Furthermore, a racial equity lens would ask for vulnerable immigrant communities what does this “assistance to officials” actually look like? Is it to request the expediency of bona fide determination on behalf of the government? Is it to submit a prosecutorial discretion memo to the immigration judge? Is it a mandate to release a detained survivor? These clarifications are necessary to effectuate the spirit of intent in the TVPRA.

It is unclear what is needed to prove to the ICE attorney that someone is a “victim” so that they can “assist officials.” Trafficking can arise in many ways in removal proceedings. The most obvious is with an application for a T Visa. However, it is possible that an individual will not have a receipt notice in time for their master calendar hearing, let alone a fully adjudicated T Visa. Moreover, outside of the T visa context, trafficking can arise in a defensive asylum claim in attempting to overcome the one-year bar, cancellation of removal, special immigration juvenile status, withholding of removal/convention against torture, a Matter of M-A-M hearing, and more. Furthermore, it is unclear if other forms of verification of trafficking are sufficient. For example, will a letter from a TVAP funded case management service be sufficient?

A racial equity lens demands that ICE officers not be the entity making trafficking-specific determinations in the first place. If this is not clarified, ICE Officers across the country will continue making random determinations on their own on who is and who isn't a trafficking survivor based on whatever level of evidence they deem sufficient. This situation is even more problematic for clients that trigger criminal histories outside of what is listed in NAP.



Without clarification, the burden of proof of triggering protection under the TVPRA falls squarely on the survivor in removal proceedings. They have to communicate the nuances of their trafficking experience to their opposing counsel while trying to overcome the psycho-social manifestations of their trauma. The U.S. government places an impossible burden on them, especially for survivors on the expedited dedicated docket and those without legal counsel.

3. What does NAP mean by “serious adverse factors” in deciding whether or not to remove a trafficking survivor?

Although the balance of equities and general discretion is provided to ICE Officers, SJI requests clarification on what is meant by “serious adverse factors” in the context of trafficking as opposed to general removal proceedings. For example, many trafficking survivors in removal proceedings have prior orders of removal, pending applications that have been denied for fraudulent claims, criminal histories for aggravated felonies and crimes of moral turpitude, and more. The crimes listed in NAP (prostitution, entry without inspection, working without authorization) are not reflective of the range of criminal activity and immigration violations survivors have. The burden shifts to the survivor to explain how any and all “serious adverse factors” are connected to their trafficking experience, which requires a detailed understanding of trauma and PTSD.

Furthermore, many survivors cannot put forward positive arguments typically used in the balance of equities because of their trafficking experiences. For example, they may not be involved in their local community and be able to present letters of recommendation because of their trafficking-related trauma makes them fearful of strangers, they may not be in the U.S. for a long period of time because of the nature of their trafficking, etc. It is possible that they are still being trafficked during removal proceedings.

Without clarification on what serious adverse factors means in the context of trafficking, ICE officers have the discretion to make determinations on the credibility of the survivor’s



trafficking claims as well as the existence of a connection between any adverse factors and trafficking and the viability of that connection in overcoming a negative determination.

4. What will prompt the release of a detained survivor from immigration detention?

The TVPRA is clear that survivors are not to be detained at the discretion of the government. However, immigration advocates and investigative journalists across the country have met scores of detained survivors.²⁸ There is no clear procedure on what triggers the release of a detained survivor, the range of discretion an ICE attorney has in contravening the congressional spirit of the TVPRA, what services are mandated under the TVPRA post release, etc. SJI recommends the following:

- 1** The U.S. Advisory Council should include survivors who have been able to successfully terminate removal proceedings, those who went through proceedings but received an order of removal, and survivors with criminal histories that trigger aggravated felonies and CIMTs (aside from prostitution).
- 2** The Biden Administration should create a working group comprised of the aforementioned survivors, case managers that specialize in trafficking specific trauma and work with survivors in removal proceedings, and removal defense attorneys (not just attorneys that specialize in affirmative T visas). The goal of this group should be to fill the gaps in these policies such that they honor the lived experiences of survivors who have endured this process.
- 3** If ICE attorneys are assigned to “assist”, it should be to expedite a bona fide determination claim (the only remedy for survivors that functions like a prima

(28) <https://www.hrw.org/news/2010/04/19/us-victims-trafficking-held-ice-detention#>



facie eligibility) to ensure that the Biden Administration follows the spirit of TVPRA in ensuring that survivors are not detained or incarcerated. If ICE officers are provided more duties, the Biden Administration should provide data (not just regulatory policy) on the historic effectiveness, accuracy, and success of ICE attorneys identifying and “assisting” survivors in removal proceedings.

- 4 The Biden Administration should have a listening session with survivors who were able to have their removal proceedings terminated to truly understand the depth of difficulty in having a survivor voice the force, fraud, and coercion they have experienced in such an adversarial setting.

Climate Justice →



SJI truly commends the Biden Administration for its intersectional and visionary whole-of-government approach to tackling climate change and environmental justice. SJI recommends the following to ensure racial equity in climate justice:

- 1 There are truly a plethora of examples of resilience workers who learn their basic rights, decide to share their exploitation with CBOs, and work with the CBO in deciding how and where to report their exploitation. The U.S. government must accept the reality that trusted CBOs are better at encouraging survivors at self-identification and identifying survivors than enforcement agencies. In turn, the U.S. government should invest in grants that are accessible and manageable for CBOs that work with resilience workers to encourage community-led reporting of exploitation.
- 2 Climate and immigration justice is intertwined. The Biden Administration should follow through on a Pathway to Citizenship for undocumented populations and especially essential workers, have the DOJ (alongside advocates) articulate a framework for climate defense as a political opinion, and create a pathway to citizenship for displaced climate migrants.



- 3 ICE should expand the existing provision under Protected Areas Memo to include “ a place where disaster or emergency response and relief is being provided, which includes all work associated with disaster restoration relief ...” Generally, DHS and ICE should not be directed to increase surveillance on resilience workers after a disaster relief because they are essential workers.
- 4 FEMA can expand its policy on shelter and food for emergency/response personnel to include the resilience force, meaning people without proper identification, immigration status, or have proof of being subcontracted by a disaster relief form. This would enable resilience workers to not rely completely on their employer for food, water, etc. FEMA should coordinate with CBOs on what kind of paperwork is sufficient to prove that
- 5 FEMA must be trained on human trafficking in the context of disaster relief. Resilience workers should be part of the training from brainstorming to delivery to communicate the nuances of their exploitation and fears.

Government Accountability →



Human trafficking is unique in that it is especially difficult to gather reliable data on its existence, patterns, and more. However, the U.S. government can do four things to paint a more reliable portrait of it's own anti-trafficking policies:

- 1 Currently, there is little to no transparency and subsequent oversight on the success of LEA operations on either sex or labor trafficking despite a federal mandate to do so in the TVPA. Neither the DOJ, FBI, nor AG has produced the data they have been mandated to do so.
- 2 The little data that is publically available underscores that LEAs are not successfully identifying trafficking survivors and prosecuting traffickers, as they



claim to. If the U.S. government continues to fund LEAs under the guise of identifying survivors, it must provide the data that it does. Furthermore, LEAs should be mandated to produce reports on how they made determinations of who is a sex worker, victim, and trafficker.

- 3 The Equitable Data Working Group (EDWG) should be directly involved in the reports produced by the DOJ, FBI, and AG. Specifically, data should be aggregated based on race on victim identification, sex work identification, traffickers, labor versus sex trafficking, and service provision. The EDWG should then contrast the LEA data with HHS data to highlight any racial and gender-based disparities according to Executive Order 13985. Within the HHS data, EDWG should highlight how many referrals came from service providers as opposed to LEAs.
- 4 EDWG should review any data available from the U.S. government's general awareness campaigns about human trafficking to highlight who was considered the trafficker, victim, as well as the race and gender of the identifier if possible.

WHAT PROMISING APPROACHES OR EFFORTS HAVE BEEN SUCCESSFUL IN EMBEDDING A RACIAL EQUITY LENS IN ANTI-TRAFFICKING WORK?

Racial & Economic Justice →



Bail Reform: It is without question that our current bail system perpetuates widespread wealth-based incarceration that is intersectional to anti-trafficking efforts. Bond, in both the criminal and immigration legal system, has been used as leverage to subject trafficking survivors to further exploitation and debt bondage. SJI urges The Legal Aid Interagency Council and the Domestic Policy Council to consider the bail reform efforts in H. Resolution 720, The People’s Justice Guarantee.

Alternatives to the Criminal Legal System: a racially equitable approach to anti-trafficking would include offering alternatives to the criminal legal system for the investigation and prosecution of traffickers²⁹, with the survivor getting to choose their approach. The end goal of what qualifies as “justice” must be specific to the survivor. SJI recommends looking into procedural justice, restorative justice, and transitional justice in an anti-trafficking framework.³⁰

Climate & Immigration Justice →



CBOs rooted in an intersectional approach to immigration and worker rights issues for disaster relief workers are a shining example of what the Biden Administration should

(29) SJI does not believe that the buyers of sex should be prosecuted. The discussion on alternatives is only focused on traffickers.

(30) https://www.urban.org/sites/default/files/publication/97341/alternative_forms_of_justice_for_human_trafficking_survivors.pdf



invest in. The staff are from the communities they represent and they serve as trusted facilitators between communities and government officials. For example, New Orleans Worker’s Center for Racial Justice, The National Guestworker Alliance, and Resilience Force have engaged in grassroots worker and immigration know-your-rights sessions directly on work place sites, created pathways for undocumented workers to testify before local and state government committees, and even brought together workers and local residents wary of brown migrants. There are countless examples of these organizations filling a gap that LEAs could never hope to achieve. These organizations have provided laminated badges on-site to workers who lack identification to avoid harassment and potential immigration concerns, retrieved passports from Sheriff Offices so that workers could report without facing immigration consequences, contacted the Department of Labor to file wage and hour claims, and formed multi-ethnic coalitions to exert pressure on government agencies to take on civil lawsuits against corporations.



WHAT CAN SPOG AGENCIES DO INDIVIDUALLY AND COLLECTIVELY TO INCORPORATE A RACIAL EQUITY FRAMEWORK?

SPOG Collective

It is hard to ascertain how to advance racial equity within SPOG when there is little data available on SPOG agencies. A racial equity analysis would look into the selection process, the racial diversity of SPOG members, their experience of belonging to and working directly with marginalized populations, etc. There is little public data available on what each SPOG committee has accomplished, the coordination between committees, the extent to which SPOG committees implement survivor directives, etc.

SPOG Research and Data

SJI suggests that this SPOG collective should work alongside the EDWG. Data must be collected and analyzed to assess the gender disparities that exist within same-race cohorts as well as the racial disparities that exist within the same gender cohorts in the U.S. government's anti-trafficking policy to assess the gaps therein.

SPOG Training

The content of any trafficking training should be developed and lead by survivors with lived experience. Survivors should also be delivering these trainings to agencies. The substance of these trainings should go beyond basic identification of trafficking survivors. They should delve into the realities of trafficking: forced criminality as labor trafficking, criminalized survivors, the implicit and explicit racial bias in the identification



Loyola Law School
Loyola Marymount University
Sunita Jain Anti-Trafficking Initiative

of survivors, etc. The Biden Administration has a unique opportunity provide to shift its resources and perspective towards preventing helping the overlooked communities by educating its officials on why they have been overlooked.

SPOG Grantmaking

This committee should focus on investing and cultivating relationships with intersectional CBOs that are trusted by marginalized communities. The selection process should involve survivor consultants from these communities. The grant applications and reporting process should also be accessible and manageable given that CBOs have limited resources.

