Thoughts on Race and SNAP IPVs from David Super (Emailed on June 5, 2021)

I thought it might be helpful if I laid out why I see the current means of pursuing SNAP IPVs as racially problematic.

Part of it, of course, is that "welfare fraud" has long been a dog whistle for "undeserving people of color benefiting unjustly from white people's hard-earned tax dollars." Even if the person advocating greater efforts against IPVs is not, her or himself, meaning to trigger a racist reaction, they have to know that that reaction is inevitable. No program can survive if it is indifferent to abuses, but when an action supposedly performed to improve program integrity has a strong negative impact on public perceptions of the program, particularly when that negative impact has a strong racial skew, policymakers have a moral obligation to determine whether the action really does significantly advance program integrity.

For example, billboards and bus signs asking people to report suspected SNAP fraud are effectively useless in combatting fraud: virtually no third party will know enough to know whether fraud is even likely in a particular case. That person getting SNAP despite a large income may be benefiting from transitional SNAP, for example, which has no income limit (but a short duration). I know SNAP rules exceedingly well and have studied SNAP IPVs for over a decade, yet I usually have to interview the recipient, eligibility worker, or attorney for an extended period before I can determine if an IPV likely occurred. Those billboards and bus signs are just serving as publicly funded dog whistles.

Similarly, when an administrator sends the simple message that she or he wants more disqualifications for IPVs without doing or saying anything to make sure that those disqualifications are obtained in ways that ensure that only guilty people are caught, that administrator is doing nothing to promote program integrity. We laugh at Claude Raines in *Casablanca* when he orders his men to round up twice the usual number of suspects, yet demanding a rise in disqualifications without any attention to how that is obtained is inviting abuses that terrorize and harm innocent people in need (and may well bring derision from actual perpetrators of fraud).

Beyond these overall concerns, I see specific civil rights risks in the methods many, many states as well as USDA employ in pursuit of SNAP IPV disqualifications. Some of these dangers apply to both kinds of IPVs; others apply only to trafficking IPVs or only to eligibility IPVs.

With regard to trafficking IPVs, the usual method is for the Compliance Branch of FNS or the Inspector General of USDA to send undercover agents into a store, attempt to sell SNAP benefits for cash, and if they succeed disqualify the store. The Compliance Branch or the IG then notifies the state agency where the store operated of the disqualification, and the state agency seeks to disqualify recipients that shopped at the store. This is done entirely based on EBT transaction records and so-called error-prone transaction profiles. These rarely provide a "smoking gun": often they look very similar to other people's transactions; at most, some of them show that the store operates informally (e.g., not rigidly enforcing its closing time or rounding purchases down to the nearest whole dollar). But because the Compliance Branch and the IG only target small stores (that typically would operate informally whether or not they were trafficking), proving informality is basically useless in proving trafficking. I took the criteria that Georgia and D.C. claimed were suspicious and FOIAed FNS for research or data that showed that these patterns were, in fact, likely to be trafficking; in both instances, FNS claimed it had no such research. (I would be happy to share these if you are interested.) Yet surely FNS knows that states are relying on these criteria to designate people as traffickers: it has paid for some of the "state exchange" visits and trainings where states learned to do so.

This means that disqualifications for trafficking depend heavily on subjectivity, on several levels. First, the Compliance Branch of the IG make highly subjective choices about which stores to try to tempt with undercover agents. My sense anecdotally is that they disproportionately target stores in immigrant communities or communities of color. One of their criteria for suspecting a recipient is that she or he did

not go to a cheaper large supermarket. Members of the majority group can find friendly faces at numerous stores; members of minorities may flock to the one or two stores that seek to identify with their community. Immigrant communities may have only one or two stores where the staff speak their language or the shelves contain culturally important foods. People also regularly shop at the same, relatively high-priced store if they live in a "food desert"; food deserts, like other shortages of services, historically have been found disproportionately in communities of color. Whenever I hear about a disqualified store feeding a round of recipient trafficking charges, I look the store's location up on FNS's food desert locator. So far, every one of them has been either in a food desert or (in one instance) across the street from a food desert. I asked the Access to Justice Office in the Justice Department to seek information on which stores were targeted for undercover agent visits, but nothing happened. I am not sure if they were rebuffed or did not grasp the importance of the inquiry. But if only stores in communities of color are being targeted and only people who shop at disqualified stores are being charged with trafficking, the racial skew is likely to be devastating. And, to repeat, the evidence of trafficking by these recipients typically is very weak. Thus, this is not a case like marijuana smoking where whites and blacks both do it but only the blacks who do it go to jail: here, we are *both* letting off those whites that do traffic *and* disqualifying many blacks who do not.

With respect to eligibility IPVs, lots and lots of information fails to get factored into SNAP determinations all the time. Sometimes the agency loses it; sometimes the household fails to supply it; in numerous individual cases, it is unclear whether it was shared and discarded or not shared at all. Even if the household did not share the information, it is only an IPV if the household member had intent to mislead. The vast majority of eligibility IPV cases I hear about lack any real evidence of intent. Yes, someone may have clicked on a computer screen with bad information on it, but if the screen was written at a college reading level and the claimant did not make it to high school, that tells us little. So the eligibility worker has to make a judgment about whether this incorrect or incomplete information was the result of an attempt to deceive or an innocent error: in the latter instance, the eligibility worker makes no referral to the fraud unit and nothing ever happens. Given the history of this country, and the studies about racial skew in eligibility workers' exercises of discretion in other contexts (e.g., approving transportation and child care subsidies in TANF work programs), it would be the height of naivete to be confident that race played no part when the eligibility worker concluded that Hashima was attempting fraud but Helga made an innocent mistake.

And, again, this is not a situation where guilty whites escape while guilty blacks pay for their misdeeds: many, many of the cases are lousy on the merits. The last two cases on which I was consulted involved supposedly withheld information that the state knew, and that the accused knew that the state knew: in one case, the household gave an accurate report to the allegedly wrong eligibility worker in the same agency, and in the other case the accusation is that a parent did not tell the human services agency that that very agency had taken away her children. I concede this is not a representative sample, but the system must be fundamentally broken if anyone in it thinks that these are even conceivable IPV cases. Leaving aside the likelihood that no rules were violated, how could there possibly be intent to deceive in either case? Yet in one, criminal charges were filed and in the other the prosecutor gave the accused a deadline to confess or she would file criminal charges.

The overarching problem in both trafficking and eligibility IPVs is that the agency rarely has to prove its case on the merits. In other words, we cannot assume that any racial skew in bringing the cases will be corrected when bad cases are tossed out in adjudications. As you can see from the State Activity Reports FNS publishes for each year, vast numbers of disqualifications are imposed based on the household's signature on a waiver or disqualification consent form. These are *not* plea bargains: no one ever gains any advantage from signing these forms: they are disqualified for the same period and with the same effect as if they had lost a hearing. No competent attorney would advise signing one of these forms no matter how guilty the client might be: they do the accused no good at all. Given that signing these forms

is not a rational choice, the only plausible explanations are coercion and confusion. I suspect there is a lot of each. Seventeen years ago, FNS issued guidance nothing that states are getting people to sign waivers and consents by threatening them with criminal charges and that that threat likely caused many innocent people to sign. Yet it has refused to take action to end this practice, and the rate of waivers and consents is hardly changed from the issuance of that guidance. The one small note of progress was when FNS forced Georgia, after two decades, to abandon its system of paying bounties to prosecutors for bullying people into signing consents to disqualification. But FNS did this not on equity or due process grounds but rather because Georgia was violating federal financial procedures. (I would be happy to share the complaints against Georgia that brought this result if you like.)

Besides waivers and consents, the other two sources of disqualifications are criminal convictions and lost administrative disqualification hearings. As we all know, the overwhelming majority of all criminal cases, regardless of the charges, are pleaded out. Public defenders' offices and appointive indigent defense counsel lack the resources to take more than a paltry number of cases to trial. Given that most criminal defense attorneys know little or nothing about the complexities of SNAP law that would be essential to mounting a defense in these cases, it is very likely that the vast majority of those criminal convictions did not results from trials on the merits. In the cases with which they are familiar, such as drug offenses, thefts, and assaults, there is no question that, if the alleged conduct occurred, it was criminal; the attorney's job is to raise a reasonable doubt about whether the conduct occurred as charged. This experience leaves criminal defense attorneys woefully ill-equipped to handle SNAP fraud charges, where the defense is not that the defendant did not do as charged but rather that the defendant's having done so was not unlawful if one sorts through the regulations properly. When the accused tells her or his attorney that the facts alleged by the state are largely correct, and the state has documentation of those facts, the typical criminal defense attorney assumes that the state must know that that is unlawful. In one case where I was recently consulted, an applicant learned that she had been hired to a new job after her SNAP interview but before the agency made a decision on her application. She notified the agency three or four days later, but the agency did not take the report into account in approving her application. The prosecutor alleged fraud because, she said, it is widely known that one must immediately report any changes so reporting a few days later was fraud. This is multiply wrong: first, regulations give applicants ten days to report changes; second, it actually is only a change when a new source of income actually starts, which was weeks away in this case; and third, reporting the new hire to the state agency before the SNAP application had been decided obviously demonstrates a lack of intent to deceive. But because the facts were more-or-less as the state alleged, a defense attorney not knowing SNAP well was going to assume that the prosecutor knew the law. (Bizarrely, the accused had written to the prosecutor to say that SNAP regulations allow ten days to report; rather than look it up, the prosecutor wrote back that the accused's "misrepresentation" of the regulations proved her bad faith.)

Administrative disqualification hearings are the one place where the merits of the state's case might be tested, but because so few of the accused have access to counsel, and are unlikely to understand and be able to function in a formal hearing setting with serious allegations lodged against them, only rarely do these hearings genuinely test the merits of agencies' cases. Each year, a few jurisdictions sustain every single IPV allegation brought while almost all others do so in the overwhelming majority of them. I have a spreadsheet of this data from the State Activity Reports for many years and all states; I would be happy to share it if you like.

Thus, we have real questions about the racial equity of the systems that generate these charges and we have almost no back-end check to screen out meritless cases. The result when recipients widely known in their communities to be highly honest are charged with IPVs and thrown off the program is that their friends and neighbors drop off the program lest they, too, face deeply unjust charges. So the likely racial skew of this system likely carries beyond the individual victimized to depress eligible participation within whole communities.

I do believe that the survival of SNAP or any other program does depend on its taking program integrity seriously. My problem is not with excessive attention to program integrity but rather insufficient attention: in the rush to run up large numbers of disqualified people to appease the racially generated expectations – a losing battle in any event – the program in much of the country has actually abandoned the search for people genuinely abusing the program and resorted to coercing disqualifications out of large numbers of people based on tenuous, deeply ambiguous facts. Rather than mimicking Claude Raines, the program should focus on identifying however many or however few people there are who are actually doing something wrong.