

SNAP Judgments: Collateral Consequences of Felony Drug Convictions for Federal Food Assistance

Claire K. Child & Stephanie A. Clark*

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INTRODUCTION

The history and application of the federal Supplemental Nutrition Assistance Program (SNAP) exist in tension with its goals of helping low-income households in the United States realize improved food security and nutrition. Without specific legislative opt-outs by states, SNAP imposes an automatic lifetime ban on food assistance specifically for individuals with felony drug convictions. As the nation awakens to its overuse of incarceration during the “war on drugs” and drug offenses that once carried criminal penalties become increasingly decriminalized, it is

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* Stephanie A. Clark is the Director of the Center for Justice Reform at Vermont Law School. Claire K. Child is the Assistant Director and a Research Fellow at the Center for Agriculture and Food Systems at Vermont Law School.

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time to critically analyze systemic barriers to assistance and consider policies that can better achieve the objectives of SNAP. The felony drug disqualification exacerbates poverty and hunger, and widens racial disparities. The effects of the ban are compounded by a lack of economic opportunity and social services for people with a felony drug conviction.

Food insecurity is a collateral consequence for individuals with felony drug convictions. In states that have not opted out of the ban on food assistance, food insecurity can also be understood as an unmet “responsivity need,”—a basic need that if left unaddressed remains unstable and hampers a person’s ability to engage with other treatment and social services, such as securing safe and sober housing, employment, or education. These social components are necessary for people with felony drug convictions to successfully build a stable life post-conviction. When people with felony drug convictions are unable to engage in these services because of food insecurity, they, their families, and society suffer. Drawing from research that analyzes the ability of participants in adult drug courts to engage in treatment and social services depending on whether their immediate responsivity needs are met, this Article proposes that states that continue to limit access to SNAP perpetuate systemic and intergenerational food insecurity as well as increased recidivism. These effects have disparately impacted people and communities of color, given that Black individuals face higher incarceration rates than white individuals; formerly incarcerated Black individuals also face higher unemployment rates than formerly incarcerated white individuals. By preventing individuals already struggling to find jobs from receiving food assistance, states exacerbate food insecurity that furthers systemic racism.

This Article addresses the history and evolution of SNAP and the federal ban on access for individuals with drug-related felony convictions. Part I introduces the Supplemental Nutrition Assistance Program and discusses its history and intent. Part II examines the origins of the felony drug disqualification from SNAP, including its legislative history. Part III discusses the broader consequences of felony convictions and eligibility requirements for participation in SNAP. Part IV addresses the Food and Nutrition Service’s annual State Options Report and presents research on state status regarding the felony drug disqualification. Part V analyzes the disqualification as it relates to achieving SNAP’s goal of improving food security and nutrition for low-income households in the US. Part VI offers recommendations for steps that could result in better inclusion of low-income individuals in federal food assistance programs.

I. AN INTRODUCTION TO FEDERAL FOOD ASSISTANCE IN THE UNITED STATES

The Supplemental Nutrition Assistance Program, or SNAP, provides federal food assistance in the United States. Public nutrition assistance began with short-term and pilot programs during the 1940s and 1950s, with the first permanent program established by the Food Stamp Act in 1964.¹ Along with supporting the US agricultural economy and a better utilization of “food abundances,” the Food Stamp Act sought to “raise levels of nutrition among low-income households.”² Now included in the nutrition title of the farm bill,³ SNAP—along with other food, agricultural, and environmental policies—is reviewed by Congress approximately every five years, and the program has undergone significant changes in the decades since it was first enacted. In 1977, access to benefits was restricted for college students.⁴ In 1981, the federal government offered states matching funds for nutrition education.⁵ In the late 1990s, states began to replace paper stamps or coupons with cards electronically linked to a debit account (the Electronic Benefits Transfer or EBT system).⁶ And the 2008 Farm Bill, known as the Food, Conservation, and Energy Act, changed the name of the federal food assistance program from food stamps to SNAP.⁷

Despite changes in name, eligibility, and operation, the Food and Nutrition Service (FNS) of the US Department of Agriculture, which administers SNAP, continues to recognize the program’s primary goal as “reduc[ing] food insecurity” among low-income households.⁸ SNAP is the largest of several nutrition assistance programs funded by the federal government, including the National School Lunch Program and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and is less restrictive than many programs that serve only particular demographics⁹ (eligibility for WIC is limited to “low-income

¹ U.S. DEP’T OF AGRIC. FNS, A SHORT HISTORY OF SNAP (2018), <https://www.fns.usda.gov/snap/short-history-snap>.

² Food Stamp Act of 1964, Pub. L. No. 88-525, §§ 1–2 Stat. 703 (1964), https://fns-prod.azureedge.net/sites/default/files/PL_88-525.pdf.

³ CONG. RSCH. SERV., RS22131, WHAT IS THE FARM BILL? (2019).

⁴ SNAP TO HEALTH, THE HISTORY OF SNAP, <https://www.snapttohealth.org/snap/the-history-of-snap>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See U.S. DEP’T OF AGRIC. FNS, *supra* note 1.

⁹ CTR. ON BUDGET & POL’Y PRIORITIES, POLICY BASICS: THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) (2019), <https://www.cbpp.org/research/food->

pregnant and post-partum women, infants, and children up to age 5,” for example).¹⁰ Except in Puerto Rico, American Samoa, and the Northern Mariana Islands, where food assistance operates as a capped block grant,¹¹ SNAP is an entitlement program, meaning that all eligible and qualifying households can participate.¹² Because of this, SNAP allocations tend to increase during economic downturns and natural disasters and contract during recoveries, providing a responsiveness that block grants lack. In response to the COVID-19 pandemic, for example, the FNS expanded SNAP eligibility in response to rising rates of unemployment and food insecurity.¹³ Thus, SNAP is an important tool in addressing domestic food insecurity.

The Food Stamp Act of 1964 established a division of responsibility between state and federal governments, with the federal government providing funding, approval of food retailers, broad eligibility guidelines, and oversight of state programs, while states established eligibility standards, certified applications from households, and printed and issued food stamps or coupons.¹⁴ States continue to have discretion over a range of matters that affect how they implement food assistance for residents. The State Options Report, published annually by the FNS, documents examples of the flexibility available to states.¹⁵ States can tailor their reporting and application processes, which affect

assistance/policy-basics-the-supplemental-nutrition-assistance-program-snap.

¹⁰ CTR. ON BUDGET & POL’Y PRIORITIES, STREAMLINING AND MODERNIZING WIC ENROLLMENT (2020), <https://www.cbpp.org/research/food-assistance/streamlining-and-modernizing-wic-enrollment>.

¹¹ CTR. ON BUDGET & POL’Y PRIORITIES, THE PROBLEMS WITH BLOCK-GRANTING ENTITLEMENT PROGRAMS (2021), <https://www.cbpp.org/the-problems-with-block-granting-entitlement-programs>.

¹² Brynne Keith-Jennings & Elizabeth Wolkomir, CTR. ON BUDGET & POL’Y PRIORITIES, HOW DOES HOUSEHOLD FOOD ASSISTANCE IN PUERTO RICO COMPARE TO THE REST OF THE UNITED STATES? (2020), <https://www.cbpp.org/sites/default/files/atoms/files/11-27-17fa.pdf>.

¹³ Ashley Burnside, LATEST COVID RELIEF BILL PROVIDES INCREASED ACCESS TO SNAP FOR COLLEGE STUDENTS (2020), <https://www.clasp.org/blog/latest-covid-relief-bill-provides-increased-access-snap-college-students>; FOOD RES. & ACTION CTR., COVID-19 UPDATES: WHAT YOU NEED TO KNOW, <https://frac.org/covid19> (last visited Jan. 23, 2021); *see also* U.S. DEP’T OF AGRIC. FNS, FNS RESPONDS TO COVID-19: OUR COMMITMENT, <https://www.fns.usda.gov/coronavirus> (last visited Jan. 19, 2021) (illustrating ways in which the government is working to provide nutrition assistance to children and those in need in response to COVID-19).

¹⁴ Food Stamp Act of 1964, Pub. L. No. 88-525, § 6, 78 Stat. 703 (1964), https://fns-prod.azureedge.net/sites/default/files/PL_88-525.pdf.

¹⁵ U.S. DEP’T OF AGRIC. FNS, STATE OPTIONS REPORT (2019), <https://fns-prod.azureedge.net/snap/waivers/state-options-report>.

how easy or difficult it may be for eligible households to access SNAP, as well as substantive eligibility requirements.¹⁶ For example, states may disqualify individuals who fall behind on child support payments or fail to cooperate with child support enforcement.¹⁷ Conversely, the federal mandate disqualifies individuals with felony drug convictions automatically, and states may take action to opt out.¹⁸ While state agencies have the discretion to implement most of the choices surveyed in the State Options Report, authority for the felony drug disqualification rests solely with a state's legislature, which must enact legislation in order to change how the state participates in the ban.¹⁹

II. THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT

The SNAP felony drug disqualification originates in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).²⁰ The US Department of Health and Human Services described PRWORA as a “comprehensive bipartisan welfare reform plan” intended to promote self-reliance and deemphasize public support. The law requires recipients of public assistance to work and restricts the period that they are eligible to receive benefits.²¹ Section 115, entitled “Denial of Assistance and Benefits for Certain Drug-Related Convictions,” makes individuals convicted of state or federal felony crimes involving controlled substances ineligible for cash assistance under the Temporary Assistance for Needy Families (TANF) program (commonly known as welfare) and food assistance under SNAP.²² It also provides states the discretion to “opt out” by passing affirmative legislation containing a “specific reference” to the law.²³ This opt-out may take several forms: a state may choose not to participate in the ban,

¹⁶ *Id.*

¹⁷ U.S. DEP'T OF AGRIC. FNS, STATE OPTIONS REPORT SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, 19 (14th ed. 2018), <https://fns-prod.azureedge.net/sites/default/files/snap/14-State-Options.pdf>.

¹⁸ *Id.*

¹⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115(d), 110 Stat. 2105 (1996) (codified at 21 U.S.C. § 862a).

²⁰ *Id.*

²¹ U.S. DEP'T OF HEALTH & HUM. SERV., OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (1996), <https://aspe.hhs.gov/report/personal-responsibility-and-work-opportunity-reconciliation-act-1996>.

²² *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115(a), 110 Stat. 2105 (1996) (codified at 21 U.S.C. § 862a).

²³ *See id.* § 115(d).

to limit a person's period of ineligibility under the ban, or to specify the population to which the ban applies.²⁴ As this Article discusses, Section 115 imposes several limitations on SNAP's ability to meet its goals of supporting low-income households and reducing food insecurity.

PRWORA was first introduced in the House of Representatives and at first made no mention of a prohibition for individuals with felony drug convictions. During deliberations in the Senate, Phil Gramm of Texas introduced Amendment 4935, which would become Section 115.²⁵ The Senate approved Amendment 4935 and added it to its own version of PRWORA, but the final version of Section 115 differs in several important ways from the original version of Amendment 4935. Although the report from the conference committee that resolved the two competing versions does not document the reasoning or negotiation process, Section 115 emerged containing several apparent compromises. First, Amendment 4935 prohibited individuals with felony drug convictions from receiving "any Federal means-tested public benefit." The committee narrowed this prohibition, limiting the ban to TANF²⁶ and SNAP (then known as food stamps). Second, Amendment 4935 contained tiered consequences that imposed a five-year prohibition for misdemeanor convictions and a lifetime prohibition for felony convictions.²⁷ The committee removed the prohibition for misdemeanor offenses, leaving Section 115 applicable to felony convictions only.²⁸ The committee also added several explicit exemptions to the ban, specifying that access to prenatal care, job training programs, and drug treatment programs would not be restricted.²⁹ And most significantly, Section 115 included the state opt-out provision whereby "a state may, by specific reference in a law enacted after the date of the enactment of this Act, exempt any or all individuals domiciled in the State from the application" of the prohibition,

²⁴ *Id.*

²⁵ 104 CONG. REC. S8493 (daily ed. July 23, 1996) (statement of Sen. Gramm), <https://www.congress.gov/crec/1996/07/23/CREC-1996-07-23-senate.pdf>.

²⁶ CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (2021), <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families> (Temporary Aid to Needy Families is a block grant program created by PRWORA to replace the entitlement program Aid to Families with Dependent Children).

²⁷ 104 CONG. REC. S8379 (daily ed. July 19, 1996), <https://www.congress.gov/104/crec/1996/07/19/CREC-1996-07-19-pt1-PgS8375.pdf>.

²⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115(d), 110 Stat. 2105 (1996) (codified at 21 U.S.C. § 862a).

²⁹ *Id.*

or limit the applicable time period.³⁰

It is worth noting that these changes responded to floor debate among legislators. The floor debate allowed just two minutes of discussion for each amendment, including Amendment 4935. The three Senators who spoke in opposition to Amendment 4935 said they supported the amendment in principle, but voiced disagreement with its details.³¹ Senator Edward Kennedy of Massachusetts criticized banning benefits for misdemeanor offenses and preventing access to prenatal care and drug treatment programs, warning that assistance would be “off limits to the people who need them the most.”³² Senator Connie Mack of Florida stated that “the Federal Government should [not] continue to tell the States how to run their welfare programs.”³³ Given these comments, the state opt-out provision was likely a response to the call for the federal government to allow states more flexibility in administering their welfare and food assistance programs, as had long been the model. The floor debate on Amendment 4935 did not challenge its basic goal of denying public assistance as punishment for drug-related crime. Instead, the debate centered on avoiding unintended or overly broad consequences, such as affecting misdemeanor convictions or restricting prenatal care for pregnant women. Ultimately, Section 115 maintained the punitive design³⁴ of Amendment 4935, notwithstanding the committees’ steps toward “distinguish[ing] between drug use as a crime and drug addiction as a public health problem,” an ongoing challenge for policymakers to this day.³⁵

³⁰ See Table 1 for the text of Amendment 4935 and Public Law 104-193, § 115 in Addendum A.

³¹ 104 CONG. REC. S8498 (daily ed. July 23, 1996) (statement of Sen. Gramm) <https://www.congress.gov/crec/1996/07/23/CREC-1996-07-23-senate.pdf>.

³² See *id.* (statement of Sen. Kennedy).

³³ *Id.* (statement of Sen. Mack); CSPAN, 104 CONG. REC. SESSION AT 2:06:15 (July 23, 1996), <https://www.c-span.org/video/?73810-1/senate-session>. Senator Mack’s comments were not made in person on the day of the debate, but were evidently added after the fact to the Congressional Record. Senator Mack was present and participated in voting on July 23, 1996, but only Senator James Exon of Nebraska and Senator Kennedy spoke in opposition to Amendment 4935. A potential goal of having comments added to the record is to ensure they are available for consideration by the conference committee when the bill reaches that step.

³⁴ Cynthia Godsoe, *The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to ‘Life Sentence’*, 13 BERKELEY WOMAN’S L.J. 257, 258 (1998), <https://core.ac.uk/download/pdf/228598563.pdf>.

³⁵ MAGGIE MCCARTY ET AL., CON. RSCH. SERV., R42394, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE 2 (2016), <https://sgp.fas.org/crs/misc/R42394.pdf>.

The prevailing attitude during this time was that strict enforcement of drug laws and policies was necessary to eradicate the illegal drug market and illegal drug use.³⁶ Tough enforcement and the prohibition of sales and possession, coupled with harsh penalties for even minor offenses, could eliminate the drug problem in many policymakers' minds.³⁷ Instead, the "war on drugs" not only failed, but led to bigger problems, including the current opioid health crisis³⁸ and the unprecedented escalation of mass incarceration.³⁹ The United States continues to grapple with the unintended impacts of the war on drugs, including for individuals with a felony drug conviction.

III. COLLATERAL CONSEQUENCES OF FELONY CONVICTION

Most people understand that a sentence imposed by a court upon conviction is the direct consequence of the conviction. Less understood are the vast consequences that follow after a conviction. These "collateral consequences" of conviction include court fees and costs, extended supervision under specified conditions of parole and probation, costs borne by that supervision, and barriers to safe and secure housing, employment, and education. In some states, people with criminal records lose substantive civil rights such as the right to vote.⁴⁰ They also may be precluded from meaningful opportunities such as chaperoning a child's field trip or receiving a professional license, notwithstanding successful completion of a requisite educational program.⁴¹

³⁶ OPEN SOCIETY FOUNDATIONS, WHY WE NEED DRUG POLICY REFORM, <https://www.opensocietyfoundations.org/explainers/why-we-need-drug-policy-reform> (June 2021); see also GLOBAL COMMISSION ON DRUG POLICY, <https://www.globalcommissionondrugs.org> (last visited Jan. 22, 2021) (displaying the work of the Global Commission on Drug Policy created in Jan. 2011).

³⁷ See OPEN SOCIETY FOUNDATIONS, *supra* note 36.

³⁸ Christine Minhee & Steve Calandrillo, *The Cure for America's Opioid Crisis: End the War on Drugs*, 42 HARV. J. L. & PUB. POL'Y 547, 547 (2019).

³⁹ *Id.*; THE SENTENCING PROJECT, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Jan. 20, 2021) ("The number of Americans incarcerated for drug offenses has skyrocketed from 40,900 in 1980 to 469,964 in 2017." At the state level, the number of people in prison for drug offenses has increased 10 times since 1980.); Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, THE PRISON POLICY INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2020.html> (globally, "one in five prisoners are incarcerated for drug offenses, mostly for mere personal possession").

⁴⁰ Margaret Love & David Schlusell, *Who Must Pay to Regain the Vote: A 50 State Survey*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Jul. 2020), <https://ccresourcecenter.org/wp-content/uploads/2020/07/Who-Must-Pay-to-Regain-the-Vote-A-50-State-Survey.pdf>.

⁴¹ See generally, 13 V.S.A. § 8002, and <https://vermont.ccresourcecenter.org/> for a

The National Inventory of Collateral Consequences of Conviction defines collateral consequences as “legal and regulatory sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other opportunities.”⁴² Included are partial, complete but time-limited, and lifetime bans from SNAP and Temporary Assistance for Needy Families (TANF).⁴³ Although discretion exists in some cases, and states are now experimenting with fully or partially lifting some of these restrictions,⁴⁴ it has historically been and continues to be more difficult for people with a criminal record to access assistance such as public housing, student loans, and SNAP benefits.

In addition to regulatory restrictions, stigma accompanying a criminal history limits employment opportunities. Surveys of employer attitudes on hiring individuals with a criminal record demonstrate the negative impact a conviction has on employment opportunities.⁴⁵ A 1996 study reported that 40 percent of employers “would not knowingly hire someone with a criminal record,” although drug crimes were seen as less serious offenses compared to other crimes.⁴⁶ A study published in 2003, which measured employers’ behavior rather than surveying their self-reported attitudes, showed that “ex-offenders [were] only one-half to one-

compilation of collateral consequences imposed in Vermont. *See also*, 13 V.S.A. § 8012(b)(2) (exempting drug trafficking convictions in Vermont from seeking an order of limited relief or certificate of restoration of rights).

⁴² NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, *What are Collateral Consequences?*, <https://niccc.csgjusticecenter.org/> (last visited Jan. 20, 2020).

⁴³ Marlysa D. Gamblin, *Mass Incarceration: A Major Cause of Hunger*, BREAD FOR THE WORLD INST. (Feb. 2018) at 6, <https://www.bread.org/sites/default/files/downloads/briefing-paper-mass-incarceration-february-2018.pdf>.

⁴⁴ FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTH BUSTER ON PUBLIC HOUSING, https://csgjusticecenter.org/wp-content/uploads/2020/03/REENTRY_MYTHBUSTERS_HOUSING.pdf (last visited Jan. 20, 2021); FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTH BUSTER ON FEDERAL STUDENT FINANCIAL AID, http://csgjusticecenter.org/wp-content/uploads/2013/03/Reentry_Council_Mythbuster_Student_Financial_Aid.pdf (last visited Jan. 20, 2021).

⁴⁵ NAT’L RSCH. COUNCIL OF THE NAT’L ACAD., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* at 236 (Jeremy Travis, Bruce Western & Steve Redburn eds. 2014), <https://www.nap.edu/read/18613/chapter/10>; Richard Schwartz & Jerome Skolnick, *Two Studies of Legal Stigma*, 10 SOCIAL PROBLEMS 133, 133–42 (1962), <https://academic.oup.com/socpro/article/10/2/133/1629824>.

⁴⁶ *See* NAT’L RSCH. COUNCIL OF THE NAT’L ACAD. at 236.

third as likely as nonoffenders to be considered by employers.”⁴⁷ Race compounds this disadvantage. The same study investigated the intersection of race and criminal history and found that young white men with criminal records were 50 percent less likely to receive a callback on a job application versus young white men without criminal records, while for young Black men callbacks decreased by almost 64 percent.⁴⁸ Thus, the effect of a criminal history is more pronounced for Black job applicants.⁴⁹

For people returning home from jail or prison, social support is crucial and a lack of assistance negatively impacts their ability to successfully reintegrate. A lack of social supports when they are most needed gives context to the 91 percent of formerly incarcerated participants in a National Institutes of Health study who reported being food insecure upon release.⁵⁰ This is not surprising when considered in light of a survey by the Ella Baker Center for Human Rights that analyzed the costs of incarceration on families. In that study, three out of four survey participants said that finding employment after release was “difficult or nearly impossible.”⁵¹ Without employment upon release, formerly incarcerated individuals struggle to make ends meet, especially when faced with added costs such as fines and fees associated with a

⁴⁷ Devah Pager, *The Mark of a Criminal Record*, 108 No. 5 AM. J. OF SOC. 937, 960 (2003), http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf.

⁴⁸ *Id.* at 937–75. The study used a felony drug conviction to distinguish applicants with and without a criminal record, making it especially relevant here.

⁴⁹ *Id.*; Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 195, 199 (2009), http://scholar.harvard.edu/files/pager/files/annals_sequencingdisadvantage.pdf. The study was replicated with similar results, six years later in a different city. See also NAT’L REENTRY RES. CTR. (2020), <https://csgjusticecenter.org/nrrc/employment-opportunities-for-people-with-criminal-records/> (citing that “The existence of a criminal record reduces job callbacks by about 50 percent on average.”); SOC’Y FOR HUM. RES. MGMT, WORKERS WITH CRIMINAL RECORDS, (May 17, 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Second-Chances.aspx>. Although some promising studies on changing attitudes exist, survey data may be less reliable than actual hiring practices at depicting the employment landscape for individuals with a history of a drug-related felony conviction.

⁵⁰ Gamblin, *supra* note 43, at 6 (citing EMILY A. WANG, NAT’L INST. OF HEALTH, A PILOT STUDY EXAMINING FOOD INSECURITY AND HIV RISK BEHAVIORS AMONG INDIVIDUALS RECENTLY RELEASED FROM PRISON (Apr. 2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3733343/pdf/nihms469405.pdf>).

⁵¹ ELLA BAKER CTR. FOR HUM. RTS., FORWARD TOGETHER & RESEARCH ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES, 20 (2015), <http://whopaysreport.org/who-pays-full-report/>.

conviction. Five years after release, 67 percent of the survey participants remained either unemployed or underemployed.⁵²

Again, this result is compounded for people and families of color. Unemployment for formerly incarcerated people is five times higher than general unemployment in the United States.⁵³ Of this population segment, formerly incarcerated Black women have a staggering unemployment rate of 43.6 percent, followed by Black men with an alarming rate of 35.2 percent.⁵⁴ Unemployment for white women and white men trails behind at rates of 23.2 percent and 18.4 percent, respectively.⁵⁵ This impact trickles down and has lasting impacts on children and families. In the Ella Baker Center study discussed above, children with incarcerated parents experienced heightened health conditions, risks, and educational delays, fueling intergenerational poverty because children experiencing these conditions are less likely to be successful in school or in finding a job with a sufficient wage to support themselves and their families, thus “reinforcing hunger across generations.”⁵⁶

Childless adults face additional hurdles under PRWORA that further limit access to SNAP benefits. Childless adults must either work at least 80 hours per month, or complete the same amount of time in an education and training program or state workfare program.⁵⁷ This population, including people 18 to 49 years of age without dependents, faces a time limitation of three months out of three years, over and above SNAP’s general work requirements.⁵⁸ As it is more difficult for individuals with a criminal record to find employment, they are more likely to need and otherwise qualify for food assistance. Receiving SNAP benefits for more than three months, however, requires paid work or a similar approved activity—a potential catch-22.⁵⁹

Historically, states have been able to waive work requirements to allow “ABAWDs” (Able-Bodied Adults Without Dependents) continued access to SNAP benefits in areas with an unemployment rate of over 10

⁵² *Id.*

⁵³ Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, Prison Policy Initiative (Jul 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

⁵⁴ *Id.* at Table 1.

⁵⁵ *Id.*

⁵⁶ Gamblin, *supra* note 43, at 2.

⁵⁷ FOOD AND NUTRITION SERV., SNAP WORK REQUIREMENTS (2019), <https://www.fns.usda.gov/snap/ABAWD>.

⁵⁸ *Id.*

⁵⁹ *Id.*

percent or where a lack of available jobs can be demonstrated.⁶⁰ On December 5, 2019, the FNS challenged states' authority to waive work requirements by publishing a final rule narrowing the conditions under which states may issue a waiver.⁶¹ The USDA described this rule as a way to "move more able-bodied recipients of [SNAP] towards self-sufficiency and into employment."⁶² Critics were concerned that narrowing eligibility would result in greater pressure on food bank charities and an increase in food insecurity. Contrary to the USDA's statement, research shows that conditioning social safety net programs is "largely ineffective in facilitating people's entry into or progression within the paid labor market over time."⁶³ As less desirable job candidates, individuals with drug-related felony convictions are likely to be especially affected by economic downturns. Fortunately, a federal court issued a preliminary injunction against the rule in March 2020, and later struck it down.⁶⁴

Other ineligibility criteria for SNAP are extensive.⁶⁵ First, a person with undocumented immigration status is not eligible for SNAP,

⁶⁰ Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 980, 980 (Feb. 1, 2019) (to be codified as 7 C.F.R. pt. 273), <https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2018-28059.pdf>.

⁶¹ FOOD AND NUTRITION SERV., USDA, 7 C.F.R. § 273 (2020), <https://www.federalregister.gov/documents/2019/12/05/2019-26044/supplemental-nutrition-assistance-program-requirements-for-able-bodied-adults-without-dependents>.

⁶² Press Release, U.S. DEP'T OF AGRIC., USDA RESTORES ORIGINAL INTENT OF SNAP: A SECOND CHANCE, NOT A WAY OF LIFE (Dec. 4, 2019), <https://www.usda.gov/media/press-releases/2019/12/04/usda-restores-original-intent-snap-second-chance-not-way-life>.

⁶³ ECON. & SOC. RSCH. COUNCIL, FINAL FINDINGS REPORT: WELFARE CONDITIONALITY PROJECT 2013-2018, 4 (2018), http://www.welfareconditionality.ac.uk/wp-content/uploads/2018/06/40475_Welfare-Conditionality_Report_complete-v3.pdf; see also Abby Vesoulis, 'I Think People Will Starve.' Experts Are Worried About the Hundreds of Thousands Who Could Lose Food Stamps Come April, TIME (Feb. 14, 2020, 4:53 PM), <https://time.com/5771169/food-stamp-rule-work-requirements/>; Sophia Khan & Kali Grant, *Unworkable & Unwise*, GEORGETOWN LAW CTR. ON POVERTY & INEQ., 1 (Sept. 2019), <http://www.georgetownpoverty.org/wp-content/uploads/2019/09/GCPI-ESOI-Work-Requirements-Fact-Sheet-20190926.pdf>.

⁶⁴ Bhargav Acharya, *U.S. Judge Strikes Down USDA Rule on Food Benefits During Pandemic*, REUTERS <https://www.reuters.com/article/us-usa-trump-food-stamps/u-s-judge-strikes-down-usda-rule-on-food-benefits-during-pandemic-idUSKBN27417U> (Oct. 19, 2020, 3:18 AM); Bill Chappell, *Court Vacates Trump Administration Rule That Sought To Kick Thousands Off Food Stamps*, NPR, <https://www.npr.org/2020/10/19/925497374/court-vacates-trump-administration-rule-that-sought-to-kick-thousands-off-food-s> (Oct. 19, 2020, 4:20 PM).

⁶⁵ 7 C.F.R. § 273.1(b)(7) (2021), <https://ecfr.federalregister.gov/current/title-7/subtitle-B/chapter-II/subchapter-C/part-273>.

and local food assistance personnel are required to report to an immigration office when they determine a person seeking SNAP benefits is undocumented.⁶⁶ Upon its passage PRWORA restricted eligibility for most documented non-citizens, although since then eligibility has been incrementally and conditionally restored.⁶⁷ Eligibility for adult students is also restricted, unless they meet work requirements, are single parents, or meet certain other conditions.⁶⁸ In California, individuals receiving supplemental security income (SSI) benefits are not eligible for SNAP because state SSI benefits have been increased to include the amount that individuals would otherwise receive in SNAP benefits.⁶⁹ Unless exempt, all adult SNAP recipients without a disability must meet 80-hour-per-month work requirements or participate in job training or a workfare program.⁷⁰ Exemptions include caring for a young child or for an “incapacitated person,” receiving unemployment compensation, participating in treatment for addiction, or being enrolled as a student.⁷¹ The regulations also state that a social security number is required to receive SNAP benefits.⁷² Program violations, including using benefits to buy or sell controlled substances or firearms, trafficking of benefits,⁷³ or applying for benefits in more than one state, result in increasing periods of suspension leading to permanent ineligibility after a third offense.⁷⁴ If a person is disqualified from any other means-tested public assistance program, the state SNAP agency may impose the same disqualification for SNAP benefits.⁷⁵ SNAP eligibility also requires meeting child support payments and cooperation with child support agency authorities, although this is another condition left to the discretion of each state.⁷⁶ As previously noted, for ABAWDs, receipt of SNAP benefits is limited to three months unless an individual meets work requirements or is covered by a state waiver.⁷⁷ A final condition of ineligibility is conviction for

⁶⁶ *Id.* § 273.4(b).

⁶⁷ FOOD AND NUTRITION SERV., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM GUIDANCE ON NON-CITIZEN ELIGIBILITY (June 2011), https://www.nilc.org/wp-content/uploads/2019/05/Non-Citizen_Guidance_063011.pdf.

⁶⁸ 7 C.F.R. § 273.5.

⁶⁹ *Id.* § 273.20.

⁷⁰ FOOD AND NUTRITION SERV., SNAP WORK REQUIREMENTS (2019), <https://www.fns.usda.gov/snap/work-requirements>.

⁷¹ 7 C.F.R. § 273.7(b).

⁷² *Id.* § 273.6(a).

⁷³ *Id.* § 273.16(b)(2).

⁷⁴ *Id.* § 273.16(b)(1).

⁷⁵ *Id.* § 273.11(k).

⁷⁶ *Id.* § 273.11(o).

⁷⁷ *Id.* § 273.24(b).

certain crimes, including murder and sex offenses, if a person is out of compliance with the terms of their sentence.⁷⁸

IV. STATE STATUS

As previously noted, states may limit or change how they participate in the federal felony disqualification of SNAP through legislation. State participation with Section 115 can be sorted into three categories: a state may fully and without qualification end its participation in the federal ban (an opt-out state); it may alter the parameters of its implementation of the ban (a modified state); or, a state may take no action, and by default fully participate in the federal ban on food assistance for people with felony drug convictions (a full ban state).⁷⁹ The State Options Report issued by the Food and Nutrition Service reports on these positions annually. The Report presents survey data collected by speaking with state agency representatives and reviewing states' Plans of Operation. The Report is a voluntary, informational publication not compelled by any statutory or regulatory requirement. The result is an extremely useful but almost certainly imperfect record, which provides a longitudinal view of state-by-state SNAP operations, but which may be subject to semantic interpretation and reporting or other errors. For example, several states have phrased their legislation to include the term "opt out," but also include qualifications. Researchers with this paper classified this status as "modified," although the state may describe itself, for the purposes of the State Options Report, as an opt-out state.⁸⁰

In the 20 years since the passage of PRWORA, most states have taken some sort of action to address the federal ban on food assistance for individuals with drug-related felony convictions.⁸¹ According to research conducted for this Article, as of October 2020, only two states (New York and South Carolina) have no law addressing the issue and thus fully

⁷⁸ *Id.* § 273.11(s).

⁷⁹ See, e.g., Hillary Payne, Mary-Claire Morrow, Alexis Gbemudu, Devon Horine, and Mathew Swinburne, *50-State Survey: SNAP Ban of Persons with Felony drug Convictions*, Network for Public Health Law (as updated Apr. 2020), <https://www.networkforphl.org/wp-content/uploads/2020/04/50-State-Survey-SNAP-Felony-Ban-Updated-1.pdf>; Chesterfield Polkey, *Most States Have Ended SNAP Ban for Convicted Drug Felons*, National Conference of State Legislatures (2019), <https://www.ncsl.org/blog/2019/07/30/most-states-have-ended-snap-ban-for-convicted-drug-felons.aspx>.

⁸⁰ STATE DATA ON SNAP & DRUG CONVICTIONS, <https://airtable.com/shr7iY8sZ7TD0TuXS> (last visited Jan. 25, 2021).

⁸¹ *Id.*

participate in the ban by default.⁸² Twenty-six states have a modified status, and the remaining 23 states have fully opted out of the federal ban (our survey includes Washington, DC).⁸³ While this appears promising, a closer look at the modifications reveals that they often perpetuate additional requirements for people seeking SNAP benefits, maintaining unnecessary barriers for people with drug-related felony convictions.

The most common modification, enacted in 15 states, is a requirement that individuals complete a drug treatment program.⁸⁴ In several states, this requirement can be avoided for individuals who can provide a medical professional's opinion that treatment is not needed, who are currently enrolled in a treatment program, or who are on a waiting list for treatment. This last concession recognizes that demand for treatment far outstrips its availability. According to a 2015 study, "approximately 21.7 million or 8.1 percent of Americans aged 12 years or older were identified as needing SUD [substance use disorder] treatment. Yet only 3.7 million . . . received any substance use treatment."⁸⁵ Startlingly, this percentage has remained more or less stagnant since 2002.⁸⁶

The next most common modification, enacted by 11 states, requires individuals to comply with the terms of their probation or parole in order to receive SNAP.⁸⁷ Once released from jail or prison, people with

⁸² *See id.*

⁸³ *See id.* (modified status: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, West Virginia, Wisconsin; no ban: Arkansas, Delaware, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, Wyoming, and Washington, D.C.).

⁸⁴ *See id.* (illustrating drug convictions by state. These examples include Alabama, Alaska, Arizona, California, Connecticut, Hawaii, Kansas, Kentucky, Missouri, Montana, Nebraska, Nevada, North Carolina, Pennsylvania, Tennessee).

⁸⁵ PEGGY O'BRIEN ET AL., TRUVEN HEALTH ANALYTICS & US DEP. OF HEALTH & HUM. SERV., BEST PRACTICES AND BARRIERS TO ENGAGING PEOPLE WITH SUBSTANCE USE DISORDERS IN TREATMENT, (Mar. 2019), <https://aspe.hhs.gov/report/best-practices-and-barriers-engaging-people-substance-use-disorders-treatment> (citing, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. CTR. FOR BEHAV. HEALTH STAT. AND QUALITY, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE U.S.: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH. (No. SMA 16-4984, NSDUH Series H-51. Rockville, MD: SAMHSA; 2016)).

⁸⁶ *Id.*

⁸⁷ STATE DATA ON SNAP & DRUG CONVICTIONS, *supra* note 80 (illustrating drug convictions by state. These examples include Alabama, Alaska, Arizona, California, Connecticut, Georgia, Idaho, Indiana, Michigan, Missouri, and Pennsylvania).

a felony drug conviction often remain on some form of supervised release, such as probation or parole. Under supervised release, these people must comply with a myriad of conditions, even while they are precluded from basic necessities such as food assistance. Some states enact waiting periods for benefits for people on probation or parole, or enforce a “three strikes” model where a third violation results in a lifetime ban. In North Carolina, individuals may be eligible for food assistance “six months after release from custody if no additional controlled substance felony offense [is] committed during that period” and they are enrolled in or have completed a drug treatment program.⁸⁸ Yet, living in hunger and poverty “often affects . . . [an individual’s] ability to comply with their parole or probation requirements (i.e., securing work, housing, etc.), which increases the likelihood of recidivism.”⁸⁹ Persons on probation, parole, or other forms of community supervision or pretrial release must comply with multiple conditions such as mandatory curfews, limits to where they can physically be within a jurisdiction, or limited or prohibited access to the internet and social media, among many others. They must also bear the costs of their supervision, on top of fines and fees from their conviction. These strict conditions often become a gateway back to jail or prison because a “technical violation” of any condition—not necessarily committing a new offense—can be enough to revoke parole or probation.⁹⁰ What’s more, some people are then held on “detainers” filed by the supervising authority, such as a probation or parole officer, which can result in a person remaining incarcerated and ineligible for bail.⁹¹

Finally, several states enforce the felony drug ban in full, with the consequence that individuals who violate probation or parole, even a “technical violation,” or are deemed to be a “fleeing felon,” are ineligible to receive SNAP benefits. It is not surprising, then, that a “2019 report by the Council of State Governments showed that technical violations account for almost 1 in 4 admissions to state prison and \$2.8 billion in annual incarceration costs.”⁹²

⁸⁸ N.C. G.S. § 108A-25.2 (2008), https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_108A/GS_108A-25.2.pdf.

⁸⁹ Gamblin, *supra* note 43, at 2.

⁹⁰ PEW CHARITABLE TRUSTS, *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations* (2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations>.

⁹¹ Wagner & Sawyer, *supra* note 39.

⁹² PEW CHARITABLE TRUSTS, *supra* note 90.

The ban on food assistance for individuals with a felony drug conviction adds to the challenges they face, which can lead to a path of reoffending. The Prison Policy Initiative analyzed mass incarceration and rearrest rates and found “[a]t least 1 in 4 people who go to jail will be arrested again within the same year—often those [who are already] dealing with poverty, mental illness, and substance use disorders.”⁹³ Rearrest rates are also disproportionately higher for people from historically marginalized populations.⁹⁴ By excluding marginalized populations from basic food assistance, states are ignoring a way to ensure formerly incarcerated people receive the social services necessary to help break the cycle of recidivism.

V. RATIONALE AND OUTCOMES OF RESTRICTING SNAP BENEFITS

During the Senate debate discussed in part II, Senator Phil Gramm of Texas made a statement which best demonstrates the rationale of Section 115: “the bottom line is, if we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation’s drug laws.”⁹⁵ This argument appears moral in nature, reflecting a goal to limit public assistance to the “deserving poor” and restrict it from the “undeserving poor.”⁹⁶ The impulse to restrict assistance to those seen as “worthy” has a long history in public assistance programs⁹⁷ and has taken various forms, from requiring recipients to work⁹⁸ to penalizing cohabitation outside of marriage.⁹⁹ Here, Section 115 is also an example of the broader “war on drugs” that began around the 1970s and conflated welfare with drug addiction and crime.¹⁰⁰ Arguably, policy is always informed by moral objectives, but restricting SNAP benefits for a

⁹³ Wagner & Sawyer, *supra* note 39; Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police And Jails Are Misused To Respond To Social Problem*, PRISON POLICY INITIATIVE (2019), <https://www.prisonpolicy.org/reports/repeatarrests.html>.

⁹⁴ *Id.*

⁹⁵ 104 CONG. REC. S8498 (daily ed. July 23, 1996) (statement of Sen. Gramm), <https://www.congress.gov/crec/1996/07/23/CREC-1996-07-23-senate.pdf>.

⁹⁶ See MCCARTY, *supra* note 35.

⁹⁷ CON. RSCH. SERV., R42394, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE 2 (2016), <https://sgp.fas.org/crs/misc/R42394.pdf>.

⁹⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 21 U.S.C. § 862a); *see also* Sophie Khan & Kali Grant, *Unworkable & Unwise*, GEORGETOWN LAW CTR. ON POVERTY & INEQ. (Sep. 2019), <http://www.georgetownpoverty.org/wp-content/uploads/2019/09/GCPI-ESOI-Work-Requirements-Fact-Sheet-20190926.pdf>.

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* at 2–3.

vulnerable population does not serve the program's purpose to "raise levels of nutrition among low-income households."¹⁰¹ While it is difficult to ascertain legislative intent, Senator Gramm's statement invokes a moral slant and is punitive in nature; it expresses the idea that illegal drug activity should not be "rewarded" with public assistance and implies that the prohibition could be a method of enforcing drug laws.

Some sources have concluded that Section 115 was passed to deter drug use and reduce fraud in the welfare and SNAP programs.¹⁰² Although a federal court accepted this assertion in *Turner v. Glickman*,¹⁰³ there are some problems with how it plays out. In that case, the Seventh Circuit affirmed a district court ruling that considered the constitutionality of Section 115.¹⁰⁴ The plaintiff challenged the section on due process and equal protection grounds.¹⁰⁵ The district court had ruled in favor of the defendants, the USDA and the Indiana Family and Social Services Administration.¹⁰⁶ In doing so, the district court recognized three rational bases for Section 115: "(1) deterring drug use; (2) reducing fraud in the food stamp program; and (3) curbing welfare spending."¹⁰⁷

Disqualifying individuals with felony drug convictions from receiving SNAP benefits is unlikely to reduce drug use for several reasons. First, the ban is not well known or understood. In order for a consequence to act as a deterrent to behavior, people must be aware of the consequence before they engage in that behavior. In *Turner*, the court reasoned that "individuals who are currently eligible for such assistance would undoubtedly consider potential disqualification from federal benefits before engaging in crimes involving illegal drugs."¹⁰⁸ However, one small study showed that 100 percent of participants were unaware of the federal ban before being convicted of drug-related offenses.¹⁰⁹

¹⁰¹ Food Stamp Act of 1964, Pub. L. No. 88-525, §§ 1-2, 78 Stat. 703 (1964), https://fns-prod.azureedge.net/sites/default/files/PL_88-525.pdf.

¹⁰² MCCARTY, *supra* note 35, at 2 ("During debate on these user accountability provisions, supporters argued that they would serve as a deterrent to drug use."); *see also Turner v. Glickman*, 207 F.3d 419, 423 (7th Cir. 2000).

¹⁰³ *Turner v. Glickman*, 207 F.3d at 426.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 425.

¹⁰⁸ *Id.*

¹⁰⁹ Amy Hirsch, *Welfare Reform and Woman with Felony Drug Convictions: Research Results and Policy Recommendations*, J. OF POV. L. & POL'Y, 587, 590 (2000), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/clear33&div=58&id=&page=>.

Second, the knowledge of a potential loss of federal benefits is unlikely to be an effective deterrent to individuals who suffer from substance use disorder and are in active addiction. In the same study, 92 percent of participants said that knowing they could lose SNAP and welfare benefits would not have acted as a deterrent while they were in active addiction.¹¹⁰

Turner's second holding addresses fraud and trafficking in the Supplemental Nutrition Assistance Program. A statutory definition of trafficking includes activities such as exchanging benefits for cash or reselling food purchased with benefits.¹¹¹ Fraud also includes misrepresenting income or assets on an application.¹¹² However, fraud is "relatively rare" in SNAP.¹¹³ In 2016, about 0.0014 percent of SNAP-participating households were found to have committed fraud upon investigation, representing less than \$100 million in losses¹¹⁴—for comparison, the tax gap ("the difference between tax amounts that taxpayers should have paid and what they actually paid voluntarily and on time") was about 18 percent during 2008-2010.¹¹⁵ However, polling indicates that the public overestimates the prevalence of fraud; in a 2019 poll, about 60 percent of respondents reported a belief that it is "very common" or "somewhat common" for recipients to "misrepresent their eligibility in order to benefit from SNAP."¹¹⁶ Additionally, the court's reasoning in *Turner* that "reducing fraud in the food stamp program" constitutes a rational basis for denying SNAP benefits to individuals with a history of drug-related felony offenses includes an underlying assumption that people with drug convictions are more likely to engage in benefits trafficking.¹¹⁷ While instances of trafficking SNAP benefits

¹¹⁰ *Id.* at 591.

¹¹¹ 7 C.F.R. § 271 (2020), <https://ecfr.federalregister.gov/current/title-7/subtitle-B/chapter-II/subchapter-C/part-271>.

¹¹² Simon Constable, *The Facts About Food Stamp Fraud*, FORBES (2018), <https://www.forbes.com/sites/simonconstable/2018/04/04/the-facts-about-food-stamp-fraud/?sh=16644ddcf880>. Fraud can be divided into retailer fraud and recipient fraud; this report discusses only fraud by recipients.

¹¹³ RANDY ALISON AUSSENBERG, CON. RSCH. SERV., R45147, ERRORS AND FRAUD IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) 4 (2018), <https://fas.org/sgp/crs/misc/R45147.pdf>.

¹¹⁴ *See id.* (referencing figure 2 illustrating the different claims establishment by type).

¹¹⁵ JAMES R. MCTIGUE, JR., U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-558T, TAX GAP: MULTIPLE STRATEGIES ARE NEEDED TO REDUCE NONCOMPLIANCE 2 (2019), <https://www.gao.gov/assets/700/698969.pdf>.

¹¹⁶ YouGovAmerica, *Americans believe benefits fraud is common for SNAP*, <https://today.yougov.com/topics/politics/articles-reports/2019/09/10/benefits-fraud-common-survey> (last updated Sept. 10, 2019).

¹¹⁷ *Turner v. Glickman*, 207 F.3d at 426.

for drugs do occur,¹¹⁸ the frequency of such fraud is low.¹¹⁹ Also, the FNS imposes significant consequences for trafficking, and cases of fraud are pursued by state SNAP agencies;¹²⁰ it seems unnecessary and unfair to impose additional consequences applicable only to people with felony drug convictions.

Interestingly, state opt-outs have a direct impact on recidivism by people with felony drug convictions, but in the opposite direction anticipated by the ban's creation and the war on drugs. A 2017 study¹²¹ looking at recidivism by people with felony drug convictions in 43 states found that "full eligibility for food stamps [alone] with no restrictions has a significant effect. Drug offenders fully eligible for food stamps at the time of release are 2.2 percentage points less likely to return to prison in one year compared to nondrug offenders, a 13.1 percent decrease from the drug offender mean."¹²² The study took "advantage of the fact that the federal welfare and food stamp ban applied exclusively to ex-offenders with drug felony convictions . . . [and concluded that] eligibility for welfare and food stamps at the time of release significantly reduces the risk of returning to prison within one year by up to 10 percent."¹²³ Despite this evidence of reduced recidivism by providing food assistance to people with felony drug convictions, many states continue to enforce a full or partial ban on SNAP for people with such convictions.¹²⁴ Thus, states that impose lifetime bans may close the door permanently to critical assistance that can reduce recidivism.

Research conducted in drug courts nationwide shows that responsivity needs must be addressed before expecting people to engage in efforts to move beyond basic stability and gain solid social and economic footing.¹²⁵ In drug courts, "[t]iming is critical to the successful

¹¹⁸ See, e.g., Scott Thistle, *Drug Agents Say EBT Cards Being Used to Buy Drugs*, BANGOR DAILY NEWS (Aug. 17, 2015), <https://bangordailynews.com/2015/08/17/news/drug-agents-say-ebt-cards-being-used-to-buy-drugs>.

¹¹⁹ Emelyn Rude, *The Very Short History of Food Stamp Fraud in America*, TIME (Mar. 30, 2017), <https://time.com/4711668/history-food-stamp-fraud>.

¹²⁰ FOOD AND NUTRITION SERV., *What is FNS Doing to Combat SNAP Fraud?*, (June 27, 2019), <https://www.fns.usda.gov/snap/integrity/fraud-FNS-fighting>.

¹²¹ Crystal S. Yang, *Does Public Assistance Reduce Recidivism*, 107 AM. ECON. REV. 551, 553 (2017).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ STATE DATA ON SNAP & DRUG CONVICTIONS, *supra* note 80.

¹²⁵ 2 NAT'L ASS'N OF DRUG CT. PROS., ADULT DRUG COURT BEST PRACTICE STANDARDS (2018), <https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-2-Text-Revision-December-2018-1.pdf>.

delivery of complementary treatment and social services,” and it is best practice to initially “focus primarily on resolving conditions that are likely to interfere with retention or compliance in treatment” and other rehabilitation efforts.¹²⁶ Once responsivity needs are stabilized, the phased best practices in drug courts turn to address criminogenic needs, and finally, maintenance needs.¹²⁷

Maintenance needs are commonly associated with social and economic stability: becoming trained in a trade or maintaining a job while engaging in positive, lawful social activities. Research in drug courts points out, however, that “improvements in maintenance needs rarely occur until after the more pressing responsivity and criminogenic needs have been resolved.”¹²⁸ Unfortunately, maintenance needs are often seen as immediate goals for success when a person gets out of prison even though that person may be struggling with other unmet needs and collateral consequences of their conviction. By hampering a person’s ability to engage in necessary treatment and social services, they are more likely to reoffend to support themselves and their family. The ban thus creates a systemic revolving door to prison.

VI. RECOMMENDATIONS FOR POLICY CHANGE

The best possible change to address this issue would be to simply repeal Section 115 at the federal level. A federal repeal would mean quick and comprehensive change effective in every SNAP-participating state. Although many states have opted out of the ban, a significant number continue to impose modified requirements which leave in place barriers to participation for those with felony drug convictions, as discussed above. Research shows that recidivism increases when people with felony drug convictions are excluded from SNAP,¹²⁹ likely because of the impact of the SNAP ban on food security.¹³⁰ A full federal repeal would allow all otherwise eligible individuals to participate and would create consistency across states.

¹²⁶ *Id.* at 10.

¹²⁷ *Id.*

¹²⁸ *Id.* at 112.

¹²⁹ Cody Tuttle, *Snapping Back: Food Stamp Bans & Criminal Recidivism*, U. OF MD. 1, 3 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845435.

¹³⁰ Ian K. McDonough & Daniel Millimet, *Criminal Incarceration, Statutory Bans on Food Assistance, and Food Security in Extremely Vulnerable Households: Findings from a Partnership with the North Texas Food Bank*, APPLIED ECON. PERS. & POL’Y (2019), <https://onlinelibrary.wiley.com/doi/abs/10.1093/aep/ppz011>; *see also* Hirsch, *supra* note 109.

However, enacting federal legislation can take time. As a stop-gap measure, state-level opt-out remains the second-best option. In recent years, an increasing number of states have enacted modifications or moved from modifications to a full opt-out.¹³¹ As this trend continues, a few best practices have risen to the surface. In order to create a law that can withstand scrutiny, it is advisable that states follow the opt-out instructions of Section 115 as closely as possible. A law that is short, clear, and direct will be easiest to understand. 21 U.S.C. § 862a (d)(1)(A) provides that “a State may, by specific reference in a law enacted after August 22, 1996, exempt any or all individuals domiciled in the State from the application of subsection (a).”¹³² The direction to use “specific reference” may be achieved by referring directly to the federal statute in a state law. Several states use short, specific language to enact an unqualified opt-out. For example, Arkansas’ law reads simply: “The State of Arkansas opts out of Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.”¹³³ Additionally, the law should not be part of an appropriations bill which may expire after one year and need regular renewal, but should be codified in a logical place such as with a state’s other SNAP eligibility regulations. Clarity in a law means first and foremost readable language, but second a logical placement that provides policymakers, researchers, and the public transparency and access.

States should also acknowledge that assistance bans work against reducing recidivism, and should take action to provide social services and economic opportunities to citizens returning from jail or prison at the outset. People returning to communities need social services to address responsibility needs and to gain traction in society: this means making sure formerly incarcerated people have housing, employment and training

¹³¹ See, e.g., Katie O’Connor, SUBCOMMITTEE ALLOWS BILL TO EXPAND SNAP ACCESS FOR PAST DRUG OFFENDERS TO SQUEEZE BY, BUT TOSSES ANOTHER AIMED AT THE TANF PROGRAM, VIRGINIA MERCURY (Jan. 23, 2019), <https://www.virginiamercury.com/2019/01/23/subcommittee-allows-bill-to-expand-snap-access-for-past-drug-offenders-to-squeeze-by-but-tosses-another-aimed-at-the-tanf-program/> (illustrating that Virginia previously allowed access for possession charges and proposed a full opt out in 2019); see also Chesterfield Polkey, *Most States Have Ended SNAP Ban for Convicted Drug Felons*, National Conference of State Legislatures (2019), <https://www.ncsl.org/blog/2019/07/30/most-states-have-ended-snap-ban-for-convicted-drug-felons.aspx>.

¹³² 21 U.S.C. § 862a.

¹³³ ARK. CODE ANN. § 20-76-409 (1997), <https://www.arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F1997%2FPublic%2F&file=1058.pdf&ddBienniumSession=1997%2FR>.

opportunities, healthcare, and food assistance. By making SNAP benefits accessible to people formerly incarcerated for felony drug convictions, states will reduce recidivism and decrease burgeoning social costs associated with recidivism and intergenerational poverty and food insecurity.

Similarly, now that the true effects of the war on drugs are in clear view, it is time for states not only to abolish the harsh punishments doled out to people with felony drug convictions as part of that war, but to take full measure of the collateral consequences linked to convictions, including bans on food assistance. If states want to eliminate food insecurity, reduce incarceration, help people overcome addiction, and encourage economic growth in historically marginalized communities, providing tangible benefits and support is crucial. It is time for states to remove collateral consequences and statutory barriers to basic assistance. People must be nourished in order to flourish.

ADDENDUM A

Amendment 4935 as submitted 7/19/96 and passed 7/23/96 to amend Senate Bill 1956	Public Law 104-193 Sec. 115 as enacted 8/22/96
https://www.congress.gov/104/crec/1996/07/19/CREC-1996-07-19-pt1-PgS8375.pdf	https://www.congress.gov/104/plaws/publ193/PLAW-104publ193.pdf
Sec. . DENIAL OF BENEFITS FOR CERTAIN DRUG RELATED CONVICTIONS.	SEC. 115. DENIAL OF ASSISTANCE AND BENEFITS FOR CERTAIN DRUG-RELATED CONVICTIONS.
(a) In General. —An individual convicted (under Federal or State law) of any crime relating to the illegal possession, use, or distribution of a drug shall not be eligible for any Federal means-tested public benefit, as defined in Section 2403(c)(1) of this Act.	(a) IN GENERAL.—An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))) shall not be eligible for— (1) assistance under any State program funded under part A of title IV of the Social Security Act, or (2) benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977) or any State program carried out under the Food

<p>(b) Family Members Exempt.—The prohibition contained under subsection (a) shall not apply to the family members or dependents of the convicted individual in a manner that would make such family members or dependents ineligible for welfare benefits that they would otherwise be eligible for. Any benefits provided to family members or dependents of a person described in subsection (a) shall be reduced by the amount which would have otherwise been made available to the convicted individual.</p>	<p>Stamp Act of 1977.</p> <p>(b) EFFECTS ON ASSISTANCE AND BENEFITS FOR OTHERS.—</p> <p>(1) PROGRAM OF TEMPORARY ASSISTANCE FOR NEEDY FAMILIES.—The amount of assistance otherwise required to be provided under a State program funded under part A of title IV of the Social Security Act to the family members of an individual to whom subsection (a) applies shall be reduced by the amount which would have otherwise been made available to the individual under such part.</p> <p>(2) BENEFITS UNDER THE FOOD STAMP ACT OF 1977.—The amount of benefits otherwise required to be provided to a household under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977), or any State program carried out under the Food Stamp Act of 1977, shall be determined by considering the individual to whom subsection (a) applies not to be a member of such household, except that the income and resources of the individual shall be considered to be income and resources of the household.</p>
<p>(c) Period of Prohibition.—The prohibition under subsection (a) shall apply—</p> <p>(1) With respect to an individual convicted of a misdemeanor, during the 5-year period beginning on the date of the conviction or the 5-year period beginning on January 1, 1997, whichever is later; and</p> <p>(2) with respect to an individual convicted of a felony, for the duration of the life of that individual.</p>	<p>(c) ENFORCEMENT.—A State that has not exercised its authority under subsection (d)(1)(A) shall require each individual applying for assistance or benefits referred to in subsection (a), during the application process, to state, in writing, whether the individual, or any member of the household of the individual, has been convicted of a crime described in subsection (a).</p>
<p>(d) Exceptions.—Subsection (a) shall not apply with respect to the following</p>	<p>(d) LIMITATIONS.—</p> <p>(1) STATE ELECTIONS.—</p>

<p>Federal benefits:</p> <p>(1) Emergency medical services under title XV or XIX of the Social Security Act.</p> <p>(2) Short-term, non-cash, in-kind emergency disaster relief.</p> <p>(3)(A) Public health assistance for immunizations.</p> <p>(B) Public health assistance for testing and treatment of communicable diseases if the Secretary of Health and Human Services determines that it is necessary to prevent the spread of such disease.</p>	<p>(A) OPT OUT.—A State may, by specific reference in a law enacted after the date of the enactment of this Act, exempt any or all individuals domiciled in the State from the application of subsection (a).</p> <p>(B) LIMIT PERIOD OF PROHIBITION.—A State may, by law enacted after the date of the enactment of this Act, limit the period for which subsection (a) shall apply to any or all individuals domiciled in the State.</p> <p>(2) INAPPLICABILITY TO CONVICTIONS OCCURRING ON OR BEFORE ENACTMENT.—Subsection (a) shall not apply to convictions occurring on or before the date of the enactment of this Act.</p>
<p>(e) Effective Date.—The denial of Federal benefits set forth in this section shall take effect for convictions occurring after the date of enactment.</p>	<p>(e) DEFINITIONS OF STATE.—For purposes of this section, the term “State” has the meaning given it—</p> <p>(1) in section 419(5) of the Social Security Act, when referring to assistance provided under a State program funded under part A of title IV of the Social Security Act, and</p> <p>(2) in section 3(m) of the Food Stamp Act of 1977, when referring to the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977) or any State program carried out under the Food Stamp Act of 1977.</p>
<p>(f) Regulations.—Not later than December 31, 1996, the Attorney General shall promulgate regulations detailing the means by which Federal and State agencies, courts, and law enforcement agencies will exchange and share the data and information necessary to implement and enforce the withholding of Federal benefits.</p>	<p>(f) RULE OF INTERPRETATION.—Nothing in this section shall be construed to deny the following Federal benefits:</p> <p>(1) Emergency medical services under title XIX of the Social Security Act.</p> <p>(2) Short-term, noncash, in-kind emergency disaster relief.</p> <p>(3)(A) Public health assistance for immunizations.</p> <p>(B) Public health assistance for testing and treatment of communicable diseases if the Secretary of Health and Human</p>

Services determines that it is necessary to prevent the spread of such disease.

(4) Prenatal care.

(5) Job training programs.

(6) Drug treatment programs.