


11-28-2017

## Changing Welfare as We Know it, Again: Reforming the Welfare Reform Act to Provide All Drug Felons Access to Food Stamps

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### Recommended Citation

Meghan Looney Paresky, *Changing Welfare as We Know it, Again: Reforming the Welfare Reform Act to Provide All Drug Felons Access to Food Stamps*, 58 B.C.L. Rev. 1659 (2017), <http://lawdigitalcommons.bc.edu/bclr/vol58/iss5/6>

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# CHANGING WELFARE AS WE KNOW IT, AGAIN: REFORMING THE WELFARE REFORM ACT TO PROVIDE ALL DRUG FELONS ACCESS TO FOOD STAMPS

**Abstract:** Approximately half a million Americans are currently incarcerated for drug convictions at the state and federal level. President Clinton’s 1996 enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) affects this enormous class of individuals by including a provision that places a lifetime ban on access to welfare benefits, including food stamps, for individuals who have been convicted of a drug felony. Although there is an option within PRWORA for states to modify or opt out of the provision, six states and territories still enforce the full lifetime ban, and most states have some form of the ban in effect. This provision, introduced as a part of the “tough on drugs” initiative of the 1990s, disparately affects minorities and low-income communities and serves to perpetuate the cycle of recidivism. Thus, Congress must amend PRWORA to eliminate the drug felony component altogether, so that individuals with drug felony convictions are no longer singled out amongst felons to be denied access to food stamps. In the short term, the United States Department of Agriculture should promote uniformity across states by introducing a model reform of the PRWORA drug felony provision for states to follow. These modifications will combat the grave societal problems imposed by the PRWORA drug felony provision, and allow all convicted drug felons to obtain important welfare benefits, including food stamps.

## INTRODUCTION

When it comes to receiving welfare benefits, not all felons are treated equally across the fifty states.<sup>1</sup> Under federal law, individuals who have been convicted of an offense that has “possession, use, or distribution of a controlled substance” as an element of the crime are banned for life from receiving food

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<sup>1</sup> See MARC MAUER, SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS, 4–5 (2015), <http://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf> [<https://perma.cc/CWW9-NPFL>] (showing the varied impact of the felony drug provision across states); Maggie McCarty et al., CONG. RESEARCH SERV., R42394, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP AND HOUSING ASSISTANCE 13 (2016) (examining numerous social assistance programs, including welfare benefits such as food stamps, and their application in different states); Teresa Wiltz, *More States Lift Welfare Restrictions for Drug Felons*, PEW CHARITABLE TRS.: STATELINE (Aug. 9, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/09/more-states-lift-welfare-restrictions-for-drug-felons> [<https://perma.cc/L3CC-8BJH>] (describing the negative effects that the Welfare Reform Act’s felony drug provision has had on drug felons).

stamps through the Supplemental Nutrition Assistance Program (“SNAP”).<sup>2</sup> In comparison, individuals who have been convicted of violent felonies such as robbery or burglary are not banned for life from receiving food stamps through SNAP.<sup>3</sup> This stratification was created by the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), which was enacted by Congress in 1996.<sup>4</sup> As is relevant to this Note, PRWORA included a provision stating that any individual convicted of a drug-related felony shall incur a lifetime ban from many welfare benefits, including access to food stamps.<sup>5</sup> The drug felony provision was intended as a punitive measure, in an effort to combat the “war on

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<sup>2</sup> See 21 U.S.C. § 862a(a) (2012 & Supp. II 2014); Wiltz, *supra* note 1. Pursuant to 21 U.S.C. § 862a(a), any individual convicted of a drug crime shall not be eligible for “assistance under any State program funded by part A of title IV of the Social Security Act,” or the benefits of SNAP. See § 862a(a). SNAP is the United States’ anti-hunger program that helps more than 45 million low-income Americans adequately feed their families and afford a healthy diet. See *Policy Basics: Introduction to the Supplemental Nutrition Assistance Program (SNAP)*, CTR. BUDGET & POLICY PRIORITIES, <http://www.cbpp.org/research/policy-basics-introduction-to-the-supplemental-nutrition-assistance-program-snap> [<https://perma.cc/6XQL-L865>] (last updated Oct. 3, 2017) [hereinafter *Policy Basics*].

<sup>3</sup> See 21 U.S.C. § 862a(a). Subsection (a) of the relevant federal statute states:

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 802(6) of this title) shall not be eligible for—(1) assistance under any State program funded under part A of title IV of the Social Security Act [42 U.S.C. § 601 et seq.], or (2) benefits under the supplemental nutrition assistance program (as defined in section 3 of the Food and Nutrition Act of 2008 (7 U.S.C. 2012)) or any State program carried out under that Act.

*Id.* The language of the statute, makes it clear that these restrictions only apply to individuals convicted of a drug-related felony and no one else. See *id.*; see also Wiltz, *supra* note 1 (explaining that the drug felony provision only affects felons with drug crime convictions). To qualify for the anti-hunger program, individuals must meet SNAP’s eligibility rules and benefit levels, which are predominantly set at the federal level and are adjusted across the states depending on average household income. See *Policy Basics*, *supra* note 2.

<sup>4</sup> Bill Clinton, *How We Ended Welfare, Together*, N.Y. TIMES (Aug. 22, 2006), <http://www.nytimes.com/2006/08/22/opinion/22clinton.html> [<https://perma.cc/7NV5-4N8Q?safari=1>] [hereinafter Clinton: *Welfare*]. President Bill Clinton signed the PRWORA as a way to reform the welfare system in the United States. *Id.* In his 1996 presidential campaign, President Clinton promised the American people that he would “change welfare as we know it,” by which he meant he would substantially decrease the number of Americans on welfare and “make welfare a second chance, not a way of life.” *Id.*

<sup>5</sup> See 21 U.S.C. § 862a(a) (“An individual convicted . . . of any offense which is classified as a felony . . . and which has as an element the possession, use, or distribution of a controlled substance . . . shall not be eligible for . . . benefits under the supplemental nutrition assistance program . . . .”); *Turner v. Glickman*, 207 F.3d 419, 427 (7th Cir. 2000) (holding that 21 U.S.C. § 862a does not violate equal protection or substantive due process and, therefore, the statute’s restriction on former food stamp recipients from receiving food stamps because of their drug-related felony convictions in a class-action lawsuit should be upheld). The court found the felony drug provision set forth in 21 U.S.C. § 862a to be “rationally related to legitimate government interests in deterring drug use and reducing welfare fraud.” *Turner*, 207 F.3d at 431.

drugs.”<sup>6</sup> As a result of PRWORA, in states that enforce the full federal ban, an individual convicted of possessing a controlled substance, such as cocaine, is banned from receiving food stamps for the rest of his life, whereas an individual convicted of a violent felony could be eligible for food stamps immediately upon release from prison.<sup>7</sup>

Johnny Waller Jr., a forty-year-old single father from Kansas City, Missouri was convicted in 1998 for selling marijuana, and sent to prison for three years.<sup>8</sup> Upon his release from prison in 2001, Waller struggled to find a job and, after applying to over 175 positions, he eventually decided to move back home and live with his mother in Kansas City.<sup>9</sup> While living with his mother, Waller applied for food stamps in order to provide some financial support for his family, but was denied access to food stamps due to his felony drug conviction.<sup>10</sup> As a way to support his mother and children, Waller worked tirelessly to start his own

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<sup>6</sup> See Rebecca Beitsch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, PEW CHARITABLE TRS.: STATELINE (July 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons> [<https://perma.cc/3JPL-G56R>] (“The bans, which don’t apply to convictions for any other crimes, were put in place as a part of a sweeping reform of the nation’s welfare system, and at the height of the war on drugs.”); see also MAUER, *supra* note 1, at 1 (“The brevity of Congressional discussion on the felony drug conviction ban makes it difficult to know the intent of Congress in adopting this policy, but the record that does exist suggests the provision was intended to be punitive and tough on crime.”). The “war on drugs” refers to the strict enforcement of drug laws by politicians and law enforcement in an effort to combat the drug epidemic by showing that the nation took its drug laws seriously. See MAUER, *supra* note 1, at 1.

<sup>7</sup> See Wiltz, *supra* note 1. Pursuant to 21 U.S.C. § 862a(d)(1), states have the option to either opt out of the federal ban, or limit the period for which the ban will apply to individuals with drug convictions. Today, just six states and territories maintain the full, lifetime ban on food stamps for drug felons—Arizona, Guam, Mississippi, South Carolina, the Virgin Islands, and West Virginia. See McCarty et al., *supra* note 1, at 13.

<sup>8</sup> See Beitsch, *supra* note 6; Jason Hancock et al., *Missouri Revisits Banning Drug Felons from Food Stamps*, KANSAS CITY STAR (May 2, 2014, 10:28 PM), <http://www.kansascity.com/news/politics-government/article348853/Missouri-revisits-banning-drug-felons-from-food-stamps.html> [<https://perma.cc/5DQV-J57J>] (describing Missouri’s legislative push toward overturning the state felony drug provision); Alan Pyke, *Missouri Likely to Drop Its Lifetime Food Stamps Ban for Drug Convicts*, THINK PROGRESS (Feb. 20, 2014, 2:21 PM), <https://thinkprogress.org/missouri-likely-to-drop-its-lifetime-food-stamps-ban-for-drug-convicts-3336595e44e7#.35e02hj28> [<https://perma.cc/C73V-JFPU>] (explaining the impact that the felony drug provision has had on individuals in Missouri, including Johnny Waller Jr.).

<sup>9</sup> See Beitsch, *supra* note 6 (describing the detrimental effect the drug felony provision had on Johnny Waller Jr. and his family).

<sup>10</sup> *Id.* Waller was categorically denied access to food stamps due to a drug conviction from when he was eighteen years old, despite his desperate need for public assistance when he got out of jail. *Id.* When he was first released from prison, Waller wondered whether it would be easier to simply return to prison rather than navigate a world in which he was severely restricted in access to basic human needs, like food and housing. *Id.* Instead, he decided to turn his life around and focus on his family, recognizing that “[he]’d been a gang member, [he]’d been shot in the head, and [he]’d gone to prison. There wasn’t anything else out of that lifestyle to get.” *Id.*

janitorial business.<sup>11</sup> Waller was successful, and eventually expanded his business and hired seven employees.<sup>12</sup>

Waller's career success was cut short in 2007 when his two-year-old son Jordyn was diagnosed with stomach cancer.<sup>13</sup> In order to get the best treatment for his son, Waller uprooted his family and relocated to Memphis, Tennessee so that Jordyn could be treated at St. Jude's Children's Research Hospital.<sup>14</sup> Waller had to close his janitorial business, and soon ran out of personal savings to support his family.<sup>15</sup> To make matters worse, Waller's car was repossessed when he could not make payments.<sup>16</sup> Waller could no longer afford to feed his family, much less provide them with fresh and healthy foods that the doctors urged he feed his dying son, because these foods were too expensive.<sup>17</sup> Waller was forced to turn to the welfare system for assistance, but was once again denied access to food stamps because of his drug conviction; under the PRWORA drug provision denying federal assistance and benefits to drug felons (hereinafter referred to as the "PRWORA drug felony provision"), Waller was ineligible for food stamps in both Tennessee and Missouri.<sup>18</sup> Pursuant to the PRWORA drug felony provision, the amount of assistance otherwise provided to family members of an individual with a felony drug conviction "shall be reduced by the amount which would have otherwise been made available to the individual under such part."<sup>19</sup> Thus, but for the PRWORA drug felony provision, Waller's family would have received substantially more federal assistance.<sup>20</sup>

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<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See Beitsch, *supra* note 6.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See 21 U.S.C. § 862a(a) (2012 & Supp. II 2014); Beitsch, *supra* note 6. At the time Waller applied for food stamps, the federal ban in both Tennessee and Missouri prevented him from being eligible. See 21 U.S.C. § 862a(a); Beitsch, *supra* note 6. Missouri has since changed its law to exempt drug felons from the prohibition contained in 21 U.S.C. § 862a(a), pursuant to § 862a(d), so long as they complete a drug treatment program or can prove their sobriety with a urine test. MO. REV. STAT. § 208.247(1) (2014); see 21 U.S.C. § 862a(a), (d); Beitsch, *supra* note 6. Similarly, Tennessee changed its law in 2012, pursuant to the option available in 21 U.S.C. § 862a(d), to exempt drug felons from the prohibition if such person is 1) participating in a substance abuse program approved by the Department of Human Services and 2) complying with all obligations imposed by the criminal court, including other substance abuse programs. TENN. CODE ANN. § 71-5-308 (2012); see 21 U.S.C. § 862a(a), (d).

<sup>19</sup> 21 U.S.C. § 862a(b)(1). The drug felony provision as a whole was viewed as a way to deter drug use and prevent welfare fraud. *Turner*, 207 F.3d at 431. One effect of the drug felony provision, however, is that innocent family members, who are dependent upon the drug felon, are disadvantaged because their family will receive less federal assistance. See 21 U.S.C. § 862a(b)(1); MAUER, *supra* note 1, at 5 (explaining that the reduction of family welfare allotments often creates significant hardships for families).

<sup>20</sup> See 21 U.S.C. § 862a(b)(1).

Tragically, Waller's son passed away in 2008 while awaiting a bone marrow transplant.<sup>21</sup> Waller never received access to food stamps and his son never received the nutrition he needed.<sup>22</sup> Although Waller has since been pardoned for his drug conviction, because he sold marijuana as a teenager and was convicted of a felony, he feels as though he "live[s] on the fringe of just being able to live a normal life" because of barriers such as the PRWORA drug felony provision.<sup>23</sup>

Approximately half a million people in the United States are incarcerated for felony drug convictions on the state and federal level, and therefore may be affected by the PRWORA drug felony provision.<sup>24</sup> As of 2014, drug felons made up more than fifteen percent of the 1,350,958 inmates in state prison, and more than fifty percent of the 210,567 inmates in federal prison.<sup>25</sup> Further, because more than sixty percent of those in prison today are people of color, the PRWORA drug felony provision has a disproportionate impact on minorities.<sup>26</sup> Despite most drug felons having no prior criminal convictions and not being "high level drug dealers," these individuals are deprived of access to food stamps because their felony convictions were drug related.<sup>27</sup> Meanwhile, felons convicted of violent crimes can still be eligible to receive that welfare benefit.<sup>28</sup>

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<sup>21</sup> See Beitsch, *supra* note 6.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* Waller eventually went back to school, and graduated from Rockhurst University in 2013. See Hancock et al., *supra* note 8. Waller has two other children, an eight-year-old daughter Alexandria and a seven-year-old son Kendall, whom he has raised on his own. *Id.* After six years of living with his mother in Kansas City, the landlord of the building gave Waller his own temporary lease and eventually allowed him to sign his own year-long lease, so that he could live on his own. See Beitsch, *supra* note 6.

<sup>24</sup> See Wiltz, *supra* note 1 (stating that approximately half a million Americans are incarcerated for felony drug convictions). As of 2015, 15.7% of the state prison population and 49.5% of the federal prison population were comprised of drug felons. *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT 2 (June 2017), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/MET9-LJSQ>] [hereinafter *Trends in U.S. Corrections*]. Most of these individuals have no prior record for a violent criminal offense. Wiltz, *supra* note 1. Regardless of the magnitude of their drug felony, however, individuals in states where the drug felony provision is in effect are subject to the same ban on food stamps. See Beitsch, *supra* note 6 (illustrating that someone with a conviction for selling marijuana is subject to the felony drug provision).

<sup>25</sup> See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014, at 2 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/GLE3-TUBF>]; *Trends in U.S. Corrections*, *supra* note 24, at 2.

<sup>26</sup> See *Trends in U.S. Corrections*, *supra* note 24. As of 2014, approximately 35.4% of the state and federal prison population was black, 33.8% of the population was white, 21.6% of the population was Hispanic, and 9.2% fell into the "other" category. *Id.* Thus, the drug felony provision disproportionately impacts minority groups. See MAUER, *supra* note 1, at 5 (stating that the drug felony provision has a disproportionate effect on minorities).

<sup>27</sup> See *Trends in U.S. Corrections*, *supra* note 24 ("Most . . . [individuals in prison for drug felonies] are not high-level actors in the drug trade, and most have no prior criminal record for a violent offense."); see also Wiltz, *supra* note 1 (citing same Sentencing Project report).

<sup>28</sup> See Wiltz, *supra* note 1. For example, there is no provision similar to PRWORA that denies violent felons access to food stamps when they are released. See *id.*

Studies have shown that, as of 2013, ninety-one percent of individuals recently released from prison lack consistent and reliable access to food.<sup>29</sup> Denying such individuals access to food stamps based solely on the category of their crime serves to drive those individuals back into a life of crime and poverty.<sup>30</sup> Much of the incarcerated population suffers from mental illness, substance abuse, homelessness, or physical abuse.<sup>31</sup> Upon release from prison, these individuals need and deserve access to welfare benefits, such as food stamps, in order to both survive and successfully reintegrate into society.<sup>32</sup>

This Note examines the profound problems caused by the PRWORA drug felony provision, which denies individuals with felony drug convictions access to welfare benefits such as food stamps.<sup>33</sup> Part I of this Note discusses the history of welfare in the United States, with a specific focus on food stamps.<sup>34</sup> Part II explores the current welfare system, the impact of the PRWORA drug felony provision on recidivism, and the disparate impact that the provision has on mi-

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<sup>29</sup> See Helen Dodson, *Ban on Food Stamps Leads to Hunger, HIV Risk Among Former Drug Felons*, YALE NEWS (Mar. 25, 2013), <https://news.yale.edu/2013/03/25/ban-food-stamps-leads-hunger-hiv-risk-among-former-drug-felons> [<https://perma.cc/LLN6-YV5U>] (relying on Yale School of Medicine study from 2013, in collaboration with California organization All of Us or None, for assertion that that 91% of individuals recently released from prison described themselves as “food insecure”). The Yale study also found that individuals recently released from prison are more at risk for HIV, because they often engage in dangerous sexual activity in exchange for food for themselves and their families. *Id.*; see also Editorial, *Unfair Punishments*, N.Y. TIMES (Mar. 16, 2013), [http://www.nytimes.com/2013/03/17/opinion/sunday/unfair-punishments-of-ex-offenders.html?hpw&\\_r=0](http://www.nytimes.com/2013/03/17/opinion/sunday/unfair-punishments-of-ex-offenders.html?hpw&_r=0) [<https://perma.cc/QK92-PZ5G>] (relying on Yale School of Medicine study for assertion that the food stamp ban increases the likelihood that mothers will go into prostitution to feed their families, thereby increasing the risk of HIV).

<sup>30</sup> See Dodson, *supra* note 29 (“[Former inmates] are incredibly vulnerable when they are released from prison. If they cannot get government food assistance, they are much more likely to be hungry and thus engage in dangerous sexual behavior in exchange for money or food for themselves and their children.”) (statement of Dr. Emily Wang, assistant professor of internal medicine at Yale School of Medicine); see also MAUER, *supra* note 1, at 7 (explaining that many individuals who have been incarcerated have suffered from mental health issues, sexual or physical abuse, or homelessness prior to their incarceration).

<sup>31</sup> See MAUER, *supra* note 1, at 7 (discussing the struggles that individuals recently released from prison tend to face); Dale E. McNiel et al., *Incarceration Associated with Homelessness, Mental Disorder, and Co-occurring Substance Abuse*, 56 PSYCHIATRIC SERVS. 840, 844 (2005) (describing the high proportion of homelessness and mental disorders among the prison population). One study found that approximately 18% of the population at the San Francisco County jail suffered from mental illness, and 16% were homeless. McNiel et al., *supra*, at 844. Further, 30% of inmates who were homeless also suffered from mental illness. *Id.*

<sup>32</sup> See MAUER, *supra* note 1, at 8 (explaining that providing recently released individuals with federal assistance like food stamps allows them to meet their “basic survival needs” during the critical period while they look for employment or housing). Thus, the food stamp program is a lifeline that prevents recidivism by reducing food insecurity and giving individuals a way to survive, without having to resort to criminal activity. See *id.*

<sup>33</sup> See *infra* notes 38–278 and accompanying text.

<sup>34</sup> See *infra* notes 38–153 and accompanying text.

nority groups.<sup>35</sup> Finally, Part III proposes a solution to the injustices triggered by the PRWORA drug felony provision: that Congress amend the Welfare Reform Act and eliminate the PRWORA drug felony provision altogether so that drug felons have the same opportunities as any other qualifying citizen to apply for food stamps.<sup>36</sup> This section also proposes a short-term solution: the introduction of a model reform to the PRWORA drug felony provision, which will help states achieve uniformity in their approach to the provision, and in turn provide consistent treatment to drug felons across all states.<sup>37</sup>

## I. A HISTORICAL OVERVIEW OF FOOD STAMPS IN THE UNITED STATES

The distribution of food stamps has been a tenet of federal welfare in the United States since the Great Depression era.<sup>38</sup> Until 1977, recipients of food stamps were required to pay for their own stamps, but received them at a substantially discounted rate.<sup>39</sup> Congress then revised the Food Stamp Act of 1977 to stop requiring payment for food stamps, and began distributing food stamps to recipients without charge.<sup>40</sup> This shift in policy targeted the individuals in society who were most in need, and sought to streamline their access to food.<sup>41</sup> The policy also changed the public's outlook on the food stamp program.<sup>42</sup> Prior to the elimination of the purchase requirement, the public generally viewed the

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<sup>35</sup> See *infra* notes 154–230 and accompanying text.

<sup>36</sup> See *infra* notes 231–278 and accompanying text.

<sup>37</sup> See *infra* notes 231–278 and accompanying text.

<sup>38</sup> See Randy James, *Brief History: Food Stamps*, TIME (Sept. 14, 2009), <http://content.time.com/time/nation/article/0,8599,1921992,00.html> [<https://perma.cc/3853-FCVGJ>] (describing the evolution of food stamps in the United States). The food stamp program began as part of the Agricultural Adjustment Act because crop prices dramatically fell and there was a crop surplus during the Great Depression. See *The History of SNAP*, SNAP TO HEALTH!, <https://www.snaptohealth.org/snap/the-history-of-snap/> [<https://perma.cc/GP4K-XL64>] (providing a brief historical timeline of food stamps in the United States). To combat this problem, the federal government purchased the surplus crops and distributed them to hunger relief programs. *Id.*

<sup>39</sup> James, *supra* note 38. Prior to 1977, the U.S. Department of Agriculture had insisted that recipients pay something for the food stamps, to maintain some semblance of dignity for the recipients. *Id.* In the years leading up to 1977, however, the price of food stamps had steadily declined until they amounted to merely a fraction of the face value. *Id.*

<sup>40</sup> See *id.* Both the Republicans and the Democrats agreed upon the need to eliminate the purchase requirement because it complicated the already cumbersome welfare system and created a barrier to those most in need of food stamps. *Supplemental Nutrition Assistance Program (SNAP): A Short History of SNAP*, U.S. DEPT OF AGRIC. (Nov. 20, 2014), <http://www.fns.usda.gov/snap/short-history-snap> [<https://perma.cc/9T2C-ZB87>] [hereinafter *A Short History of SNAP*]. After the purchase requirement was eliminated, food stamp recipients increased by 1.5 million participants in just one month. *Id.*

<sup>41</sup> James, *supra* note 38; *A Short History of SNAP*, *supra* note 40.

<sup>42</sup> See James, *supra* note 38 (describing the public backlash to the elimination of the purchase requirement for food stamps).



food stamp program as a way to help the poor get back on their feet.<sup>43</sup> Once food stamp recipients no longer needed to purchase food stamps, the public began viewing the food stamp program as a direct government handout.<sup>44</sup> Following this change, over the next decade legislators grew concerned with the increasing size of the federal food stamp program in the United States.<sup>45</sup>

In 1996, President Bill Clinton implemented the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), or the “Welfare Reform Act,” in order to scale back the size and scope of the federal welfare system.<sup>46</sup> The Act was successful in reducing the number of Americans who received welfare benefits; the number of individuals receiving cash assistance dropped from over thirteen million individuals prior to the enactment of the “Welfare Reform Act” in 1995, to just three million individuals today.<sup>47</sup> Although the Act successfully downsized the welfare program in America, many of the drastic reforms President Clinton implemented through the “Welfare Reform

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<sup>43</sup> See *id.* (explaining that people supported the food stamp program “as a means to help the poor help themselves”).

<sup>44</sup> *Id.* This policy shift generated animosity because of the impression that food-stamp users were eating better than middle-class individuals. *Id.*

<sup>45</sup> See INST. OF MED. & NAT’L RESEARCH COUNCIL, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: EXAMINING THE EVIDENCE TO DEFINE BENEFIT ADEQUACY (Julie A. Caswell & Ann L. Yaktine eds., 2013), <https://www.ncbi.nlm.nih.gov/books/NBK206907/> [<https://perma.cc/HC4R-6QQJ>] (describing Congress’s concern over the growing size and cost of the food stamp program). Many feared that the program would overburden taxpayers because food stamp recipients were no longer required to pay for the stamps at a reduced rate, and thus taxpayers complained that food stamp recipients were eating better than the taxpayers who subsidized the stamps. See James, *supra* note 38. Legislators were also concerned about the thousands of students who signed up for welfare, and feared that food stamps “were fueling the iconoclastic culture and radical politics of the nation’s youth.” Steven B. Roberts, *Food Stamps Program: How It Grew and How Reagan Wants to Cut It Back; The Budget Targets*, N.Y. TIMES (Apr. 4, 1981), <http://www.nytimes.com/1981/04/04/us/food-stamps-program-it-grew-reagan-wants-cut-it-back-budget-targets.html?pagewanted=all> [<https://perma.cc/SQ9L-SLL2>].

<sup>46</sup> See INST. OF MED. & NAT’L RESEARCH COUNCIL, *supra* note 45; Alana Semuels, *The End of Welfare as We Know It*, THE ATLANTIC (Apr. 1, 2016), <http://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/> [<https://perma.cc/QF6X-3K38>]. Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, also known as the “Welfare Reform Act” in 1996. INST. OF MED. & NAT’L RESEARCH COUNCIL, *supra* note 45. President Clinton famously promised to “end welfare as we know it,” vowing to decrease government spending on welfare “to make welfare a second chance, not a way of life.” Clinton: *Welfare*, *supra* note 4.

<sup>47</sup> Semuels, *supra* note 46. As part of the Welfare Reform Act, individuals could only receive government benefits for a maximum of five years. *Id.* In addition, the Welfare Reform Act required many welfare recipients to work, or at least volunteer, in order to be eligible to receive benefits. *Id.* Cash assistance is another form of welfare, like food stamps, in which the federal government provides cash aid to families in need. See McCarty et al., *supra* note 1, at 3. Today, the federal cash assistance program is called Temporary Assistance for Needy Families (TANF), and it is offered to a more limited group of recipients, with a specific focus on single mothers. See *id.*

Act,” including the federal ban on food stamps for drug felons, have left countless Americans without food or a viable path toward reentry into society.<sup>48</sup>

### A. *The Beginning of Welfare in the United States*

During the Progressive Era, state and local governments, as well as private charitable organizations, assumed considerable responsibility for public assistance of the poor.<sup>49</sup> As of 1926, forty states had some form of state public assistance program in place for the poor, however as the country’s economy began to plummet during the Great Depression, these state programs were unable to support the growing need for public assistance programs.<sup>50</sup> In 1932, President Herbert Hoover signed into law the Emergency Relief and Construction Act to reduce hunger in the United States.<sup>51</sup> This was the United States’ first major federal public assistance relief legislation, which President Franklin D. Roosevelt further expanded as part of the New Deal when he assumed office in 1933.<sup>52</sup>

Following the enactment of the Emergency Relief and Construction Act, President Franklin D. Roosevelt signed into law the Federal Emergency Relief Act (“FERA”), which allowed the federal government to provide over one billion dollars to states for the purpose of public relief.<sup>53</sup> This amount of funding,

<sup>48</sup> See Wiltz, *supra* note 1. The PRWORA implemented the drug felony provision, which bars individuals with drug convictions from receiving food stamps and other welfare benefits such as TANF cash assistance. See *id.* Thus, in addition to making it more difficult for individuals to qualify for welfare, PRWORA also categorically excluded drug felons from receiving welfare benefits. *Id.*

<sup>49</sup> See John D. Hansan, *Origins of the State and Federal Public Welfare Programs (1932–1935)*, VA. COMMONWEALTH UNIV.: SOC. WELFARE HISTORY PROJECT (2011), <http://socialwelfare.library.vcu.edu/public-welfare/origins-of-the-state-federal-public-welfare-programs/> [<https://perma.cc/MK7Q-785A>] (describing the beginnings of federal welfare within the United States). Prior to 1900, small groups such as local governments or charitable organizations were the only ones able to provide public relief for the poor. *Id.* By the Progressive Era, however, state governments also began to help the “worthy poor.” *Id.*

<sup>50</sup> See *id.* During the Great Depression, states were inundated with requests for public relief, which ultimately resulted in the collapse of the state-financed relief programs. *Id.* In addition, the Great Depression substantially depleted local and state revenues, which also contributed to the collapse of the state-financed public relief programs. *Id.*

<sup>51</sup> See *id.* President Hoover noted that the three main features of the Emergency Relief and Construction Act of 1932 were: 1) a \$300 million temporary loan provision, to serve as a last-resort for states in need of funding so that there would “be no hunger and cold in the United States”; 2) “\$1,500 million of loans” to provide construction jobs for Americans “without drain on the taxpayer”; and 3) the broadening of power to loan money to assist farmers with agriculture. See *id.*; *Text of Emergency Relief and Construction Act of 1932—H.R. 9642*, 24 J. (AM. WATER WORKS ASS’N) 1208, 1208 (1932).

<sup>52</sup> See Hansan, *supra* note 49. President Roosevelt signed the Federal Emergency Relief Act into law shortly after taking office in 1933. *Id.* This Act allowed the federal government to distribute over one billion dollars to state relief programs. *Id.*

<sup>53</sup> See *id.* See generally Federal Emergency Relief Act of 1933, Pub. L. No. 73-13, 48 Stat. 55 (1933). FERA entitled each state to federal grants amounting to approximately one-third of the state’s expenditures, in order to “aid in meeting the costs of furnishing relief and work relief and in relieving

however, was still not sufficient to support Americans.<sup>54</sup> President Roosevelt believed the country needed a bigger, permanent reform to ensure that the government could adequately support the American people, and provide unemployed workers and their families with adequate resources they needed to keep food on the table.<sup>55</sup> Therefore, after signing an Executive Order in 1934 to create a “Committee on Economic Security” in the United States, in 1935 President Roosevelt signed the Social Security Act into law.<sup>56</sup> This piece of legislation structured the United States’ welfare system for the next six decades.<sup>57</sup>

The first “food stamp” system began during the Great Depression when Secretary of Agriculture Henry Wallace enacted the Experimental Food Stamp Program of 1939, which was intended to combat poverty and distribute the growing food surpluses in the United States to those in need.<sup>58</sup> The program began in Rochester, New York, and an unemployed factory worker named Mabel McFigginn was the first person to take advantage of the country’s experimental food stamp program.<sup>59</sup> McFigginn collected stamps to buy surplus butter, eggs, and other groceries at a discounted price.<sup>60</sup> The reasons for enacting the Experimental Food Stamp Program of 1939 were two-fold: first, the program assisted the needy in accessing food during the Great Depression, and second, it helped

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the hardship and suffering caused by unemployment in the form of money, service, materials, and/or commodities to provide the necessities of life to persons in need.” *Id.* at 57.

<sup>54</sup> See Hansan, *supra* note 49. President Roosevelt believed that to avoid another national crisis like the Great Depression, the government needed to implement more reforms including greater access to jobs and public relief. *See id.*

<sup>55</sup> *See id.* President Roosevelt identified the three primary factors needed to ensure “security” for the individual and the family, explaining that “[p]eople want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safeguards against misfortunes which cannot be wholly eliminated in this man-made world of ours.” *Id.* President Roosevelt believed that the American people needed “security against the hazards and vicissitudes of life” and sought to create a system of social insurance for the country. *Id.*

<sup>56</sup> *See id.* *See generally* Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935). The Committee of Economic Security was comprised of five cabinet members who were tasked by President Roosevelt to design a “workable social insurance system.” *See* Hansan, *supra* note 49.

<sup>57</sup> *See* Hansan, *supra* note 49. The Social Security Act of 1935 was enacted to provide economic protections for groups most in need, and initially established three types of cash assistance programs: Title I Grants to States for Old-Age Assistance, Title IV Grants to States for Aid to Dependent Children, and Title X Grants to States for Aid to the Blind. *See id.* In 1950, the program added another form of public welfare assistance with Aid to the Disabled. *Id.* The Social Security Act itself did not explicitly implement food stamps; however, both programs are essential forms of social welfare. *See id.*

<sup>58</sup> *See* James, *supra* note 38; *A Short History of SNAP*, *supra* note 40. During the Great Depression, the government bought surplus commodities such as wheat in order to offset the plummeting economy, so food stamps were a way for the government to get rid of these products, while also feeding the poor. James, *supra* note 38. Food stamps, now called the Supplemental Nutrition Assistance Program (SNAP), are just one element of the broader federal welfare system. *See A Short History of SNAP*, *supra* note 40. This Note will focus primarily on food stamps; however, the federal welfare system is quite interrelated. *See id.*

<sup>59</sup> *See* James, *supra* note 38.

<sup>60</sup> *See id.*

unload the surplus food products that the government had purchased in order to support the country's agriculture industry.<sup>61</sup>

By 1943, the Experimental Food Stamp Program had expanded to eighty-eight cities across the United States and reached over twenty million people.<sup>62</sup> The program was successful in both feeding the hungry and unloading the surplus food and resources that the government purchased to support farm prices.<sup>63</sup> The food stamps originally came in two colors: blue and orange.<sup>64</sup> Recipients purchased booklets of orange stamps, which were used to buy foods typically found in the grocery store, and then for every dollar spent on orange food stamps, individuals received fifty cents of blue food stamps at no cost, which could only be used to buy designated surplus foods.<sup>65</sup> Despite the food stamp program's wide success and popularity, it also gave way to scandal, fraud, and abuse of the system.<sup>66</sup> By 1943, the country was out of the Great Depression, was growing in prosperity, and no longer had a food surplus or high unemployment rates.<sup>67</sup> As such, the first Food Stamp Program was terminated in 1943, even though individuals were still desperately in need of food stamps.<sup>68</sup>

For the next eighteen years, advocates fought to reintroduce a food stamp program in the United States.<sup>69</sup> In 1959, a Democratic representative from Missouri proposed a legislative amendment to launch another pilot food stamp pro-

<sup>61</sup> See *id.* The program achieved these two goals by creating a system that provided food to the poor while at the same time effectively unloading the government's surplus commodities. See *id.*

<sup>62</sup> See *From Food Stamps to the Supplemental Nutrition Assistance Program: Legislative Timeline*, U.S. DEP'T OF AGRIC., <https://fns-prod.azureedge.net/sites/default/files/timeline.pdf> [<https://perma.cc/9DJ7-D5J8>] (illustrating the evolution of the food stamp system in the United States) [hereinafter *Legislative Timeline*]; James, *supra* note 38.

<sup>63</sup> See James, *supra* note 38. Approximately twenty million Americans enrolled in the food stamp program between 1939 and 1943. *Id.* In 1941, the Nutrition Council for Defense called the food stamp program a "'vital cog' in the National Defense Plan." See *Legislative Timeline*, *supra* note 62, at 1.

<sup>64</sup> See *Legislative Timeline*, *supra* note 62, at 1.

<sup>65</sup> *Id.*; JANEL OBENCHAIN & ARLENE SPARK, *FOOD POLICY: LOOKING FORWARD FROM THE PAST 20* (2015). Orange stamps could also be used to purchase household items such as soap or matches, however they could not be used to purchase tobacco or alcohol. Obenchain & Spark, *supra*, at 20. Examples of surplus foods, which could be purchased with blue stamps, were dry beans, flour, corn meal, eggs, and vegetables. *The History of SNAP*, *supra* note 38.

<sup>66</sup> See *Legislative Timeline*, *supra* note 62, at 1. A retailer named Nick Salzano was the first known person to commit food stamp fraud, and he did so by up-charging his customers paying with food stamps. Emelyn Rude, *The Very Short History of Food Stamp Fraud in America*, TIME (Mar. 30, 2017), <http://time.com/4711668/history-food-stamp-fraud/> [[perma.cc/HF7W-FLPR](https://perma.cc/HF7W-FLPR)]. This incident of fraud was widely publicized at the time. *Id.*

<sup>67</sup> See James, *supra* note 38.

<sup>68</sup> See *id.*; *Legislative Timeline*, *supra* note 62, at 1.

<sup>69</sup> See James, *supra* note 38. Proponents recognized that despite the propensity for fraud and abuse of the system, the food stamp system was critical to promoting a healthy, thriving society. See *id.* These proponents of food stamp programs, including popular government officials, compiled research and drafted legislative proposals to enact a new food stamp program. See *A Short History of SNAP*, *supra* note 40.

gram, to be run by the Department of Agriculture.<sup>70</sup> The Eisenhower administration chose not to implement this law, fearing that the proposed food stamp program was too complex and would not provide any additional benefit to those in need.<sup>71</sup> The food stamp program was not officially resurrected again until 1961, when President Kennedy authorized a three-year food stamp program.<sup>72</sup> In 1961, President Kennedy issued an Executive Order for the funding of food stamp pilot programs, which maintained that participants could purchase food stamps, but did not create separate stamps for surplus food.<sup>73</sup> In 1964, President Lyndon Johnson renewed President Kennedy's 1963 request to Congress to make the food stamp programs permanent and federally enforceable.<sup>74</sup>

On August 31, 1964, President Johnson enacted the Food Stamp Act, acknowledging that the implementation of the Act was "one of our most valuable weapons for the war on poverty."<sup>75</sup> The legislation allowed the government to

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<sup>70</sup> See James, *supra* note 38. Lenore Sullivan, the Democratic Representative from Missouri, pushed through Public Law 86-341 on September 21, 1959. See *id.*; *Legislative Timeline*, *supra* note 62, at 1. This public law authorized a "discretionary, two-year [food stamp program] to promote the purchase of surplus commodities." See *Legislative Timeline*, *supra* note 62, at 1. Despite Representative Sullivan's tireless work to pass the food stamp legislation, however, the program did not come to fruition. *Id.*

<sup>71</sup> See Dwight D. Eisenhower, *Statement by the President Upon Signing Bill Extending the Agricultural Trade Development and Assistance Act of 1954*, AM. PRESIDENCY PROJECT (Sept. 21, 1959), <http://www.presidency.ucsb.edu/ws/?pid=11519> [<https://perma.cc/8TA6-RR78>] (providing transcript of President Eisenhower's statements after signing a bill "[t]o extend the Agricultural Trade Development and Assistance Act of 1954"). President Eisenhower stated: "If implemented, [the food stamp plan] would simply replace the existing distribution system with a Federally-financed system, further increasing the already disproportionate Federal share of welfare expenses." *Id.*

<sup>72</sup> See James, *supra* note 38. While on the campaign trail, President Kennedy was deeply impacted by the poverty he witnessed, particularly in West Virginia. See *id.* As a result of the abject poverty he saw across the country, President Kennedy implemented the food stamp program when he became president that year. See *id.* Much like Mabel McFiggan (mentioned above), the first individuals to utilize the food stamp program in 1961 were Mr. and Mrs. Alderson Muncy, from Paynesville, West Virginia. See *id.* The couple purchased a can of pork and beans on May 29, 1961, to help support their family of fifteen. See *id.*

<sup>73</sup> See *Legislative Timeline*, *supra* note 62, at 2. The program focused on promoting the consumption of perishables, instead of issuing separate food stamps for surplus food items as previous food stamp programs had done. See *A Short History of SNAP*, *supra* note 40. After the Great Depression, the government no longer had to purchase large quantities of surplus commodities from farms, and thus had no surplus goods to distribute. See *Legislative Timeline*, *supra* note 62, at 2.

<sup>74</sup> See *Legislative Timeline*, *supra* note 62, at 2. Following President Kennedy's assassination on November 21, 1963, President Johnson was swift to make President Kennedy's dream of a permanent food stamp program a reality. See Bill Ganzel, *Farming in the 1950s & 60s: Food Stamps*, WESSELS LIVING HISTORY FARM (2007), [http://www.livinghistoryfarm.org/farminginthe50s/money\\_09.html](http://www.livinghistoryfarm.org/farminginthe50s/money_09.html) [<https://perma.cc/RPN7-FAYX>]; *Life of John F. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <https://www.jfklibrary.org/JFK/Life-of-John-F-Kennedy.aspx> [<https://perma.cc/59J2-GGEC>].

<sup>75</sup> See Lyndon B. Johnson, *Remarks Upon Signing the Food Stamp Act*, AM. PRESIDENCY PROJECT (Aug. 31, 1964), <http://www.presidency.ucsb.edu/ws/?pid=26472> [<https://perma.cc/42SX-MVBT>] (providing a transcript of President Johnson's statement when signing the Food Stamp Act into law); *Legislative Timeline*, *supra* note 62, at 2. The Food Stamp Act of 1964 was enacted as Pub-

use an already “highly efficient commercial food distribution system” to simultaneously serve the needy.<sup>76</sup> Upon signing the Food Stamp Act of 1964 into legislation, President Johnson emphasized the important role it played in addressing the global issue of combatting hunger.<sup>77</sup> Under the Food Stamp Act of 1964, individual state agencies determined the eligibility standards for participants in the food stamp program.<sup>78</sup> The coupons could only be used to purchase food from approved retail locations.<sup>79</sup> For the next decade, the nation witnessed a focused attention on combatting poverty, and as a result, program enrollment skyrocketed.<sup>80</sup> Soon, almost twenty million Americans were reliant on the food stamp program.<sup>81</sup>

In 1977, Congress again reformed the food stamp program by enacting the Food and Agriculture Act, which eliminated the purchase requirement associated with food stamps, and instead authorized that food stamps be distributed to all recipients without charge.<sup>82</sup> The Food and Agriculture Act of 1977 was enacted under President Jimmy Carter, who recognized that food stamps were sometimes viewed as an “anomaly or an anachronism in a modern day Department of Agriculture.”<sup>83</sup> Congress believed that the changes would create a simpler and more effective food stamp system by eliminating the barrier imposed by the purchase

lic Law 88-525, 78 Stat. 703–09. See Johnson, *supra*; *Legislative Timeline*, *supra* note 62. Upon signing the Food Stamp Act into law, President Johnson stated: “I believe the Food Stamp Act weds the best of humanitarian instincts of the American people with the best of the free enterprise system.” Johnson, *supra*.

<sup>76</sup> See Johnson, *supra* note 75.

<sup>77</sup> See *id.* President Johnson further remarked: “Our food abundance is being used constructively not only to combat hunger but also to help other nations to control inflation, generate funds for financing developing projects, and to help provide lunches for some 40 million school children throughout the developing world.” *Id.*

<sup>78</sup> *Legislative Timeline*, *supra* note 62, at 2. Individuals, however, still needed to purchase the food stamps. *Id.* Eligibility standards included setting ceilings on maximum income, as well as limiting the amount of resources each family household could receive. *Id.*

<sup>79</sup> See *id.* Retail stores were permitted to submit applications for approval to participate in the food stamp program. *Id.*

<sup>80</sup> See James, *supra* note 38. With the growing popularity of television, and particularly the release of the 1968 television documentary “Hunger in America,” the average American became more aware of the impoverished rural areas of the United States, and expressed sincere concern for their fellow Americans. See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *Legislative Timeline*, *supra* note 62, at 10. See generally Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913 (1977). Lawmakers sought to make it easier for the neediest in society to access food stamps, and found that the purchase requirement was overly complicated and slowed the process of receiving food stamps. See *A Short History of SNAP*, *supra* note 40.

<sup>83</sup> See Jimmy Carter, *Food and Agriculture Act of 1977 Remarks on Signing S. 275 into Law*, AM. PRESIDENCY PROJECT (Sept. 29, 1977), <http://www.presidency.ucsb.edu/ws/?pid=6714> [<https://perma.cc/VHW3-CYLB>] (providing a transcript of President Carter’s statements upon signing the Food and Agriculture Act of 1977 into law).

requirement to participation in the food stamp program.<sup>84</sup> The Food and Agriculture Act of 1977 changed the food stamp system by eliminating the purchase requirement, thereby making food stamps easier to administer to those in need.<sup>85</sup>

Unfortunately, middle-class Americans largely disapproved of the free food stamps, and saw the new system as a handout from the government.<sup>86</sup> Before the Food and Agriculture Act was implemented in 1977, the Department of Agriculture had always required at least a minimal payment to receive food stamps, arguing that it gave food stamp recipients a feeling of empowerment and dignity.<sup>87</sup> After the purchase requirement was eliminated, middle-class Americans complained that food stamp recipients had better access to food than they did, and many viewed the once-popular food stamp program as a burden on the working class.<sup>88</sup>

By 1981, many Americans, including President Ronald Reagan, regarded the food stamp program as a “classic example of a runaway Federal program” based on the changes implemented by the Food and Agriculture Act of 1977.<sup>89</sup> Although the food stamp program’s original purpose had been to feed the needy and provide adequate nutrition to struggling families in America, President Reagan believed that it had become a mere “generalized income-transfer program” that was unrelated to nutrition altogether.<sup>90</sup> President Reagan cited the popular conservative rhetoric of the fabled “welfare queen,” to support his proposal to cut back on welfare spending.<sup>91</sup> Under the Reagan Administration,

<sup>84</sup> *See id.*; *A Short History of SNAP*, *supra* note 40. In addition to expediting the process by which recipients could receive the food stamps, eliminating the purchase requirement was also aimed at eliminating food stamp abuse and reducing errors within the system by making the whole process simpler. *See A Short History of SNAP*, *supra* note 40.

<sup>85</sup> *See A Short History of SNAP*, *supra* note 40. This change was thought to make the system more equitable. *See id.*

<sup>86</sup> *See James*, *supra* note 38.

<sup>87</sup> *See id.* (expressing the Department of Agriculture’s previous fear of “undermining the dignity of recipients”).

<sup>88</sup> *See id.* (describing the middle-class sentiment that food stamps had become a burdensome government handout).

<sup>89</sup> *See Roberts*, *supra* note 45. President Reagan was concerned about the rapidly increasing cost of food stamps, which were expected to grow from \$10.95 billion in 1981 to \$12.47 billion in 1982. *Id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.* In a 1976 campaign speech, Ronald Reagan shocked and appalled the crowd with his tale of Linda Taylor, a woman from Chicago who had allegedly used “80 names, 30 addresses, [and] 15 telephone numbers” to collect Social Security and food stamps, amounting to an annual tax-free income of \$150,000. *See Josh Levin, The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), [http://www.slate.com/articles/news\\_and\\_politics/history/2013/12/linda\\_taylor\\_welfare\\_queen\\_ronald\\_reagan\\_made\\_her\\_a\\_notorious\\_american\\_villain.html](http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html) [https://web.archive.org/web/20171009071959/http://www.slate.com/articles/news\_and\_politics/history/2013/12/linda\_taylor\_welfare\_queen\_ronald\_reagan\_made\_her\_a\_notorious\_american\_villain.html] (analyzing the history behind President Reagan’s description of a “welfare queen” who was symbolic of welfare fraud and used as an anecdote for the President’s desire to “fix” the broken welfare system). Despite this woman’s true existence, President Reagan was

which had campaigned on the idea that Reagan would fix the defective welfare system, Congress enacted stricter eligibility rules for receiving food stamps and other government welfare benefits.<sup>92</sup>

### B. The Clinton Era and the “Welfare Reform Act”

In 1996, President Bill Clinton effectuated the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) to “end welfare as we know it.”<sup>93</sup> President Clinton believed that welfare should be seen as giving individuals a second chance, rather than a “way of life.”<sup>94</sup> PRWORA, also known as the “Welfare Reform Act,” was a comprehensive, bipartisan piece of legislation that aimed to cut back on the expansive federal costs of welfare.<sup>95</sup> President Clinton was optimistic that PRWORA would empower Americans to get off welfare and join the American job market.<sup>96</sup> In a 1995 radio address about welfare reform, President Clinton remarked, “[i]f we’re going to make people self-reliant, we have to make it possible for them to support themselves. We can be tough, but we’ve got to be practical.”<sup>97</sup> The passing of PRWORA was the culmination of a nearly four-decade debate over how to reform the country’s welfare program, and the outcome was a compromise between Democrats and Republicans.<sup>98</sup>

Prior to the enactment of PRWORA, but while it was being debated, a House Committee Report on the Act expressed Congress’ belief that the current

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accused of “gross[ly] exaggerat[ing]” a minor case of welfare fraud, and critics have noted that the idea of the “welfare queen” had undertones of racism. See Paul Krugman, *Republicans and Race*, N.Y. TIMES (Nov. 19, 2007), <http://www.nytimes.com/2007/11/19/opinion/19krugman.html> [<https://perma.cc/KG2J-LBYG>].

<sup>92</sup> See *A Short History of SNAP*, *supra* note 40. Some of the stricter eligibility requirements included allowing states to impose a job search requirement for recipients, considering non-elderly parents who live with their children as part of one household, and including retirement accounts as part of a recipient’s reported resources. *Id.*

<sup>93</sup> See Semuels, *supra* note 46. See generally Pub. L. 104-193, 110 Stat. 2105 (1996).

<sup>94</sup> See Clinton: *Welfare*, *supra* note 4.

<sup>95</sup> See *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Sept. 1, 1996), <https://aspe.hhs.gov/report/personal-responsibility-and-work-opportunity-reconciliation-act-1996> [<https://perma.cc/2ADA-S6YA>] (highlighting the provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996). Some reforms to achieve this goal included a requirement that recipients must work after receiving benefits for two years. *Id.* Further, PRWORA imposed a five-year limit for receiving federal assistance. *Id.*

<sup>96</sup> See Bill Clinton, *The President’s Radio Address*, THE AMERICAN PRESIDENCY PROJECT (Apr. 8, 1995), <http://www.presidency.ucsb.edu/ws/index.php?pid=51209> [<https://perma.cc/2DLF-CDGD>] [hereinafter Clinton: *Radio Address*]. President Clinton, however, was said to have called the program “a decent welfare bill wrapped in a sack of s[\*\*\*],” thereby recognizing the political give-and-take that was required to get the bill passed. Lily Rothman, *Why Bill Clinton Signed the Welfare Reform Bill, as Explained in 1996*, TIME (Aug. 19, 2016), <http://time.com/4446348/welfare-reform-20-years/> [<https://perma.cc/DS54-532Q>]. Despite this, President Clinton signed and touted the welfare bill. See *id.*

<sup>97</sup> Clinton: *Radio Address*, *supra* note 96.

<sup>98</sup> See *id.*; Clinton: *Welfare*, *supra* note 4.



welfare system in the United States was a complete failure.<sup>99</sup> The House Committee Report on June 27, 1996 saw America's welfare system at that time as "subsidiz[ing] dysfunctional behavior" instead of encouraging and rewarding sacred "American values" such as "work, family, personal responsibility, and self-sufficiency."<sup>100</sup> The view that the food stamp system discouraged individuals from seeking job opportunities and encouraged indefinite dependency on federal welfare programs resonated with many Americans.<sup>101</sup> The Report also highlighted the correlation between welfare and high crime rates.<sup>102</sup> Further, it alleged that the welfare system promoted "illegitimacy," because non-married adults could have children and still rest assured that a welfare security net would be available for their family.<sup>103</sup> The arguments laid out in the House Committee Report depicting consequences of the current welfare system were among the top reasons for implementing PRWORA.<sup>104</sup>

President Bill Clinton worked to create a reformed welfare system that promoted empowerment, rather than dependency on the federal government.<sup>105</sup> Prior to the enactment of PRWORA, President Clinton had issued waivers to forty-five states to enact their own welfare reforms; the results of which were used to guide drafting the federal Welfare Reform Act.<sup>106</sup> PRWORA substantial-

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<sup>99</sup> See H.R. REP. NO. 104-651, at 3 (1996) (illustrating the Budget Committee's view that the welfare system was a failure).

<sup>100</sup> See *id.* By "dysfunctional behavior," the Report was likely referring to the then-popularized notion that food stamp recipients were indulging in social-ills rather than positively contributing to society, and getting paid for such behavior. See *id.*; Levin, *supra* note 91. The House Committee Report also highlighted a Cato Institute Study that demonstrated many cases in which it was more profitable for Americans to rely on public benefits than get a paying job. See H.R. REP. NO. 104-651, at 4. The Cato Institute Study stated that welfare paid more than an eight-dollar-per-hour job in forty states, and in nine states it paid more than the starting salary for a teacher. See *id.* The Cato Institute is a conservative think tank based in Washington D.C. that is focused on promoting principles like individual liberty, free markets, and a limited government. *About Cato*, CATO INST., <https://www.cato.org/about> [<https://perma.cc/92PE-NLTH>]. As a result, the House Committee Report was pulling information from an inherently biased organization. See H.R. REP. NO. 104-651, at 4.

<sup>101</sup> See Clinton: *Welfare*, *supra* note 4 (expressing the desire of both Democrats and Republicans to shift welfare's emphasis "from dependence to empowerment"). Thus, the House Committee Report expressed a bipartisan sentiment that the current welfare system was flawed and in need of repair. See H.R. REP. NO. 104-651, at 4.

<sup>102</sup> See H.R. REP. NO. 104-651, at 4. The Report stated that the welfare system made it easier for single parents to support families (without getting married) because food stamps gave them easy access to food. *Id.* The Report also noted that, statistically, "a lack of married parents" was a greater contributing factor to high crime rates than poverty or race. See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.* President Clinton also recognized that the old welfare system was "not working for the taxpayers or for those it intended to help," and thus he promised to "end welfare as we know it." Clinton: *Welfare*, *supra* note 4.

<sup>105</sup> See Clinton: *Welfare*, *supra* note 4. Here, empowerment meant being employed and providing for one's self, without reliance on the welfare system or federal aid of any kind. See *id.* President Clinton did this through PRWORA initiatives like the work requirement and the five-year limit on receiving federal benefits. See HEALTH & HUMAN SERVS., *supra* note 95.

<sup>106</sup> See HEALTH & HUMAN SERVS., *supra* note 95.

ly increased funding for childcare in order to encourage single mothers to reenter the workforce, and implemented a work requirement mandating that welfare recipients work after receiving welfare assistance for two years.<sup>107</sup> PRWORA also shifted welfare from an indefinite source of federal aid for families to a temporary source of aid by instituting a five-year lifetime limit on welfare benefits.<sup>108</sup>

Among the sweeping changes imposed by President Clinton's Welfare Reform Act was a provision denying federal benefits, including access to food stamps, to individuals convicted of felonies "which ha[ve] as an element the possession, use, or distribution of a controlled substance."<sup>109</sup> This provision of PRWORA—hereinafter, the "PRWORA drug felony provision," codified in 21 U.S.C. § 862a—only received two minutes of debate in the Senate, and was voted in favor of inclusion by both parties.<sup>110</sup> Republican Senator Phil Gramm of Texas sponsored the provision as part of a "tough on drugs" initiative.<sup>111</sup> This "tough on drugs" attitude was popular in the 1990's, so both the Democrats and the Republicans in the Senate passed the PRWORA drug felony provision without discussing how the federal ban on food stamps for drug felons would impact welfare reform in general.<sup>112</sup>

The two major reforms that the PRWORA drug felony provision implemented concerned the Supplemental Nutrition Assistance Program ("SNAP") and Temporary Assistance for Needy Families ("TANF").<sup>113</sup> Both SNAP and

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<sup>107</sup> HEALTH & HUMAN SERVS., *supra* note 95. PRWORA provided \$14 billion in childcare funding over six years, which was an increase of over \$3.5 billion, and ensured that women on welfare received healthcare coverage for their families. *Id.* By making childcare more affordable, PRWORA aimed to help single mothers reenter the workforce, thereby furthering its mission of empowering recipients to eventually support themselves. *See id.* Further, as part of the work requirement, welfare recipients are subject to a five-year cumulative limit on receiving government assistance before being ineligible for cash aid. *Id.*

<sup>108</sup> *See id.* Pursuant to PRWORA, families who had received TANF for more than five cumulative years were ineligible for additional cash assistance under the new welfare law. *Id.* This reform was also aimed at President Clinton's goal "to get people off welfare and into jobs." Clinton: *Radio Address*, *supra* note 96.

<sup>109</sup> 21 U.S.C. § 862a(a) (2012 & Supp. II 2014); *see MAUER*, *supra* note 1, at 1, 4–5 (describing the drug felony provision and its impact on individuals recently released from prison).

<sup>110</sup> MAUER, *supra* note 1, at 1. The short debate included strong opposition from Massachusetts Senator Ted Kennedy, who argued, "[u]nder this amendment, if you are a murderer, rapist, or a robber, you can get federal funds; but if you are convicted even for possession of marijuana, you cannot." 142 CONG. REC. 8,498 (1996) (statement of Senator Kennedy).

<sup>111</sup> 142 CONG. REC. 8,498 (1996) (statement of Senator Gramm). Senator Gramm argued, "if we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation's drug laws. *Id.*

<sup>112</sup> *See MAUER*, *supra* note 1, at 1.

<sup>113</sup> *See McCarty et al.*, *supra* note 1, at 3. SNAP benefits, formerly known as food stamps, give recipients electronic benefit cards, which can be used to purchase food. *Id.* at 5. TANF refers to block grants given to states by the federal government, and are used to fund programs such as TANF cash assistance, which gives aid to severely poor families. *Id.* at 4.

TANF are federally funded welfare programs administered at the state and local level based on need.<sup>114</sup> SNAP, formerly referred to as food stamps, is one hundred percent federally funded, and provides food assistance to a broad range of households in need.<sup>115</sup> In 2015, the average household in the program received approximately \$127 per month in SNAP benefits.<sup>116</sup> SNAP benefits are provided to recipients via electronic benefit transfer cards, which can be used to purchase food.<sup>117</sup> Fewer individuals receive TANF benefits, which provide cash assistance and support only to very low-income parents and children.<sup>118</sup> All families receiving TANF benefits automatically qualify for SNAP benefits.<sup>119</sup> Pursuant to the PRWORA drug felony provision, neither of these welfare programs is available to “[a]n individual convicted (under Federal or State law) of any offense . . . which has as an element the possession, use, or distribution of a controlled substance.”<sup>120</sup> The effect of this ban on families is that, although other family members may still be eligible for welfare benefits such as SNAP and TANF, the amount of assistance provided to the family is “reduced by the amount which would have otherwise been made available to the [drug felon].”<sup>121</sup>

In addition to TANF and SNAP benefit reductions imposed by the PRWORA drug felon provision, Congress passed several other drug-related sanctions during this time period in an effort to eradicate the negative societal effects of crime and drugs.<sup>122</sup> For example, states are permitted to drug-test recipients of TANF.<sup>123</sup> Although there is no legislation that authorizes drug testing for SNAP recipients, the Congressional Research Service has acknowledged that the intimate relationship between the two welfare programs means that SNAP

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<sup>114</sup> See *id.* at 6.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* at 5.

<sup>117</sup> *Id.*

<sup>118</sup> See *id.* TANF eligibility is determined by each state based on the economy, whereas SNAP eligibility includes factors such as meeting gross and net income standards and having less than \$2,000 liquidity. *Id.* at 4–5.

<sup>119</sup> *Id.* at 4–5.

<sup>120</sup> 21 U.S.C. § 862a(a) (2012 & Supp. II 2014).

<sup>121</sup> *Id.* § 862a(b)(1). The result of this provision is that the benefits are substantially reduced; for example, a four-person household would be treated as a three-person household for federal benefits purposes. See MAUER, *supra* note 1, at 5. Because welfare benefits are meager to begin with, this reduction creates hardships for families in need. *Id.*

<sup>122</sup> McCarty et al., *supra* note 1, at 3. Congress passed these sanctions to show that they were serious about the country’s drug laws. *Id.*

<sup>123</sup> *Id.* at 7–8. Most states, however, require at least some showing of a “reasonable suspicion” that the individual was using a controlled substance. *Id.* For example, states will evaluate individuals for signs of substance abuse, and implement a drug test only when the evaluation indicates that an individual has a propensity for substance abuse. *Id.* Incidents of the suspicion-less drug testing of TANF applicants and participants have successfully been challenged in state court, and state policies allowing suspicion-less drug testing have been overturned. *Id.*

recipients are also likely affected by drug testing.<sup>124</sup> Additionally, just prior to the passage of PRWORA, drug and crime-related restrictions in the federal housing programs were implemented.<sup>125</sup> After PRWORA was passed, Congress enacted the Quality Housing and Work Opportunity Reconciliation Act of 1998 (“QHWORA”).<sup>126</sup> QHWORA modified the prior housing restrictions, focusing particularly on restrictions for individuals convicted of sex offenses or drugs offenses involving methamphetamines.<sup>127</sup>

Although Congress implemented the PRWORA drug sanctions to combat the war on drugs, the sanctions have since been shown to do significantly more harm than good.<sup>128</sup> In the two minutes that the provision was debated on the Senate floor, there was no mention of whether the PRWORA drug felony provision would further the objectives of welfare reform.<sup>129</sup> Two reasons supporting implementation of the PRWORA drug felony provision were deterrence of drug use and reduction of food stamp fraud.<sup>130</sup> However, the deterrence justification assumes a relationship between substance abuse and criminal activity, when in reality many individuals convicted of drug felonies do not use drugs.<sup>131</sup> A similarly flawed justification for the drug felony provision is that it will reduce welfare fraud.<sup>132</sup> Because the majority of individuals convicted for drug felonies are not users, it does not follow that those convicts would be more likely to traffic their food stamps in order to purchase more drugs.<sup>133</sup> In reality, the

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<sup>124</sup> See *id.* at 8. TANF recipients are categorically eligible for SNAP, and both TANF and SNAP are federal welfare benefits falling under PRWORA. See *id.* at 3–5.

<sup>125</sup> See *id.* at 4. Congress passed the Housing Opportunity Program Extension Act of 1996 on March 28, 1996. See generally Pub. L. 104-120, 110 Stat. 834 (1996). Congress also passed the Quality Housing and Work Opportunity Reconciliation Act of 1998. McCarty et al., *supra* note 1, at 4.

<sup>126</sup> McCarty et al., *supra* note 1, at 4.

<sup>127</sup> *Id.*

<sup>128</sup> See MAUER, *supra* note 1, at 7 (outlining the ways that the PROWORA felony drug provision leads to recidivism and disproportionately impacts minorities); see, e.g., Beitsch, *supra* note 6 (showing how an individual’s marijuana conviction from his youth prevented him from receiving food stamps when his family was most in need); see also Wiltz, *supra* note 1 (highlighting the reasons why most states have revised the drug felony provision, or opted out altogether).

<sup>129</sup> See MAUER, *supra* note 1, at 1. The debate centered around showing that congress was “serious about our drug laws,” and despite a strong opposition, the provision was swiftly passed by a majority vote of seventy-four yeas and twenty-five nays. 142 CONG. REC. 8,499 (1996).

<sup>130</sup> MAUER, *supra* note 1, at 1; see *Turner v. Glickman*, 207 F.3d 419, 427 (7th Cir. 2000) (holding that PRWORA was “rationally related to legitimate government interests in deterring drug use and reducing welfare fraud”).

<sup>131</sup> See MAUER, *supra* note 1, at 5–6. According to data from the Bureau of Justice Statistics, more than 56% of the drug convictions in 2006 were for selling, as opposed to using, drugs. See *id.* Further, of those convicted for drug possession, 44% of those convictions were for “possession with intent to deliver.” *Id.*

<sup>132</sup> See *id.* This notion stemmed from the idea that drug felons are drug users, and further, that drug users are desperate and therefore likely to abuse the food stamp system for drug money. *Id.*

<sup>133</sup> See *id.* In the 1990s, the media reported on several incidents in which food stamps were exchanged for money and contraband. *Id.* These accounts, however, often involved undercover police

number of food stamps that are trafficked for drugs is very low—roughly one cent per dollar spent on food stamps.<sup>134</sup> Thus, the PRWORA drug felony provision is not properly tailored to deterring drug use and preventing welfare fraud.<sup>135</sup>

### *C. The Effect of the Federal Ban on Food Stamps for Drug Felons Across the States*

The denial of federal welfare benefits, including eligibility for food stamps, for individuals with state or federal felony drug convictions has led to varying responses by states across the country.<sup>136</sup> The PRWORA drug felony provision provides that states may either opt out of the federal ban entirely, or modify the ban by limiting the period for which the ban applies to convicted drug felons.<sup>137</sup> This means that the state in which an individual resides has the power to determine whether a drug-related felony is a basis to deny the individual access to a reliable source of food.<sup>138</sup> Opting out or exempting individuals from the PRWORA drug felony provision requires affirmative state government action in the form of enacting an “opt out” law.<sup>139</sup> Recognizing that this federal ban has disparate effects on individuals with drug felony convictions, and ultimately perpetuates a cycle of poverty for those individuals, many states have opted out of the ban entirely.<sup>140</sup> Six states and territories currently have the complete ban in effect—Arizona, Guam, Mississippi, South Carolina, Virgin Islands and West

officers who were initiating the welfare fraud, and thus did not indicate that the households receiving food stamps were engaged in welfare fraud. *Id.*

<sup>134</sup> *See id.* Food stamp fraud, or trafficking food stamps, occurs when individuals use their food stamps as a currency for purchasing illicit items, rather than for obtaining food. *See id.* One reason for the low fraud rate within SNAP could be that the benefits are now disbursed using an electronic benefits card, which is used by recipients like a credit card and makes it more difficult to cheat the system. *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *See* McCarty et al., *supra* note 1, at 13 (stating that twenty-one states and territories have opted out of the felony drug provision entirely, twenty-six have modified it, and six still have the lifetime disqualification in effect).

<sup>137</sup> *See* 21 U.S.C. § 862a(d)(1)(A) (2012) (“Opt out: 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) [the felony drug provision] of this section.”).

<sup>138</sup> *See id.*

<sup>139</sup> McCarty et al., *supra* note 1, at 8. Because § 862a(d) provides that a state may opt out of the felony drug provision “*by specific reference in a law*” (emphasis added), it requires that states pass a law explicitly opting out of the provision. *See* 21 U.S.C. § 862a(d); McCarty et al., *supra* note 1, at 8.

<sup>140</sup> *See* MAUER, *supra* note 1, at 4 (explaining that the felony drug provision leads to recidivism and disparately impacts minorities); Wiltz, *supra* note 1. (highlighting how the felony drug provision perpetuates a life of crime and poverty for individuals). As of 2016, the following twenty-one states have opted out of the PRWORA drug felony provision’s ban on SNAP: Alabama, California, Delaware, District of Columbia, Georgia, Illinois, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wyoming. McCarty et al., *supra* note 1, at 13.

Virginia—though neither TANF nor SNAP require that states report whether they retain the full ban in effect.<sup>141</sup> In addition to these six states and territories, twenty-six other states have implemented modified disqualifications from food stamps for drug felons.<sup>142</sup> Only twenty-one states have no disqualification from SNAP for drug felons.<sup>143</sup> The PRWORA drug felony provision also disqualifies drug felons from TANF benefits, and as of August 1, 2016, ten states still have a full ban on TANF benefits in effect.<sup>144</sup>

Recently, many states have lifted the ban on food stamps for drug felons, recognizing the need to assist individuals recently released from prison to reduce recidivism.<sup>145</sup> For example, in April 2016, Georgia enacted a criminal justice reform bill to lift the ban on food stamps, and Delaware and Alaska passed similar reform bills in June and July 2016.<sup>146</sup> A Georgia state representative who supported the criminal reform act acknowledged that the ban on food stamps for drug felons was impractical.<sup>147</sup>

Although congressmen and women across the nation have sympathized with Georgia state representative Rich Golick's sentiment, under federal law, states have the ability to implement their own welfare restrictions.<sup>148</sup> Examples of welfare restrictions implemented by the states include providing welfare benefits only if the food stamp recipient complies with his or her parole, or only if he or she enrolls in drug treatment, or does not commit a second offense.<sup>149</sup>

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<sup>141</sup> McCarty et al., *supra* note 1, at 10, 13.

<sup>142</sup> *See id.* at 13. As of August 1, 2016, the states that have implemented modified disqualifications are: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin. *Id.* Examples of these modified disqualifications include drug tests, limiting to only certain types of drug felonies, disqualifying those drug felons who are repeat offenders, temporarily disqualifying drug felons from access to food stamps, or requiring attendance to drug treatment programs. *See id.* at 12.

<sup>143</sup> *Id.* at 13.

<sup>144</sup> *See id.* at 9. As of August 1, 2016, states that completely disqualify drug felons from receiving TANF benefits are: Arizona, Delaware, Georgia, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Texas, and Virginia. *Id.* Thirteen states plus the District of Columbia have since repealed this provision for TANF benefits and have no disqualification for TANF benefits for drug felons. *See id.*

<sup>145</sup> *See MAUER, supra* note 1, at 7 (explaining that without access to food stamps, individuals recently released from prison who are in need of food often resort back to a life of crime).

<sup>146</sup> *See id.*; Wiltz, *supra* note 1 (citing reasons for reforming the felony drug provision, such as reducing over-populated state prisons and helping former inmates get back on their feet).

<sup>147</sup> *See Wiltz, supra* note 1 (quoting Georgia State Representative Rich Golick). Representative Golick stated: "You had individuals who were coming out of the system convicted of a violent crime who had the eligibility to apply for food stamps whereas someone who went in on a drug charge, including possession, didn't have that ability. You're increasing the chances that they may reoffend because they don't have the ability to make ends meet. Doesn't this go against what we are trying to achieve as they re-enter society?" *Id.*

<sup>148</sup> *See id.*; *see also* 21 U.S.C. § 862a(d)(1)(A) (2012).

<sup>149</sup> *See Effect of Denial of SNAP Benefits on Convicted Drug Felons*, NETWORK FOR PUB. HEALTH LAW (2015), [https://www.networkforphl.org/\\_asset/1mvl2f/SNAP-drug-felony-bans-issue](https://www.networkforphl.org/_asset/1mvl2f/SNAP-drug-felony-bans-issue)

Although many states have opted out of the PRWORA drug felony provision, or modified the federal ban to allow individuals with drug felony convictions the opportunity to qualify for food stamps if they meet certain requirements, the inconsistencies across states impose another barrier for welfare recipients.<sup>150</sup> Many individuals released from prison have difficulty finding employment because employers are less inclined to hire someone with a criminal record, and thus they lack adequate means to relocate to another state.<sup>151</sup> Further, understanding the nuances of an individual state's stance on the PRWORA drug felony provision requires complex research.<sup>152</sup> For these reasons, individuals impacted by the drug felony provision will be disadvantaged as long as some form of this federal ban remains in effect.<sup>153</sup>

## II. HOW THE DRUG FELONY PROVISION OF PRWORA TARGETS A VULNERABLE COMMUNITY AND PERPETUATES A CYCLE OF POVERTY

When President Bill Clinton promised “to end welfare as we know it,” he said that he hoped the passing of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) would be “remembered not for what it ended, but for what it began.”<sup>154</sup> More than twenty years after PRWORA was signed into law, it is clear that the drug felony provision of the law did alter the welfare system—by erecting a barrier to reentry into society for convicted drug felons.<sup>155</sup> Drug felons are prevented from successfully reintegrating back into society when they are denied federal benefits, like food stamps, pursuant to

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brief.pdf [<https://perma.cc/Y4AC-KSV4>] (“Currently, 15 states require the defendants to enter and complete a drug treatment program. Only 10 of these states explicitly impose drug testing requirements. . . .”).

<sup>150</sup> See *id.*

<sup>151</sup> See Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. FOR AM. PROGRESS 10 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> [<https://perma.cc/P579-PJZY>] (stating that, according to the National Institute of Justice, employers are less likely to hire individuals with criminal records).

<sup>152</sup> See McCarty et al., *supra* note 1, at 10 (explaining that states only need to affirmatively act when they opt out of the provision). Because states do not need to affirmatively act to maintain the ban on welfare benefits for drug felons, it can be difficult to ascertain whether the ban remains in effect because it requires looking closely at the individual state's statutes. See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, WASH. POST (Aug. 23, 1996), <http://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wf082396.htm> [<https://perma.cc/4G7L-6BUL>] (illustrating the mixed responses to President Clinton's Welfare Reform Act in 1996).

<sup>155</sup> See MAUER, *supra* note 1, at 7–8. This was a result of a blanket denial on access to food stamps for any individual convicted of a drug-related felony. See *id.*

the PRWORA drug felony provision.<sup>156</sup> Whereas individuals released from prison for violent crimes maintain their eligibility for welfare benefits as they apply for jobs and/or look for housing, an individual convicted of a crime involving a controlled substance is denied access to these rudimentary needs.<sup>157</sup> Included as an off-hand attempt to address the “war on drugs,” the PRWORA drug felony provision has had unanticipated negative effects on tens of thousands of Americans.<sup>158</sup> The reality of this “tough on drugs” provision of PRWORA is not that individuals are dissuaded from committing drug-related crimes, but rather that individuals released from prison remain captive to the consequences of their past mistakes.<sup>159</sup>

Many states have recognized that the PRWORA drug felony provision eternalizes the cycle of poverty and has a damaging impact on low-income and minority groups; as such, these states have responded by opting out of the federal law, or modifying it.<sup>160</sup> African Americans make up approximately thirteen percent of the U.S. population, yet they make up thirty-one percent of individuals arrested for drug-related crimes, and forty percent of those who are incarcerated for drug-related crimes.<sup>161</sup> Therefore, the PRWORA drug felony provision—and subsequent denial of food stamps—more significantly affects African American felons.<sup>162</sup> Because the populations most affected by this federal ban typically have limited geographical mobility, the injustices imposed by the PRWORA drug felony provision will continue to disproportionately affect minority populations until the provision is repealed altogether.<sup>163</sup>

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<sup>156</sup> *See id.* In addition to being denied food stamps, individuals with felony drug convictions are often also denied other forms of federal assistance such as subsidized housing or federal loans for education. *See id.* at 8. In 1998, Congress enacted the Quality Housing and Work Opportunity Reconciliation Act of 1998 (“QHWORA”), which implemented housing restrictions for individuals convicted of sex offenses or drugs involving methamphetamines. *See* McCarty et al., *supra* note 1, at 4.

<sup>157</sup> 21 U.S.C. § 862a(a) (2012 & Supp. II 2014); Wiltz, *supra* note 1.

<sup>158</sup> MAUER, *supra* note 1, at 1, 4–5. For example, the PRWORA drug felony provision received a mere two minutes of debate on the floor of the Senate, and yet it has impacted an entire class of individuals by making them ineligible for food stamps, and thereby susceptible to recidivism and further crime. *See id.* at 1.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.* at 7–8; Wiltz, *supra* note 1.

<sup>161</sup> *See The Drug War, Mass Incarceration and Race*, DRUG POLICY ALL. (Feb. 2016), [https://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet\\_Drug%20War%20Mass%20Incarceration%20and%20Race\\_%28Feb.%202016%29\\_0.pdf](https://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Drug%20War%20Mass%20Incarceration%20and%20Race_%28Feb.%202016%29_0.pdf) [<https://perma.cc/L839-XG67>] (highlighting the magnitude of incarceration rates for minority drug felons). These statistics include both state and federal drug law violations. *See id.*

<sup>162</sup> MAUER, *supra* note 1, at 5. Although African Americans, Hispanics, and whites use drugs at approximately the same rate, as of 2011, 40.7% of people in state prison for drug offenses were African American. *Id.*; *see also The Drug War*, *supra* note 161 (explaining that African Americans make up roughly 13% of the U.S. population, but 40% of the state and federal prison population for drug offenses).

<sup>163</sup> *See* MAUER, *supra* note 1, at 5 (highlighting the disproportionate impact that the drug felony provision has on minorities); Vallas & Dietrich, *supra* note 151, at 10 (stating that roughly 60% of



*A. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 Fails to Provide Support to Minority Drug Felons*

In 1995, when President Clinton articulated his goals for enacting PRWORA, he explained that his main priority was to get Americans working again, rather than relying on welfare for support.<sup>164</sup> PRWORA emphasized finding employment as a prerequisite for receiving welfare benefits, set a work requirement, and limited the amount of time an individual could spend on welfare.<sup>165</sup> The PRWORA drug felony provision, however, denies many recently-released prisoners the opportunity to adequately search for a job in the first place.<sup>166</sup> All formerly incarcerated individuals are subject to a wide range of obstacles to reentering the job force, gaining the respect and trust of friends and neighbors, and overcoming the stigma that comes with being an ex-convict.<sup>167</sup> These challenges are compounded for drug felons when welfare benefits, which were designed for the very purpose of getting individuals back on their feet, are withheld based solely on the fact that their offense was drug-related.<sup>168</sup> Denying a person access to a basic human necessity such as food may force them to return to a life of crime in order to survive.<sup>169</sup> Instead of enabling drug felons to overcome their mistakes and contribute to society in a positive way, the PRWORA drug felony provision tethers them to their past criminal history.<sup>170</sup>

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individuals recently released from prison are still unemployed after a year, thereby highlighting their economic limitations).

<sup>164</sup> Clinton: *Radio Address*, *supra* note 96. With his enactment of PRWORA, President Clinton sought to move individuals “from dependence to independence,” while also helping single mothers get back into the job force and protecting children to keep them healthy and safe. *See id.*

<sup>165</sup> *See* HEALTH & HUMAN SERVS., *supra* note 95. The PRWORA work requirement mandates that individuals receiving welfare benefits must work after two years on assistance. *Id.* Single parents must work at least twenty hours per week, while two-parent families must work thirty-five hours per week. *Id.* PRWORA also set a five-year limit, after which individuals are no longer eligible for benefits. *Id.* Welfare recipients must work after receiving welfare assistance for two years, and are subject to a five-year cumulative limit on receiving government assistance before being ineligible for cash aid. *Id.*

<sup>166</sup> *See* MAUER, *supra* note 1, at 5–6 (highlighting the “collateral consequences of a criminal conviction” and the resulting struggle to reintegrate into society). Without basic necessities like food for themselves and their families, individuals transitioning into society from prison struggle to focus on next-steps, like finding employment. *See id.*

<sup>167</sup> *See id.*; Vallas & Dietrich, *supra* note 151, at 11.

<sup>168</sup> *See* MAUER, *supra* note 1, at 7. Although non-drug felons can qualify for welfare benefits when they are released from prison, drug felons are categorically denied these basic lifelines under PRWORA. *See id.*

<sup>169</sup> *See id.*; Grant Schulte, *Give Drug Felons Food Stamps, Many States Now Say*, ASSOCIATED PRESS (Apr. 18, 2016), <http://bigstory.ap.org/article/81bd3a51075a4a478d2d9881af6a70e3/give-drug-felons-food-stamps-many-states-now-say> [<https://perma.cc/8KFL-GWWB>] (providing an example of a drug-felon who was denied food stamps and who resorts to stealing food when he runs out of money). Human instincts inevitably kick in, and individuals turn to drastic, sometimes criminal, measures to feed themselves and their families. *See* Schulte, *supra*.

<sup>170</sup> *See* MAUER, *supra* note 1, at 8 (“For formerly incarcerated individuals transitioning back to their home communities, SNAP or TANF benefits can help them to meet their basic survival needs

As soon as individuals are released from prison, they immediately face countless challenges when they reenter society.<sup>171</sup> According to the National Institute of Justice, recently released ex-convicts are likely to struggle with substance abuse, mental health issues, insecure housing, and inadequate job skills.<sup>172</sup> In addition to these initial obstacles, recently-released individuals must also confront the strong prejudice that many employers have against hiring people with criminal records.<sup>173</sup> According to a self-reported employer study, over sixty percent of employers indicated that they have an “aversion to hiring ex-offenders.”<sup>174</sup> The majority of employers—sixty-nine percent as of 2012—conduct criminal background checks of future employees; many more require prospective employees to check a box if they have a criminal record.<sup>175</sup> Further, only fifty-eight percent of employers allow a prospective employee the chance to explain his or her criminal history prior to deciding whether to hire him or her.<sup>176</sup>

It takes a significant amount of time for formerly incarcerated individuals to find employment at all—sixty percent of formerly incarcerated individuals report being unemployed one year after their release from prison.<sup>177</sup> Compounding the difficulty in obtaining employment, when an individual with a

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during the period in which they are searching for jobs or housing.”). Reintegration to society can be difficult for individuals recently released from prison, particularly because employers are reluctant to hire individuals with criminal records. *See id.*; Vallas & Dietrich, *supra* note 151, at 10–11. Food stamps play a critical role in allowing individuals to focus on finding housing and employment, without having to resort to crime to provide for their families. *See MAUER, supra* note 1. Drug felons who are denied these essential benefits are therefore more likely to fall back into the cycle of crime. *See id.* at 7–8.

<sup>171</sup> *See Offender Reentry*, NAT’L INST. OF JUSTICE, <https://www.nij.gov/topics/corrections/reentry/Pages/welcome.aspx> [<https://perma.cc/VS7K-9ZUC>] (last modified Feb. 25, 2015) (listing challenges to reentry, such as “substance abuse, lack of adequate education and job skills, limited housing options, and mental health issues”).

<sup>172</sup> *See id.*

<sup>173</sup> *See* Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J. L. & ECON. 451, 455 (2006) (explaining that most employers have an “aversion” to hiring individuals with criminal records); Vallas & Dietrich, *supra* note 151, at 10 (“But regardless of race, a person who has been incarcerated has a lesser chance of getting an interview than does a job seeker with identical qualifications but no record.”).

<sup>174</sup> *See* Holzer, *supra* note 173, at 453. This statistic indicates that employers are less inclined to hire ex-convicts than other stigmatized groups such as individuals on welfare or who have stretches without steady employment. *Id.*

<sup>175</sup> *See Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, SOC’Y FOR HUMAN RES. MGMT. (July 19, 2012), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/criminalbackgroundcheck.aspx> [<https://perma.cc/9Z7J-QA77>] (explaining the results of a survey given to employers focusing on their use of criminal background checks in their hiring process).

<sup>176</sup> *See id.*

<sup>177</sup> *See* Vallas & Dietrich, *supra* note 151, at 10–11 (describing the barriers that a criminal record creates in obtaining employment). “[H]aving any arrest during one’s life decreases employment opportunities more than any other employment related-stigma, such as long-term unemployment, receipt of public assistance, or having a GED instead of a high school diploma.” *Id.*

criminal record finally secures a job, that individual will make on average forty percent less than someone without a criminal record.<sup>178</sup> Further, formerly incarcerated individuals typically work approximately nine fewer weeks per year than someone without a criminal record.<sup>179</sup> Employers have an even greater prejudice against hiring non-white males with a criminal record.<sup>180</sup> Thus, economic insecurity for recently released drug felons makes the ban on food stamps even more harmful.<sup>181</sup>

These challenges significantly hinder recently-released felons' ability to reenter society.<sup>182</sup> The delay or altogether inability to find a steady job that can support the basic needs of both the individual and his or her family leaves these individuals feeling hopeless and defeated.<sup>183</sup> Access to welfare, particularly food stamps, is essential for these individuals to survive and effectively reintegrate back into society.<sup>184</sup> Both SNAP and TANF were created specifically for people who could not afford to feed or clothe themselves and their family.<sup>185</sup> Thus, by denying individuals access to these welfare programs purely because they were convicted of a drug felony rather than any other felony, the PRWORA drug felony provision has the consequence of promoting recidivism specifically among drug felons.<sup>186</sup>

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<sup>178</sup> *Collateral Costs: Incarceration's Effect on Economic Mobility*, PEW CHARITABLE TRS. 11 (2010), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf) [<https://perma.cc/PQL4-M8TS>]. After accounting for factors like region, age, and education level, individuals who have been incarcerated typically earn wages 11% below their counterparts. *Id.*

<sup>179</sup> See Vallas & Dietrich, *supra* note 151, at 10. This disparity results in an average of \$179,000 lost income for individuals by the time they are forty-eight years old. *Id.*

<sup>180</sup> See *id.* ("Studies find that white male and female job seekers with records have better employment chances than black or Hispanic applicants with records."). Non-white males who were formerly incarcerated face the most significant barriers to securing a job after release from prison, and are less likely to be hired than white males or females with criminal histories. *Id.*

<sup>181</sup> See *id.*

<sup>182</sup> See *id.* In one focus group run by Neighborhood Local Services, Inc. in Washington, D.C. in November of 2013, one individual who had recently been released from prison shared his struggle, explaining: "It's a challenge everywhere. When you come home from jail . . . [t]here are no 600 dollar apartments anymore. When you come home you aren't an asset to your family, you are a liability. Food costs increase, housing, your kids, clothes. Odds are if you don't find a job, you'll go back to doing what you know. It's easier to get a gun and drugs than a job." See *id.*

<sup>183</sup> See *id.* (detailing the common feeling recently-released individuals have of being a burden on their families).

<sup>184</sup> See MAUER, *supra* note 1, at 8 (explaining that SNAP and TANF were "designed to provide subsistence level benefits" for individuals in need); Vallas & Dietrich, *supra* note 151, at 10–11.

<sup>185</sup> See MAUER, *supra* note 1, at 1, 5 (stating that SNAP provides individuals with food stamps, while TANF benefits provide cash assistance to needy families).

<sup>186</sup> See *id.* PRWORA welfare programs such as SNAP and TANF provide recently-released individuals with the basic necessities, so that they are less likely to return to a life of crime to provide for themselves and their families. *Id.* at 1; Vallas & Dietrich, *supra* note 151, at 10–11 (highlighting the difficulties individuals with criminal records face in finding employment). Thus, denying drug felons access to these programs makes them more susceptible to reoffending. See MAUER, *supra* note 1, at 7–8.

### B. How the Drug Felony Provision Perpetuates Recidivism and Disparately Impacts Racial Minorities

The PRWORA drug felony provision runs contrary to the stated objectives of the Welfare Reform Act, which include empowering Americans to become productive members of the workforce.<sup>187</sup> Banning drug felons from receiving food stamps increases the likelihood that they will recidivate once they are released, even after many courts have already identified factors indicating a propensity to recidivate in their original sentencing determinations.<sup>188</sup> In fact, one study found that food insecurity among individuals recently released from prison “mirror[s] the magnitude of food insecurity in developing countries.”<sup>189</sup> Ronald Tillman, a fifty-four-year-old Navy veteran and resident of Lincoln, Nebraska, has felt the brunt of this ban.<sup>190</sup> In 2013, Tillman was released from prison after serving three years in prison for selling morphine pills to a police informant.<sup>191</sup> As a result of the PRWORA felony drug provision, Tillman is ineligible for food stamps.<sup>192</sup> Thus, he survives solely on the \$733 he receives monthly from his

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<sup>187</sup> See Clinton: *Radio Address*, *supra* note 96 (“My top priority is to get people off of welfare and into jobs.”).

<sup>188</sup> See MAUER, *supra* note 1, at 7–8; Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 715 (2015) (critiquing the common sentencing practice of using statistics to inform sentencing decisions because it undermines individual autonomy and punishes individuals for factors outside of their control). Courts frequently use “risk-assessment tools” when determining sentencing, and increase the length of imprisonment based on a defendant’s likelihood to recidivate, looking to factors such as substance abuse, age and unemployment. Sidhu, *supra*, at 715. “Risk-assessment tools” refer to statistics such as socio-economic status, race, gender, and level of education, which are used to analyze an individual’s propensity to recidivate. *Id.* at 674–75.

<sup>189</sup> Emily A. Wang et al., *A Pilot Study Examining Food Insecurity and HIV Risk Behaviors Among Individuals Recently Released from Prison*, 25 AIDS EDUC. & PREVENTION 112, 112, 113 (2013); see MAUER, *supra* note 1, at 7–8; Vallas & Dietrich, *supra* note 151, at 23. A study by Dr. Emily Wang, affiliated with the Yale School of Medicine, found that 91% of individuals released from prison report being food insecure, and 37% reported not having eaten for a whole day. Wang, *supra*, at 113. This level of food insecurity “mirror[ed] the magnitude of food insecurity in developing countries.” *Id.*

<sup>190</sup> See Schulte, *supra* note 169 (explaining that Tillman is ineligible for food stamps because he is a drug felon). Nebraska remains one of the states that has not completely opted out of the PRWORA drug felony provision. See *id.*

<sup>191</sup> See *id.*; Wiltz, *supra* note 1.

<sup>192</sup> 21 U.S.C. § 862a(a) (2012 & Supp. II 2014); Wiltz, *supra* note 1. Nebraska has modified the drug felony provision, and an individual is ineligible for SNAP benefits “if he or she (i) has had three or more felony convictions for the possession or use of a controlled substance or (ii) has been convicted of a felony involving the sale or distribution of a controlled substance or the intent to sell or distribute a controlled substance. A person with one or two felony convictions for the possession or use of a controlled substance shall only be eligible to receive Supplemental Nutrition Assistance Program benefits under this subsection if he or she is participating in or has completed a state-licensed or nationally accredited substance abuse treatment program since the date of conviction.” NEB. REV. STAT. § 68-1017.02(4)(a)–(b) (2012). Thus, Tillman failed to meet those requirements. See *id.*; Wiltz, *supra* note 1.

disability check for a serious back injury.<sup>193</sup> In an interview with the Associated Press, Tillman explained, “[s]ometimes when you need food, you have to steal it . . . . I’ve shoplifted a couple of times, just to eat that night and maybe the next morning.”<sup>194</sup>

The PRWORA drug felony provision and the “war on drugs” have disproportionately affected racial minorities.<sup>195</sup> The vast majority of inmates convicted of drug related felonies are racial minorities, specifically African Americans and Latinos.<sup>196</sup> As of 2005, although African Americans represented a mere twelve percent of drug users, African Americans made up approximately forty-five percent of the state prison population for drug offenses.<sup>197</sup> Additionally, Latinos make up another twenty percent of the drug offending prison population.<sup>198</sup> A myriad of issues affect the criminal justice system and contribute to the vast inequities felt by racial minorities, including implicit and systematic biases within law enforcement.<sup>199</sup>

Minorities living in poor, urban neighborhoods are most affected by the PRWORA drug felony provision’s ban on food stamps for drug felons.<sup>200</sup> The effect of the “war on drugs” is that people of color are more frequently targeted and arrested than white people are.<sup>201</sup> As of 2007, approximately seventy-seven

<sup>193</sup> Schulte, *supra* note 169. This meager income means that when food runs short, Tillman has to resort to drastic measures just to keep from going hungry. *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See MAUER, *supra* note 1, at 5 (“The federal ban on receipt of food stamps and cash assistance for individuals with felony drug convictions disproportionately impacts African Americans and other minority groups.”).

<sup>196</sup> See MARC MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 1 (2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Changing-Racial-Dynamics-of-the-War-on-Drugs.pdf> [<https://perma.cc/3VV6-DQWY>] (“Overall, two-thirds of persons incarcerated for a drug offense in state prison are African-American or Latino.”).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See Cheryl Staats, *State of the Science: Implicit Bias Review*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY 19 (2016), <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf> [<https://perma.cc/E8NX-U7ZP>] (explaining what implicit bias is, and how it impacts the criminal justice system). Implicit biases, defined as “[t]he attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner,” are ingrained within the criminal justice system, from policing, to jury biases, to judicial biases. *Id.* at 14, 19. Thus, individual biases that may be unconscious can contribute to the systematic injustices within the criminal justice system. See *id.*; see also Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 57 B.C.L. REV. 809, 814–15 (2017) (discussing implicit bias in the employment discrimination context).

<sup>200</sup> See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, HUMAN RIGHTS WATCH (June, 19, 2009), [https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states#\\_fnref55](https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states#_fnref55) [<https://perma.cc/68SJ-UF6Y>] (explaining that the use of crack was prevalent in poor, urban, minority neighborhoods, and because this was a focus of the federal crackdown, “those neighborhoods became and remain principle ‘fronts’ in the war on drugs”); MAUER, *supra* note 1, at 5.

<sup>201</sup> See Fellner, *supra* note 200. According to a study from Seattle, Washington, where 70% of the population is white, the majority of those who had shared or distributed drugs were white, yet 64% of

percent of all drug-related arrests took place in cities.<sup>202</sup> Police departments often implement drug enforcement procedures by “market,” which are divided by race and socio-economic class, and thus many of the markets that police officers target tend to be heavily made up of minorities.<sup>203</sup> Drugs are more likely to be sold on the street corners in poor and minority neighborhoods, making it easier for police officers to target and make drug-related arrests in these neighborhoods than in the suburbs.<sup>204</sup> Thus, drug felons who are barred or severely limited from receiving welfare benefits pursuant to the PRWORA drug felony provision are more likely to be non-white and come from a poor neighborhood.<sup>205</sup> Racial minorities are not only more likely to be arrested and convicted of a drug felony, but as a result of the PRWORA drug felony provision, they are also more likely to be disadvantaged upon release from prison.<sup>206</sup>

### *C. Individual State Responses to the PRWORA Drug Felony Provision*

The PRWORA drug felony provision provides that states may opt out of the provision by either exempting individuals from all or part of the provision, or by implementing a time limit on the prohibition.<sup>207</sup> Without an affirmative action by the state, however, drug felons are subject to the federal lifetime ban from welfare benefits.<sup>208</sup> Today, six states and territories have the full lifetime ban on SNAP benefits for drug felons, and ten states and territories have the full ban on TANF benefits.<sup>209</sup> The SNAP program was designed to be open and accessible to everyone, including individuals recently released from prison.<sup>210</sup> The Federal

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those arrested for drug offenses were black. *See id.* The study determined that the reason for these incongruent numbers was that the police department focused on neighborhoods with more racial diversity when making drug arrests, and they also more heavily targeted the sale of crack cocaine. *See id.*

<sup>202</sup> *See id.* (citing arrest data from the Federal Bureau of Investigations).

<sup>203</sup> *See id.* A recent study of race and drug-related law enforcement in Seattle found that “[t]he racially disproportionate drug arrests result from the police department’s emphasis on the outdoor drug market in the racially diverse downtown area of the city, its lack of attention to other outdoor markets that are predominantly white, and its emphasis on crack.” *Id.*

<sup>204</sup> *See id.* (explaining that drug sales made on street corners are more conspicuous and therefore easier for police to make arrests, and these outdoor sales tend to happen in low-income, urban neighborhoods).

<sup>205</sup> *See id.* (highlighting the correlation between drug-related arrests and low-income, urban neighborhoods); MAUER, *supra* note 1, at 5 (relaying that the felony drug provision has a disparate impact on minorities).

<sup>206</sup> *See* MAUER, *supra* note 1, at 5; *supra* notes 187–206.

<sup>207</sup> *See* 21 U.S.C. § 862a(d)(1) (2012) (detailing the opt-out provision of the drug felony provision).

<sup>208</sup> *See id.* (“A State may, by specific reference in a law enacted after August 22, 1996 . . .”); McCarty et al., *supra* note 1, at 10 (explaining that states must affirmatively act when they opt out of the provision).

<sup>209</sup> McCarty et al., *supra* note 1, at 13.

<sup>210</sup> *See* MAUER, *supra* note 1, at 8 (“The SNAP and TANF programs are designed to provide subsistence level benefits for people who cannot afford to feed themselves or clothe their children.”);

Interagency Reentry Council outlined the ways in which the SNAP program is inclusive of ex-convicts.<sup>211</sup> For instance, an individual can be eligible for SNAP without a mailing address or even a government-issued identification card.<sup>212</sup> The strict, unforgiving lifetime ban imposed by the PRWORA drug felony provision is not in line with these other flexible policies, and thus many states have come up with ways to amend the provision to better suit their citizens.<sup>213</sup>

One popular modification to the PRWORA drug felony provision has been the implementation of a drug-testing requirement for drug felons seeking assistance under the SNAP program.<sup>214</sup> In general, the United States Department of Agriculture (USDA) does not permit states to implement drug testing as a prerequisite to disbursing SNAP benefits.<sup>215</sup> Drug testing, however, is acceptable as a way for states to modify the PRWORA drug felony provision.<sup>216</sup> States with the drug-testing prerequisite do not believe that a lifetime ban from SNAP benefits is an appropriate consequence of having a prior drug felony; however, they do see a need for some restrictions.<sup>217</sup> The drug-testing requirement ensures that

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McCarty et al., *supra* note 1, at 12 (highlighting ways in which obtaining SNAP benefits is flexible for individuals recently released from jail).

<sup>211</sup> See McCarty et al., *supra* note 1, at 12 (noting SNAP's recognition that recently-released individuals are in a period of transition). The Federal Interagency Reentry Council is a council of more than twenty federal agencies, including the U.S. Department of Agriculture, that works to end recidivism and empower the lives of individuals recently released from prison through assistance in securing housing, employment, and education. *Id.*; *The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future*, NAT'L REENTRY RES. CTR. (Aug. 30, 2016), <https://csjusticecenter.org/nrrc/publications/the-federal-interagency-reentry-council-a-record-of-progress-and-a-roadmap-for-the-future/> [<https://perma.cc/ZZR6-63Q5>].

<sup>212</sup> See McCarty et al., *supra* note 1, at 12 (identifying ways the SNAP program is inclusive of ex-convicts).

<sup>213</sup> Compare *id.* at 12–13 (examining ways that SNAP is inclusive of recently-released individuals), with MAUER, *supra* note 1, at 4–5 (describing the effects of the categorical ban on food stamps for individuals convicted of a drug-related felony).

<sup>214</sup> See McCarty et al., *supra* note 1, at 12; *Effect of Denial of SNAP Benefits*, *supra* note 149. There are currently five states that explicitly require drug testing for drug-felons requesting SNAP benefits. McCarty et al., *supra* note 1, at 11.

<sup>215</sup> See McCarty et al., *supra* note 1, at 11; 7 U.S.C. § 2014(b) (2012) (“No plan of operation submitted by a State agency shall be approved unless the standards of eligibility meet those established by the Secretary, and no State agency shall impose any other standards of eligibility as a condition for participation in the program.”). Though the Food and Nutrition Act states that no other standards of eligibility may be imposed, including drug testing, one exception is when a drug test is a part of a state's modification to the felony drug provision. See 21 U.S.C. § 862a(d) (2012) (outlining the “opt out” provision of the felony drug provision); McCarty et al., *supra* note 1, at 11.

<sup>216</sup> See McCarty et al., *supra* note 1, at 11. States have the authority to impose a drug-testing requirement as a modification to the felony drug provision under 21 U.S.C. § 862a(d). *Id.* This modification would allow recently released individuals to receive food stamps so long as they submit to drug testing. *Id.* However, in general states cannot otherwise impose mandatory drug testing in exchange for access to food stamps. *Id.*

<sup>217</sup> See *id.* at 13; Grant Schulte, *Nebraska Bill Would Allow SNAP Benefits for Drug Felons*, ASSOCIATED PRESS (Feb. 16, 2017), <http://journalstar.com/legislature/nebraska-bill-would-allow-snap>

ex-offenders are not using drugs while they are receiving SNAP benefits.<sup>218</sup> Currently, five states have implemented drug testing as a modification to the PRWORA drug felony provision.<sup>219</sup>

Drug testing and drug treatment are the most popular state modifications of the PRWORA drug felony provision.<sup>220</sup> Although only five states require drug-testing as a prerequisite to receiving SNAP benefits, approximately fifteen states require that an individual enter and complete a drug treatment program in order to receive such benefits.<sup>221</sup> Other states have modified the provision by disqualifying an individual if he or she is convicted of more than one drug felony.<sup>222</sup> Several states disqualify only those individuals convicted of a distribution crime, but not possession.<sup>223</sup> Other states have set a time limit on ineligibility, based on either the date of conviction or release date from prison.<sup>224</sup> Indiana has implemented an inverse time limitation requirement, whereby individuals are eligible for SNAP benefits only for the first twelve months following their release from prison, after which they are banned.<sup>225</sup> Still, other states have implemented unique modifications; for example, both Nevada and Kentucky have exceptions

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benefits-for-drug-felons/article\_29d55532-c631-5e80-b549-2da003c28cbf.html [https://perma.cc/RJ8H-HTM9] (detailing the debate of Nebraska’s legislators over how to modify the ban).

<sup>218</sup> See McCarty et al., *supra* note 1, at 11 (explaining that drug-testing is a pre-requisite for receiving food stamps in states that implement this modification).

<sup>219</sup> See *id.* As of August 1, 2016, Kansas, Maryland, Minnesota, Missouri, and Wisconsin have implemented a compulsory drug test, and Pennsylvania has given the SNAP agency itself the authority to implement drug tests, although the agency has not used this authority. *Id.*

<sup>220</sup> *Effect of Denial of SNAP Benefits, supra* note 149. These two types of modifications are most closely related to deterring drug use, the main purported purposes of the felony drug provisions. See *id.*; see also Turner v. Glickman, 207 F.3d 419, 423 (7th Cir. 2000) (stating the two government interests for the felony drug provision are “detering drug use and reducing welfare fraud”).

<sup>221</sup> *Effect of Denial of SNAP Benefits, supra* note 149; McCarty et al., *supra* note 1, at 11. It should be noted that many drug treatment programs require a clean drug test in order to successfully complete the program. McCarty et al., *supra* note 1.

<sup>222</sup> See *Effect of Denial of SNAP Benefits, supra* note 149; 50 *State Survey: SNAP Drug Felony Bans*, NETWORK FOR PUB. HEALTH LAW, [https://www.networkforphl.org/\\_asset/6zvbla/SNAP—Drug-Felony-Bans-Chart.pdf](https://www.networkforphl.org/_asset/6zvbla/SNAP—Drug-Felony-Bans-Chart.pdf) [https://perma.cc/BZN4-TRZ5]. For example, Texas disqualifies individuals who have multiple drug convictions. TEX. HUM. RES. CODE ANN. § 33.018 (West Supp. 2017).

<sup>223</sup> *Effect of Denial of SNAP Benefits, supra* note 149; 50 *State Survey, supra* note 222. States that disqualify only those individuals convicted of distribution, not possession, include Arkansas, Missouri, Nebraska, New Jersey, and Oregon. 50 *State Survey, supra*, note 222.

<sup>224</sup> *Effect of Denial of SNAP Benefits, supra* note 149. For example, Arizona leaves the ineligibility time period determination up to the judge, whereas Indiana’s modification only allows drug felons to be eligible for food stamps for the initial twelve months following their release from prison. *Id.*

<sup>225</sup> See IND. CODE ANN. § 12-14-29-5 (LexisNexis 2017); *Effect of Denial of SNAP Benefits, supra* note 149. Indiana’s unusual modification proposes a solution to the problems many recently-incarcerated individuals face reintegrating to society, because it provides these individuals access to food stamps when they are most vulnerable to food insecurity. See *Effect of Denial of SNAP Benefits, supra* note 149.



for otherwise eligible pregnant women.<sup>226</sup> Although state modifications to the PRWORA drug felony provision are a positive step toward providing drug felons access to SNAP benefits, the inconsistent approaches across the different states make it difficult for individuals to keep track of what benefits they are eligible for and where.<sup>227</sup>

The broad patchwork of different state modifications to the PRWORA drug felony provision implies that states have a real interest in reforming the provision.<sup>228</sup> These varied and disjointed state reforms, however, do not go far enough to resolve the larger problem—that drug felons, and particularly minorities, are denied basic necessities as a result of their criminal record.<sup>229</sup> The PRWORA drug felony provision must be repealed altogether so that ex-felons in all states have access to food stamps.<sup>230</sup>

### III. COMBATTING THE INEQUALITIES PERPETUATED BY THE PRWORA DRUG FELONY PROVISION: AMENDING THE PROVISION AND UNIFYING THE STATES' APPROACHES

The PRWORA drug felony provision places a lifetime ban on welfare benefits such as SNAP and TANF for individuals who have been convicted of a state or federal drug felony.<sup>231</sup> In order to ensure that drug felons are provided the same benefits as other felons, and to promote their successful reintegration into society after imprisonment, Congress must amend the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”) to repeal the PRWORA drug felony provision altogether.<sup>232</sup> The PRWORA drug felony provision disproportionately affects minority individuals, and is largely ineffective in deterring drug use.<sup>233</sup> Amending federal legislation, however, can be a lengthy

<sup>226</sup> See KY. REV. STAT. ANN. § 205.2005 (LexisNexis 2013); NEV. REV. STAT. § 422A.345 (2015). In Nevada, however, in order for a pregnant woman to qualify for SNAP benefits, she must have proof from her doctor that SNAP is essential to her health or the health of her child. See NEV. REV. STAT. ANN. § 422A.345; *Effect of Denial of SNAP Benefits*, *supra* note 149.

<sup>227</sup> See MAUER, *supra* note 1, at 2.

<sup>228</sup> See *id.* (explaining that the majority of states have modified the provision, and the number of states following suit has increased significantly in recent years). Despite the fact that opting out of the felony drug provision requires affirmative legislative action, forty-seven states and territories have come up with a variety of ways to modify or opt out of the ban completely. McCarty, *supra* note 1, at 13; *Effect of Denial of SNAP Benefits*, *supra* note 149.

<sup>229</sup> See MAUER, *supra* note 1, at 1, 4–5 (highlighting the impact of the felony drug provision).

<sup>230</sup> See *id.* at 9; text accompanying note 235 *infra*; see also *supra* notes 154–230.

<sup>231</sup> 21 U.S.C. § 862a(a) (2012 & Supp. II 2014).

<sup>232</sup> See *id.*; MAUER, *supra* note 1, at 2 (“SNAP and TANF benefits can help [recently released individuals] to meet their basic survival needs during the period in which they are searching for jobs or housing.”). Eliminating the drug felony provision from PRWORA will ensure that drug felons in all states are not categorically excluded from receiving welfare benefits, which serve to help them reintegrate into society. See MAUER, *supra* note 1, at 9.

<sup>233</sup> See MAUER, *supra* note 1, at 9. Because the majority of drug felonies involve drug sales, rather than drug possession, there is little proof that the individuals convicted of these drug felonies are

process.<sup>234</sup> Therefore, in the short-term, the United States Department of Agriculture should implement a modified and uniform approach to the PRWORA drug felony provision across all states, so that drug felons receive uniform welfare benefits across the country with limited discrepancies.<sup>235</sup>

*A. To Reduce Inequality and Recidivism, Congress Must Amend PRWORA and Repeal the PRWORA Drug Felony Provision*

To eradicate the severe problems caused by the PRWORA drug felony provision, Congress must amend PRWORA so that the PRWORA drug felony provision is eliminated altogether.<sup>236</sup> As of August 1, 2016, twenty-one states have eliminated the PRWORA drug felony provision from their state welfare law so that drug felons are no longer disqualified from receiving food stamps.<sup>237</sup> For example, in 2001, the Massachusetts state legislature determined that an individual's felony drug conviction should not be determinative of their food stamp eligibility, and thus the state legislature removed the regulation codifying the PRWORA drug felony provision.<sup>238</sup> Other states must follow suit to eradicate the disparate effects of the PRWORA drug felony provision, particularly within impoverished and minority groups.<sup>239</sup>

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drug users at all. *See id.* Further, studies have shown that individuals convicted of drug felonies were completely unaware that their convictions would impact whether they qualified for SNAP or TANF benefits, further debunking the notion that the provision has a deterrent value. *See id.*

<sup>234</sup> *See Government 101: How a Bill Becomes a Law*, VOTE SMART, <https://votesmart.org/education/how-a-bill-becomes-law#.WeWEKROPJOs> [<https://perma.cc/H9WF-X5QD>] (outlining the steps for amending federal legislation, beginning with introducing legislation to Congress, followed by adhering to the rules of the appropriate committee, placement on the house or senate calendar, debate on the floor, discussion by conference committees, and final review by the president).

<sup>235</sup> *See MAUER, supra* note 1, at 9 (“At a minimum, states should modify the ban such that individuals with felony drug convictions have some possibility of regaining eligibility for SNAP or TANF benefits . . . .”); *Effect of Denial of SNAP Benefits, supra* note 149 (outlining the various approaches states have taken in modifying the felony drug provision).

<sup>236</sup> *See* 21 U.S.C. § 862a(a) (2012 & Supp. II 2014); MAUER, *supra* note 1, at 9.

<sup>237</sup> *See* McCarty, et al., *supra* note 1, at 13.

<sup>238</sup> *See* Cescia Derderian, *Food Stamp and TAFDC Eligibility for Drug Felons, Field Operations Memo 2001-38*, COMMONWEALTH OF MASS. DEP'T OF TRANSITIONAL ASSISTANCE (Dec. 27, 2001), <https://www.masslegalservices.org/system/files/library/fo01038.pdf> [<https://perma.cc/L262-AZG4>] (stating in Massachusetts field operations memorandum that as of December 27, 2001, drug felons are no longer banned from receiving food stamps). Now, the Massachusetts regulation that governs disqualification from SNAP benefits no longer cites drug felony convictions, but only lists disqualifications for “intentional program violations,” “receipt of multiple SNAP benefits,” “trading SNAP benefits,” “fleeing felons,” and “voluntary quit.” 106 MASS. CODE REGS. 367.800(A)–(E) (2017). In addition to the twenty-one states that have acted similarly to Massachusetts, twenty-six additional states have imposed modifications to the PRWORA drug felony provision to limit the scope of the law and allow drug felons the chance to qualify for food stamps. *See* McCarty et al., *supra* note 1, at 13.

<sup>239</sup> *See* MAUER, *supra* note 1, at 4–5 (highlighting the disparate impact that the felony drug provision has on low-income and minority individuals). Thus, all states should opt out of the felony drug provision. *See id.* at 9.

The clearest way to ensure that drug felons will no longer be restricted from receiving food stamps through SNAP is to amend PRWORA and eliminate the drug felony provision altogether.<sup>240</sup> In order to do so, an amendment must first be introduced in either the House of Representatives or the Senate.<sup>241</sup> It would not be difficult to garner support in either Chamber of Congress; many states have already either eliminated the provision from their state laws, or have modified the law substantially.<sup>242</sup> If it is difficult to garner support for the amendment in Congress, however, there are many non-profit organizations and special interest groups who support the repeal of the lifetime ban, such as the American Civil Liberties Union (“ACLU”), or the Sentencing Project, that could lobby for the amendment.<sup>243</sup> Once lobbying groups and Congressmen and women rally enough support for this amendment, a member of Congress will introduce the bill to Congress and begin the legislative process, culminating with the presentment of a bill to the President.<sup>244</sup>

The most difficult step in amending PRWORA will most likely be getting it approved by President Donald Trump.<sup>245</sup> Prior to President Trump’s election, President Barack Obama made substantial reforms to the criminal justice system, pursuant to his belief that “America is a nation of second chances.”<sup>246</sup> President

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<sup>240</sup> See *id.* at 1 (stating that the felony drug provision bans convicted drug felons from receiving food stamps).

<sup>241</sup> See *How a Bill Becomes a Law*, *supra* note 234 (explaining that a member of either the house or the senate can introduce a piece of legislation).

<sup>242</sup> See McCarty et al., *supra* note 1, at 13.

<sup>243</sup> See MAUER, *supra* note 1, at 1–9; *ACLU Welcomes New Report from Sentencing Project*, ACLU, <https://www.aclu.org/other/aclu-welcomes-new-report-sentencing-project> [<https://perma.cc/FG9K-7RYE>]. The ACLU supports the repeal of the PRWORA drug felony provision, which it finds to be “discriminatory and unfair.” ACLU, *supra*. The ACLU responded positively to the Sentencing Project’s report, reiterating its sentiment: “When a person has paid her debt to society by serving whatever punishment is imposed, she should be allowed to get a fresh start and have the best chance of becoming a productive member of society. By denying a person the ability to pay for basic family needs, current welfare policy only promotes the likelihood that she will [resort] . . . to crime to feed and shelter her family.” *Id.*

<sup>244</sup> See *How a Bill Becomes a Law*, *supra* note 234 (detailing the lengthy process of getting a bill passed, from garnering enough support for the issue through to presidential enactment).

<sup>245</sup> See *The Legislative Process: How Are Laws Made?*, U.S. HOUSE OF REPRESENTATIVES, [http://www.house.gov/content/learn/legislative\\_process/](http://www.house.gov/content/learn/legislative_process/) [<https://perma.cc/MK95-46EX>]; Janell Ross, *Donald Trump’s Doubling Down on the Central Park Five Reflects a Bigger Problem*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/10/08/donald-trumps-doubling-down-on-the-central-park-five-reflects-a-bigger-problem/?utm\\_term=.c0d892dbeece6](https://www.washingtonpost.com/news/the-fix/wp/2016/10/08/donald-trumps-doubling-down-on-the-central-park-five-reflects-a-bigger-problem/?utm_term=.c0d892dbeece6) [<https://perma.cc/V6VW-Q4QP>] (illustrating President Trump’s apathy toward criminal justice reform).

<sup>246</sup> See Neil Eggleston, *President Obama Grants 153 Commutations and 78 Pardons to Individuals Deserving of a Second Chance*, WHITE HOUSE: BLOG (Dec. 19, 2016, 3:00 PM), <https://obama.whitehouse.archives.gov/blog/2016/12/19/president-obama-grants-153-commutations-and-78-pardons-individuals-deserving-second> [<https://perma.cc/D6HR-YBAA>] (describing President Obama’s acts of granting clemency and commuting sentences over his tenure as president). On December 19, 2016, in his final weeks in office, President Obama granted clemency to 231 individuals, each with a unique story, who demonstrated through their lives in prison that they were deserving of a second chance. *Id.*

Obama granted clemency to over one thousand individuals in 2016 alone, amounting to 1,176 clemencies total as acting president.<sup>247</sup> Further, prior to the 2016 presidential election, there existed bi-partisan support for criminal justice reform.<sup>248</sup> President Trump has demonstrated an unforgiving attitude toward incarcerated individuals, however, and has touted a presidency that is tough on crime.<sup>249</sup> President Trump has repeatedly denounced President Obama's efforts to reform the criminal justice system as coddling.<sup>250</sup> This track record makes it unlikely that President Trump would be willing to sign off on the elimination of the PRWORA drug felony provision right away, because the amendment is an explicit criminal justice reform that values giving welfare benefits to drug felons over being "tough on drugs."<sup>251</sup> In the meantime, there are steps the federal gov-

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<sup>247</sup> See John Gramlich & Kristen Bialik, *Obama Used Clemency Power More Often Than Any President Since Truman*, PEW RES. CTR. (Jan. 20, 2017), <http://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power/> [<https://perma.cc/89YV-TS8V>] (stating that President Obama granted clemency to 1,927 individuals during his presidency). The two most common forms of clemency, or "presidential mercy," are commutations and pardons. *Id.* Commutations occur when the president partially or completely reduces an individual's prison sentence, whereas a pardon forgives the individual of the crime altogether and reinstates individual freedoms. *Id.* In total, President Obama granted 1,715 commutations and 212 pardons. *Id.*

<sup>248</sup> See James Arkin, *Criminal Justice Reform: There's Bipartisan Hope*, REAL CLEAR POLITICS (May 6, 2016), [http://www.realclearpolitics.com/articles/2016/05/06/criminal\\_justice\\_reform\\_theres\\_bipartisan\\_hope\\_\\_130482.html](http://www.realclearpolitics.com/articles/2016/05/06/criminal_justice_reform_theres_bipartisan_hope__130482.html) [[https://web.archive.org/web/20170203204152/https://www.realclearpolitics.com/articles/2016/05/06/criminal\\_justice\\_reform\\_theres\\_bipartisan\\_hope\\_\\_130482.html](https://web.archive.org/web/20170203204152/https://www.realclearpolitics.com/articles/2016/05/06/criminal_justice_reform_theres_bipartisan_hope__130482.html)] (highlighting the desire from both parties to reform sentencing laws in order to slow the growing prison population).

<sup>249</sup> See Ames C. Gawert & Natasha Camhi, *Criminal Justice in President Trump's First 100 Days*, BRENNAN CTR. FOR JUSTICE 1–2 (Apr. 20, 2017), [https://www.brennancenter.org/sites/default/files/analysis/Criminal\\_Justice\\_in\\_President\\_Trumps\\_First\\_100\\_Days.pdf](https://www.brennancenter.org/sites/default/files/analysis/Criminal_Justice_in_President_Trumps_First_100_Days.pdf) [<https://perma.cc/GF27-GY85>] (outlining the impact President Trump has had on criminal justice reform in his first 100 days in office). The first 100 days of the Trump Administration "evidence a clear return to the discredited 'tough on crime' rhetoric of the 1990s, and suggest a significant departure from the Obama Administration's approach to criminal justice." *Id.* Some reforms have included calling for harsher policies for charging nonviolent drug cases and implementing the immigration "Travel Ban" executive orders, which call for increased immigration enforcement. *See id.*

<sup>250</sup> See Julia Harte, *Trump Seen More Moderate on Criminal Justice, Law Enforcement*, REUTERS (Nov. 11, 2016, 2:38 PM), <http://www.reuters.com/article/us-usa-election-trump-crime-idUSKBN13625K> [<https://perma.cc/H2WA-U7GS>] (describing President Trump's view that President Obama was "too soft" with regard to inner-city violence, as well as "extremist plots against the United States" and police violence).

<sup>251</sup> See MAUER, *supra* note 1, at 1; Harte, *supra* note 250. The Trump Administration, however, has not yet clearly demonstrated its stance on criminal justice reform, so over time it is possible that the amendment will garner enough support to persuade the president to sign it into law. *See* Harte, *supra* note 250. On President Trump's campaign trail, Vice President Mike Pence stated: "We have got to do a better job recognizing and correcting the errors in the system that do reflect an institutional bias in criminal justice." *Id.* Thus, the Trump Administration may eventually embrace this reform. *See id.*

ernment can take to ensure all drug felons have the opportunity to receive food stamps upon release from prison.<sup>252</sup>

*B. A Proposed Uniform Modification to the PRWORA Drug Felony Provision Across All States*

The process for amending a piece of legislation is lengthy, and based on President Trump's stance on criminal justice reform, it is likely that even if both Chambers of Congress passed an amendment to eliminate the PRWORA drug felony provision, President Trump would veto the bill.<sup>253</sup> The effect of the PRWORA drug felony provision is that individuals are subject to "invisible punishment" even after they have served their prison sentence.<sup>254</sup> It is just as problematic, however, that the modifications to the PRWORA drug felony provision vary by state.<sup>255</sup> Individuals who are affected by the PRWORA drug felony provision are largely poor and lack geographical mobility, particularly because many drug felons recently released from incarceration are unemployed.<sup>256</sup> Further, many drug felons recently released from prison have reported not knowing that their conviction would affect their welfare benefits, so it is unlikely that the provision will serve any real deterrent purpose.<sup>257</sup>

Other provisions of PRWORA have already been modified to create uniformity and clarity across states.<sup>258</sup> For instance, PRWORA bars "fleeing" or "fugitive" felons from receiving federal assistance.<sup>259</sup> Originally, the regula-

<sup>252</sup> See MAUER, *supra* note 1, at 1 (the PRWORA drug felony provision bans drug felons from receiving food stamps); *How a Bill Becomes a Law*, *supra* note 234 (outlining the process for passing new legislation or amending the law).

<sup>253</sup> See *How a Bill Becomes a Law*, *supra* note 234; Ross, *supra* note 245. When a president vetoes a bill, the house in which the law originated can override the veto by a two-thirds vote of those present. *How a Bill Becomes a Law*, *supra* note 234. Once the veto is overridden in both houses, the law stands. *Id.*

<sup>254</sup> See MAUER, *supra* note 1, at 6. Even after these individuals have served their time in jail and are released, they are further punished when they are categorically denied access to food stamps. *See id.*

<sup>255</sup> *See id.* Food stamps constitute a lifeline for many individuals, but when modifications vary drastically from state to state, it is difficult for individuals to know whether they are eligible for food stamps to begin with. *See id.* This uncertainty is contrary to the very purpose of programs like SNAP or TANF, which are meant to provide basic survival needs for individuals to allow them to get back on their feet. *See id.* at 8.

<sup>256</sup> See Vallas & Dietrich, *supra* note 151, at 10.

<sup>257</sup> See MAUER, *supra* note 1, at 6.

<sup>258</sup> See McCarty et al., *supra* note 1, at 13–14.

<sup>259</sup> *See id.* This provision is codified at 42 U.S.C. § 608(a)(9) (2012) ("(A) In general[:] A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance to any individual who is—(i) fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the individual flees, or which, in the case of the State of New Jersey, is a high misdemeanor under the laws of such State . . . .").

tions governing the “fleeing felon” provision were silent on how states should enforce this ban.<sup>260</sup> In 2008, Congress passed a law that mandated the United States Department of Agriculture (“USDA”) define terms in the provision, so that states could implement this ban in a consistent way.<sup>261</sup> This regulation set forth two ways in which states can choose to implement the “fleeing felon” ban, and states must indicate which plan they choose to adopt.<sup>262</sup> If the PRWORA drug felony provision is to remain in effect, the USDA must similarly provide guidance to the states as to how they should modify the provision to make it consistent across states.<sup>263</sup>

The USDA must pass a regulation to clarify terms of the PRWORA drug felony provision, just as it clarified terms within the “fleeing felon” ban.<sup>264</sup> Presently, subsection (d) of the provision provides limitations to the law, but ambiguities remain.<sup>265</sup> Therefore, the USDA must provide more clarity and notice as to when states may choose to exempt individuals from the provision, or limit the time period for which the provision applies, so that individuals will know the consequences their actions will have; only then can the law serve to deter drug use.<sup>266</sup>

Because twenty-one states have already opted out of the PRWORA drug felony provision entirely, the USDA should provide two options for states, one being that states can still choose to opt out of the provision.<sup>267</sup> It would be

<sup>260</sup> See McCarty et al., *supra* note 1, at 10.

<sup>261</sup> *Id.* Federal agencies such as the USDA are organizations made up of individuals with more specific knowledge of the subject matter of the laws than legislators. See *The Basics of the Regulatory Process*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/basics-regulatory-process> [<https://perma.cc/EGL4-75ZE>] (explaining the process by which regulations are passed in the United States). Agencies pass regulations that govern how laws are implemented in everyday life. *Id.*

<sup>262</sup> See 7 C.F.R. § 273.11(n) (2017); McCarty et al., *supra* note 1, at 14. The rule gave states the option to either adopt a four-part test for establishing that an individual is a “fleeing felon,” or else establish the individual’s status by presenting an outstanding felony arrest warrant for the individual. See 7 C.F.R. § 273.11(n); McCarty et al., *supra*, at 14.

<sup>263</sup> See McCarty et al., *supra* note 1, at 14. When an agency proposes a regulation, it is then listed in the Federal Register so that the public may provide comments to the regulation before it passes to final review. See *The Basics of the Regulatory Process*, *supra* note 261.

<sup>264</sup> See McCarty et al., *supra* note 1, at 14.

<sup>265</sup> See 21 U.S.C. § 862a(d)(1) (2012) (stating that states may opt out of the PRWORA drug felony provision or limit the amount of time the individual is banned). The drug felony provision 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 [the drug felony provision] . . .

A State may, by law enacted after August 22, 1996, limit the period for which subsection (a) of this section shall apply to any or all individuals domiciled in the State.

*Id.*

<sup>266</sup> See McCarty et al., *supra* note 1, at 14 (illustrating the reality that many individuals with drug felonies are unaware if their conviction could impact their access to welfare benefits). Implementing uniform modifications, however, may still not deter a person during “active addiction,” or individuals who were previously undeterred by the prospect of criminal prosecution to begin with. *Id.*

<sup>267</sup> See *id.* at 13.

counter-productive for the USDA to implement a modification for states that have already opted out of the PRWORA drug felony provision to reinstate the provision.<sup>268</sup> As an alternative to opting out of the ban altogether, the USDA should give states opting to maintain some form of the ban the option to require mandatory participation in a drug treatment program and drug testing in order for drug felons to qualify for SNAP benefits.<sup>269</sup> Although not every individual convicted of a drug crime is a drug user, requiring widespread treatment and testing will foster a culture of awareness about the ways drugs affect society, and will reduce the number of drug felons who are currently using drugs from receiving welfare benefits.<sup>270</sup> This modification to the PRWORA drug felony provision is the most popular modification across states; as a result, many states will already be familiar with implementing these policies.<sup>271</sup> Thus, instead of giving states the vague power to modify the PRWORA drug felony provision, this alternative of providing states with specific modifications will likely be well-received by states because of its familiarity and clarity.<sup>272</sup>

An examination of time limitations on the PRWORA drug felony provision across different states indicates that no time limitation policy is necessary.<sup>273</sup> Although some states have implemented a ban on SNAP benefits for the first year after release from prison, this policy exacerbates the challenges to reentry that recently incarcerated individuals already face, such as food insecurity and unemployment.<sup>274</sup> Alternatively, Indiana applies an inverted time limitation ban for drug felons, whereby they are only eligible for SNAP benefits for the first year after release, after which they are banned for life.<sup>275</sup> Although this policy caters to the hardships faced by recently incarcerated individuals in the short-term, it does not account for the possibility that an individual may not need food stamps right away, but may need them later in life when circumstances

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<sup>268</sup> See *id.* (stating that twenty-one states have already opted out of the PRWORA felony drug provision entirely).

<sup>269</sup> See *id.*; *Effect of Denial of SNAP Benefits*, *supra* note 149.

<sup>270</sup> See MAUER, *supra* note 1, at 5–6 (in past years, there have been more drug convictions for selling drugs rather than using drugs); McCarty et al., *supra* note 1, at 11 (observing that drug testing is a modification that has been implemented in five states already).

<sup>271</sup> See *Effect of Denial of SNAP Benefits*, *supra* note 149 (highlighting popular modifications to the felony drug provision). Because many states are already familiar with this process, implementation will likely be smoother because states will have examples to model their modifications after. See *id.*

<sup>272</sup> See *id.*

<sup>273</sup> See MAUER, *supra* note 1, at 7 (highlighting a myriad of challenges that individuals released from prison face); *Effect of Denial of SNAP Benefits*, *supra* note 149 (outlining different state approaches to time limitations for the felony drug provision).

<sup>274</sup> MAUER, *supra* note 1, at 8 (“SNAP or TANF benefits can help [formerly incarcerated individuals] to meet their basic survival needs during the period in which they are searching for jobs or housing.”).

<sup>275</sup> See IND. CODE ANN. § 12-14-29-5 (LexisNexis 2017).

change.<sup>276</sup> As a result, the USDA should refrain from setting a time limitation on the ban, and instead impose a regulation whereby drug felons may receive food stamps upon completion of a drug treatment program and routine drug testing for a specified time period.<sup>277</sup> Either solution will give drug felons access to food stamps, and will correct the disparate treatment that minorities have faced for the last twenty years as a result of the PRWORA drug felony provision.<sup>278</sup>

#### CONCLUSION

In 1996, President Clinton passed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) and promised to “end welfare as we know it.” The Act was a success by many standards, because it regulated a previously unwieldy welfare system and transformed it into a system geared towards helping Americans get back on their feet. One seemingly minor provision in the comprehensive PRWORA legislation, however, has discriminated against convicted drug felons for the past two decades. As a result of the drug felony provision, these individuals are effectively denied the chance to successfully reenter society. Because people of color are more likely to be both arrested and convicted of drug crimes, the PRWORA drug felony provision disparately impacts this group. As such, Congress must amend PRWORA to eliminate the PRWORA drug felony provision altogether. Because the legislative process is lengthy, the United States Department of Agriculture should, in the interim, implement a uniform modification of the PRWORA drug felony provision for states to adopt, if they decide to maintain some form of the ban. This solution will give drug felons like Johnny Waller Jr. a second chance at life, and will tear down the arbitrarily imposed barriers that lead drug felons into a cycle of recidivism.

MEGHAN LOONEY PARESKY

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<sup>276</sup> See *id.*; Beitsch, *supra* note 6 (explaining that Johnny Waller Jr. desperately needed food stamps years after he was released from prison, when his son was ill, but was barred due to a prior drug conviction).

<sup>277</sup> See *Effect of Denial of SNAP Benefits*, *supra* note 149.

<sup>278</sup> See MAUER, *supra* note 1, at 4–5.



