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Purging the Drug Conviction Ban on Food Stamps in California.

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NOTES

PURGING THE DRUG CONVICTION BAN ON FOOD STAMPS IN CALIFORNIA

LYNDSEY K. EADLER*

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* JD, Santa Clara University, May 2011; B.A., University of Florida, *magna cum laude*, 2008. I would like to express my sincere thanks to Professor W. David Ball for his guidance and support. I would also like to thank the San Francisco Reentry Council for inspiring this Note and providing information vital to its success. Finally, to my family and fiancé, a few words of thanks cannot express my deep appreciation for your love and support throughout my life, and especially during my law school career.

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I. INTRODUCTION

A federal statute places a lifetime ban on food stamps for felony drug offenders.¹ While the statute allows individual states to opt out of the ban and restore food stamp benefits to resident drug offenders, California has chosen to only partially opt out of the federal ban.² This results in thousands of otherwise eligible Californians being denied necessary and vital food assistance. The original purpose of the Food Stamp Program does not support the mechanical denial of food to an entire category of otherwise eligible individuals.³ Other than supporting a “tough on drugs” agenda, no legitimate reason can be provided for categorically denying food stamps to individuals with felony drug convictions while allowing

1. 21 U.S.C. § 862a(a) (2006).

2. CAL. WELF. & INST. CODE § 18901.3 (Deering 2006).

3. Food Stamp Act of 1977, 7 U.S.C. § 2011 (2006).

individuals convicted of other crimes to continue receiving the benefit. This ban is detrimental to the reintegration of ex-felons into the community. For poor ex-felons, who are financially eligible to receive food stamps, the ban significantly limits the possibility and likelihood of leading a successful and productive life outside prison walls. The denial of needed food assistance also presents insurmountable barriers to living a drug- and crime-free lifestyle.

This Note proposes that California pass a provision fully opting out of the federal lifetime ban on receipt of food stamps by individuals convicted of felony drug offenses. A full opt-out measure will help remedy the problems associated with an inadequate food supply. Such a provision would also bring desirable federal funds into California. By eliminating the drug offense ban, these funds would be spent in grocery stores and restaurants,⁴ spurring the state and local economies while incurring limited additional overhead costs. For these reasons, California Legislators must reconsider a measure that would fully remove the lifetime federal ban on food stamps for drug offenders.

In Part II of this Note, I discuss the federal Food Stamp Program as well as the federal lifetime ban on food stamps for drug offenders. An examination of the original purpose of the federal Food Stamp Program is later used to conclude that no legitimate reasons exist for denying food stamps to drug offenders. In Part III, I analyze California's food stamp program and the state's response to the federal drug conviction ban. While California's partial opt-out provision was a step in the right direction, food stamp benefits have been conditionally restored to only a minuscule portion of the drug offender population. In Part IV, I make six main arguments to support full reinstatement of food stamp benefits to drug offenders. In the process of presenting my arguments, I also conclude that proffered reasons for denying food stamps to drug offenders lack evidentiary support and serve only to feed the cycles of poverty, drug addiction, and crime. Finally, in Part V, I recommend that California Legislators reconsider a full opt-out provision, and advocate for the restoration of food stamp benefits to all otherwise eligible drug offenders.

4. See *Local Restaurants May Accept Food Stamps*, SAN DIEGO NEWS (Jan. 7, 2011, 7:41 PM), <http://www.10news.com/news/26407821/detail.html> (referring to the Restaurant Meals Program, already implemented in several California counties, that allows homeless, disabled, or elderly CalFresh recipients to purchase prepared food from approved restaurants).

II. THE FEDERAL FOOD STAMP PROGRAM AND ITS BAN ON DRUG OFFENDERS

Part II of this Note presents the history of the Food Stamp Program, with particular focus on the originating purpose of the program. This purpose—to provide necessary food to poor Americans—colors the subsequent discussion and arguments. Part II also examines the federal felony drug conviction ban on receiving food stamps and the reasons for automatically excluding otherwise eligible recipients from this welfare benefit simply because of a felony drug conviction.

A. *Food for the Poor: A Federal Program to End Hunger*

Food stamps are a federal welfare benefit⁵ born from Depression-era destitution in America.⁶ The first Food Stamp Program began in 1939, as an experimental program designed to aid needy Americans and make use of surplus goods bought by the government to support the agriculture industry.⁷ Although it was highly popular in its initial years, once prosperity returned to the nation, the experimental program was terminated in 1943.⁸ Sixteen years later in 1959, with the work of advocates for the poor, another pilot Food Stamp Program was established.⁹ Congress passed the first Food Stamp Act in 1964, and over the next decade partici-

5. Food Stamp Act of 1977 § 2011. At the outset, it is important to recognize that food stamps are one form of welfare benefits. Thus, this Note focuses on only one small aspect of the larger welfare benefits system, which includes other programs such as Medicare and Medicaid, Social Security, and Aid to Families with Dependent Children.

6. Randy James, *Food Stamps: More Americans Relying on Uncle Sam to Eat*, TIME, Sept. 14, 2009, available at <http://www.time.com/time/nation/article/0,8599,1921992,00.html>. Under the George W. Bush administration, the Federal Food Stamp Program was rebranded as the Supplemental Nutrition and Assistance Program (SNAP). *Food and Nutrition Services Program Data*, U.S. DEP'T AGRIC. FOOD AND NUTRITION SERV., <http://www.fns.usda.gov/pd/snapmain.htm> (last visited June 1, 2011). In California, the food stamp program is called CalFresh. CALFRESH, <http://www.calfresh.ca.gov> (last visited June 4, 2011). I also recognize that some people consider the phrase “food stamp” an anachronism, given the efforts to rebrand these programs. However, for purposes of clarity, throughout this Note I will refer to such programs as either the federal or California “Food Stamp Program,” despite their rebranded names.

7. Elisabeth Goodridge & Jason DeParle, *The Safety Net: A History of Food Stamps Use and Policy*, N.Y. TIMES (Feb. 11, 2010), <http://www.nytimes.com/interactive/2010/02/11/us/FOODSTAMPS.html>; James, *supra* note 6.

8. James, *supra* note 6.

9. *Id.* After seeing the rampant destitution in America along his campaign trail, President John F. Kennedy, immediately after his inauguration in January 1961, issued an executive order creating another experimental food stamp program. *Id.* But it was not until Congress passed the Food Stamp Act in 1964 that it became a national program. *Id.*; Food Stamp Act of 1964, Pub. L. 88-525, 78 Stat. 703 (codified at 7 U.S.C. §§2011-32 (2006)).

pation swelled to nearly 20 million people.¹⁰ The purpose of the Act was to “permit low-income households to receive ‘a greater share of the nation’s food abundance.’”¹¹ When President Lyndon Johnson signed the Act into law, he spoke of “building a better life for every American.”¹² President Johnson stated that there was a twin purpose of utilizing America’s abundance as a weapon against the war on poverty:¹³ “I believe the Food Stamp Act weds the best of the humanitarian instincts of the American people with the best of the free enterprise system.”¹⁴

With an eye toward alleviating poverty in America, significant changes were made to the Food Stamp Program in 1977.¹⁵ Under this Act, eligible individuals received food stamps for free.¹⁶ Until this point, the stamps had to be purchased, albeit at just a fraction of their face value.¹⁷ Although this change was in line with the purpose of the Program, it negatively impacted the reputation of food stamps among the general public. Much support had been garnered for the stamps over the years because they were viewed as a way to help the poor help themselves.¹⁸ Yet now, with the stamps being provided free of charge, they were seen as a government handout, or welfare.¹⁹ One of the main purposes of the changes embodied in the 1977 Act was to “redirect benefits to needier persons” and to facilitate disbursement to marginalized groups such as the elderly

10. James, *supra* note 6.

11. *The Food Stamp Act of 1964*, U.S. DEP’T AGRIC. FOOD AND NUTRITION SERV., http://www.fns.usda.gov/snap/rules/Legislation/history/PL_88-525.htm (last modified Apr. 20, 2009).

12. John T. Woolley & Gerhard Peters, *Lyndon B. Johnson: Remarks Upon Signing the Food Stamp Act*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=26472> (last visited May 10, 2011).

13. In his first State of the Union address, President Johnson famously declared a “War on Poverty,” beginning his anti-poverty campaign in America. Transcript of *All Things Considered: Lyndon Johnson’s War on Poverty*, Nat’l Public Radio (Jan. 8, 2004), <http://www.npr.org/templates/story/story.php?storyId=1589660>. Food stamps were just one example of his efforts to highlight poverty. *Id.*

14. Woolley & Peters, *supra* note 12.

15. Food Stamp Act of 1977, 7 U.S.C. § 2011 (2006). The impetus for changes in the Food Stamp Program was, at least in part, due to the media attention that poverty was receiving. In 1968, CBS News aired *Hunger in America*, which reported the heart-breaking stories of starving Americans. See Goodridge & DeParle, *supra* note 7 (describing how this documentary spurred the formation of a special committee on hunger).

16. Food Stamp Act of 1977 §§ 2016–17 (discussing the Food Stamp allotment process). President Jimmy Carter signed the Act. Goodridge & DeParle, *supra* note 7.

17. According to one source, instead of providing them for free, the Department of Agriculture “insisted on selling food stamps for fear of undermining the dignity of recipients.” James, *supra* note 6.

18. *Id.*

19. *Id.*

and handicapped.²⁰ Yet, the reputational damage had been done; food stamps could not escape the welfare, handout brand. Such sentiments began a wave of restrictions and eligibility limitations.²¹ The most notable restrictions came two decades later with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which revolutionized the nation's welfare program significantly, and created the federal ban on food stamps for certain drug-related felonies.

i. How it Works: The Program Basics

The federal Food Stamp Program is administered by the U.S. Department of Agriculture's (USDA) Food and Nutrition Service through state welfare agencies.²² As a federal program, the Food Stamp Program is funded almost entirely by the federal government.²³ The federal government disperses funds to individual states, which are responsible for administering the program and ensuring that its qualified residents receive the benefit. In California, at the state level, the Department of Social Services oversees food stamp operations.²⁴ This department delegates the day-to-day operations to county agencies.²⁵ In San Francisco County, for example, benefits are disbursed to eligible residents through the Human Services Agency.²⁶

20. HUMAN SERVS. AGENCY OF S.F., S.F. FOOD STAMPS MANUAL 2 (2010), available at <http://www.sfsa.org/asset/FoodAssistance/FSManual.pdf>. The agency further states that the Food Stamp Act of 1977 intended to:

1. tighten administration of the program and redirect benefits to needier persons;
2. make it impossible for middle income persons to claim enough deductions to qualify for Food Stamps;
3. include more flexible certification procedures for elderly and handicapped persons;
4. encourage the elderly poor and the working poor to participate in the program through the elimination of a purchase requirement;
5. disqualify persons who committed Intentional Program Violation (IPV) from receiving Food Stamps for periods of six (6) to twelve (12) months, or indefinitely;
6. standardize Public Assistance and Non-assistance Food Stamp eligibility requirements.

Id.

21. The federal Food Stamp Program went through ups and downs over the next two decades. Goodridge & DeParle, *supra* note 7. In 1981, under President Ronald Reagan, the Program faced significant cuts based upon the belief that abuses in the Food Stamp Program were rampant. *Id.* After the recession of the 1990s, the program rebounded and membership peaked at around 27 million people. *Id.*

22. HUMAN SERVS. AGENCY OF S.F., *supra* note 20, at 1.

23. *Id.*

24. CAL. DEP'T. SOC. SERVS., FOOD STAMP REGULATIONS: GENERAL PROVISIONS 70 (1998), available at <http://www.dss.cahwnet.gov/foodstamps/entres/getinfo/pdf/fsman2>.

25. *Id.*

26. HUMAN SERVS. AGENCY OF S.F., *supra* note 20, at 1 (discussing the guidelines of the Food Stamp Program).

To receive food stamps, an individual or household must apply to his or her state or county, where they will be screened for eligibility.²⁷ Eligibility is determined by a number of mostly economic factors. An individual's income and property value must be below a designated level.²⁸ For most households, gross monthly income must be 130 percent or less of the federal poverty guidelines.²⁹ Once eligibility is established, the state or county then distributes the benefits on a monthly basis. Under the George W. Bush administration, paper food stamps were replaced with electronic benefit cards.³⁰ The reasons behind electronic benefit cards include easing the stigma of food stamps, and minimizing the potential for fraud.³¹ The cards look and function like a credit or debit card and are accepted at most grocery stores, and increasingly, at restaurants and farmers markets.³² An additional benefit is that households no longer

27. *Id.* at 14. For example, an individual living in San Francisco County would apply for food stamps with the Human Services Agency. *Id.*

28. James, *supra* note 6. The process of determining eligibility is confusing. Self-screening is virtually impossible; the formulas for determining what income is permissible, what property is deductible, what type of individuals living in one's household are exempt or receive a special deduction, is dizzying. On top of this, actually calculating the benefit amount is confusing. *See* Food Stamp Act of 1977, 7 U.S.C. §§ 2014, 2016–17 (2006) (detailing eligibility requirements and allotment procedures); *Supplemental Nutrition Assistance Program: Eligibility*, U.S. DEP'T AGRIC. FOOD AND NUTRITION SERV., http://www.fns.usda.gov/snap/applicant_recipients/eligibility.htm (last modified Feb. 25, 2011).

29. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, U.S. DEP'T OF AGRIC. FOOD AND NUTRITION SERV., <http://www.fns.usda.gov/snap/faqs.htm#1>. In fiscal year 2006, the average gross monthly household income receiving food stamps was \$673. *Id.*

30. Goodridge & DeParle, *supra* note 7.

31. *Id.* Stigma is reduced with the EBT cards because when recipients use the debit-like card, fewer people can recognize that they are using food stamps.

32. Katie Zezima, *Food Stamps, Now Paperless, Are Getting Easier to Use at Farmers' Markets*, N.Y. TIMES, July 20, 2009, <http://www.nytimes.com/2009/07/20/us/20market.html> (discussing the support of states and non-profit organizations in increasing the availability of credit card terminals at farmer's markets); REENTRY COUNCIL OF THE CITY & COUNTY OF SAN FRANCISCO, GETTING OUT & STAYING OUT: A GUIDE TO SAN FRANCISCO RESOURCES FOR PEOPLE LEAVING JAILS AND PRISONS 46 (2010–2011 ed. 2010), *available at* <http://sfreentry.com/wp-content/uploads/2011/05/1011-Resource-Guide-complete-2nd-printing.pdf> (providing information on eligibility requirements for the CalFresh program as well as application information). Permissible purchases with food stamps include food for the household such as breads, fruits, vegetables, meat, and dairy products, as well as seeds and plants which produce food. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29. Food stamps are not to be spent on nonfood items such as pet food, paper products or household supplies, as well as alcoholic beverages or tobacco products, just to name a few. *Id.*

have to go to the state or county welfare office every month to get their allotment because it is automatically uploaded to their card.³³

While the Food Stamp Program is a lifeline for millions of poor Americans, the benefits are nothing but minimal. To illustrate the point, for a household of four, the *maximum* monthly food stamp allotment under the federal program is presently \$668, or \$167 per person.³⁴ For a typical thirty-day month, this boils down to only \$5.56 per day for food per person. However, the *average* monthly allotment is much lower. During the fiscal year of 2008, the average monthly food stamp ration was roughly \$227 per household and \$101 per person.³⁵ This amounts to roughly \$3 per day per person. Despite the nominal allotment given to food stamp recipients, food stamps are a vital lifeline for our nation's poor people.

ii. A Deeper Dive Into Purpose

A historical review of the Food Stamp Program reveals that despite the years of change, the overriding purpose of the Food Stamp Program has stood firmly rooted—to provide necessary nutrition to poor Americans. Because the originating and continuing purpose of the Food Stamp Program is at the core of the subsequent arguments presented in this Note, a deeper examination of the purpose is essential.

Numerous agencies, departments, and organizational bodies have interpreted the purpose of the Food Stamp Program in such a way to fit their own purpose. The theme underlying every purpose pronouncement is assisting the poor to meet a basic human need—eating. In its Declaration of Policy for the Supplemental Nutrition Assistance Program (the federal version of the Food Stamp Program), Congress declared its policy to promote the general welfare by “safeguarding[ing] the health and well-being of the Nation’s population by raising levels of nutrition among low-income households.”³⁶ Congress found that “the limited food purchasing power of low-income households contributes to hunger and malnutrition”³⁷ The Food Stamp Program was thus promulgated as a means to alleviate hunger and malnutrition by “permit[ing] low-income households to obtain a more nutritious diet through normal channels of trade by in-

33. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29.

34. *Supplemental Nutrition Assistance Program: Eligibility*, *supra* note 28.

35. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29.

36. Food Stamp Act of 1977, 7 U.S.C. § 2011 (2006); HUMAN SERVS. AGENCY OF S.F., *supra* note 20, at 1.

37. Food Stamp Act of 1977 § 2011.

creasing food purchasing power for all eligible households who apply for participation.”³⁸

This sentiment is echoed today. The U.S. Department of Agriculture, the federal agency that administers the Food Stamp Program, notes that the federal program “provides crucial support to needy households and to those making the transition from welfare to work.”³⁹ The slogan on the USDA Food and Nutrition Service’s homepage is “[w]e help put healthy food on the table for over 40 million people each month,” highlighting their goal of providing low-income households with necessary sustenance.⁴⁰

There is no indication in the history of the Food Stamp Program that the benefits were ever considered a reward.⁴¹ To the contrary, all evidence points to the desire to provide a minimal level of nourishment for the poor. The only aspect of history that arguably buttresses the idea of food stamp benefits as being undeserved rewards is the negative reputation of food stamps being a government handout. The most notable of these negative connotations was the Reagan-era “welfare queen” anecdote.⁴²

38. *Id.*

39. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29.

40. *Supplemental Nutrition Assistance Program*, U.S. DEP’T. AGRIC. FOOD AND NUTRITION SERV., <http://www.fns.usda.gov/snap/> (last modified May 26, 2011).

41. It is not clear where this entitlement concept came from, but it was a view shared by many individuals and governmental bodies. “In place of the entitlement concept, the new law creates two block grants that provide States with the funds necessary to help families escape welfare.” STAFF OF H. COMM. ON WAYS AND MEANS, 104TH CONG., PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION 1 (Comm. Print 1996), *available at* <http://www.access.gpo.gov/congress/wm015.txt>.

42. SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN* 185 (2004) (discussing how Reagan’s “welfare queen” comment created an association of gender and welfare); MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 67 (1999) (drawing attention to public opinion and the strong association between “the poor” and minorities); e.g., ‘*Welfare Queen*’ *Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, <http://picofarad.info/misc/welfare-queen.pdf> (arguing that Reagan’s campaign contributed to the misconceptions surrounding the term, “welfare queen”) (PDF posted with permission from the NY Times); SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* 23 (2003) (asserting that Ronald Regan’s “welfare queen” comment was specifically meant to highlight the issue of race in regards to welfare). It should be noted that this anecdote refers to welfare on a broader scale than just food stamps. However, the illustration is still useful in explaining the negative associations between food stamps and government handouts because food stamps are a form of welfare. Paul Krugman, Op-Ed., *Republicans and*

While on the 1976 presidential campaign trail,⁴³ Reagan introduced the pejorative phrase “welfare queen” to the American public.⁴⁴ He used the phrase to tell a story about a woman who had defrauded the welfare system. It is believed that the story was about Linda Taylor, a Cadillac-driving Illinois woman who was receiving various welfare benefits.⁴⁵ The phrase carried gender and racial undertones, and is now a stigmatizing label used in the poverty dialogue.

The “welfare queen” catchphrase was a sounding board from which the anti-welfare movement championed the concept of a grandiose, reward-like welfare system. This notion has trickled down to food stamps. Yet, the amount of benefits received—a paltry \$668 per month for a family of four—does not support the “welfare queen” idea. And that allotment is the *most* the household could receive; the average family receives less than half of that. Only the bare minimum is provided. While these benefits are better than no benefit at all, surviving on the monthly allotment alone is a challenging task, and potentially an impossible one depending on the household’s state of residence.⁴⁶

What the history of the Program and various purpose proclamations reveal is a consistently recognized purpose of providing life-sustaining food to poor Americans in an effort to eliminate hunger in America.

Race, N.Y. TIMES, Nov. 19, 2007, <http://www.nytimes.com/2007/11/19/opinion/19krugman.html>.

43. See generally *Timeline of Ronald Reagan’s Life*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/reagan/2/> (last visited May 28, 2011) (providing a timeline of Ronald Reagan’s life and his unsuccessful run for the presidency in 1976). Democrat Jimmy Carter won the 1976 election. *Id.*

44. ‘Welfare Queen’ Becomes Issue in Reagan Campaign, *supra* note 42.

45. Krugman, *supra* note 42; ‘Welfare Queen’ Becomes Issue in Reagan Campaign, *supra* note 42. Interestingly, Reagan’s characterization was largely overblown. Krugman, *supra* note 42. For example, in a campaign speech to a New Hampshire audience Reagan touted that Taylor had used eighty different illegal aliases to collect benefits amounting to \$150,000. ‘Welfare Queen’ Becomes Issue in Reagan Campaign, *supra* note 42. Yet, the indictments indicated that Taylor used only four aliases and defrauded a total of only \$8,000. *Id.* While her crimes should not be overlooked, the extent of the exaggeration shows how the issue has been sensationalized.

46. The challenges of living on a food stamp budget are discussed below. The difficulty of sustaining oneself on food stamps can also be exacerbated by one’s state of residence. Generally speaking, food products tend to cost more in California than many other states, yet the food stamp allotment is determined on a federal level, without taking into consideration price variations across the states. Thus, a food stamp recipient in California must pay more for food necessities than a food stamp recipient in another state. This leaves less money for other products, and results in fewer food items being purchased by California food stamp recipients.

B. *Welfare Reformed: No Drug Offenders Allowed*

The wave of restrictions and eligibility limitations came to a head in 1996 through the Personal Responsibility and Work Opportunity Reconciliation Act.⁴⁷ This Act, signed into law by President Clinton on August 22, 1996, transformed the nation's welfare system, making vast changes to the Food Stamp Act of 1977.⁴⁸ Following the Act's passage, the Clinton years brought massive cuts and the implementation of harsher eligibility requirements by Congressional Republicans, while the President himself vowed to "end welfare as we know it."⁴⁹ In his January 1994 State of the Union address, Clinton reiterated the importance of a functional welfare system, but was careful to point out that the system should not make welfare more attractive than work.⁵⁰

The segment of the Act relevant to the focus of this Note is codified in 21 U.S.C. §862a—titled the "[d]enial of assistance and benefits for certain drug-related convictions."⁵¹ The pertinent portion reads:

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 . . . shall not be eligible for . . . benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977) . . . or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.].⁵²

47. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

48. STAFF OF H. COMM. ON WAYS AND MEANS, 104TH CONG., PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION 1 (Comm. Print 1996), available at <http://www.access.gpo.gov/congress/wm015.txt>; see David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1273-74 (2004) (examining the effects of the 1996 Welfare law on the Food Stamp program).

49. Bill Clinton, Op-Ed., *How We Ended Welfare, Together*, N.Y. TIMES, Aug. 22, 2006, <http://www.nytimes.com/2006/08/22/opinion/22clinton.html>.

50. Ann Devroy, *President Insists Congress Enact Reforms in Welfare, Health Care*, WASH. POST, Jan. 26, 1994, <http://www.washingtonpost.com/wp-srv/politics/special/states/stories/sou012694.htm>.

51. 21 U.S.C. § 862a (2006). This provision was passed on August 22, 1996. Personal Responsibility and Work Opportunity Reconciliation Act, 110 Stat. 2105 at 2180. It is now codified in Part D (Offenses and Penalties) of the Drug Abuse Prevention and Control chapter in the United States Code. 21 U.S.C. §862. Although the majority of Clinton's presidential attention was focused on the welfare system rather than the criminal justice system, he did promote tough-on-crime legislation as well. Devroy, *supra* note 50. The felony drug conviction ban seems to be a merging of these goals. *Id.*

52. 21 U.S.C. § 862a(a); see also Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 23 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter

The ban proscribes only those drug-related felonies involving *use*, *possession*, and *distribution*, yet these categories encompass almost every type of drug felony.⁵³

Senator Phil Gramm, a Republican from Texas, introduced this section as an amendment during the Senate debate over welfare reform legislation.⁵⁴ His original proposal was much broader, applying to all federal means-based benefits.⁵⁵ The initial ban was also more expansive than later versions with respect to the mass of people it affected.⁵⁶ For example, under Gramm's original scheme, individuals with felony drug convictions would face a lifetime ban, while individuals with a misdemeanor drug conviction would only be barred for five years.⁵⁷ Notably, this version of Gramm's bill was only expansive as to drug-related offenses.

Before it was put before the Senate, the breadth of Gramm's bill narrowed.⁵⁸ The Senate debated the bill that would become section 115 for only two minutes—one minute for Republicans and one minute for Democrats—before it was ratified with bipartisan support.⁵⁹ As the ban's sponsor, Senator Gramm stated: “[I]f we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation's drug laws.”⁶⁰ He was also quoted as saying: “I don't believe that people who are using drugs and who are selling drugs should be getting welfare It is a tough provision but it's time to get tough.”⁶¹

INVISIBLE PUNISHMENT] (discussing the legislation's intent to preclude offenders from benefiting from the welfare state).

53. See Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT, *supra* note 52, at 41 (illustrating the broad reach of the drug felony ban, even though it purports to sanction “only” drug use, distribution, and possession in addition to standard sanctions for welfare fraud). Welfare fraud is proscribed in a different section, and interestingly, “the welfare fraud ban is limited to ten years,” while the use-, possession-, and distribution-related drug felonies result in a lifetime ban on food stamps. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Rubinstein & Mukamal, *supra* note 53.

59. *Id.* at 42; Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 310 (2005).

60. Rubinstein & Mukamal, *supra* note 53, at 42; Finzen, *supra* note 59. It should be noted that Senator Gramm used the more encompassing “welfare benefits” phrase, even though he was discussing section 115, which only affected food stamps. *Id.* at 309–10. It seems that Gramm saw section 115 as one step in the effort to reform the welfare system as a whole.

61. Recent Legislation, *Welfare Reform—Punishment of Drug Offenders—Congress Denies Cash Assistance and Food Stamps to Drug Felons*, 110 HARV. L. REV. 983, 988 n.31 (1997).

No other reason for passing the ban was offered.⁶² However, other potential grounds were suggested in other media. The Seventh Circuit, in *Turner v. Glickman*,⁶³ characterized the ban as “an attempt to address what many members of Congress regarded as increasing and costly incidences of fraud in the food stamp program.”⁶⁴ In *Turner*, the Court examined a challenge to the ban under the Equal Protection Clause and addressed whether the stated reasons proffered by the government for passing the ban were a sufficient justification.⁶⁵ The Seventh Circuit upheld section 115, finding that it did not violate the Equal Protection or Due Process Clauses because Congress had a rational basis for enacting the statute.⁶⁶ The district court had found several rational bases for the prohibition, including deterring drug use, reducing fraud in the program, and reducing welfare spending.⁶⁷ The Seventh Circuit agreed that these were sufficient justifications for passing the ban. However, it is not clear whether these reasons have a foundation in the legislative history. Although not required under rational basis review,⁶⁸ for purposes of this Note, the fact that additional reasons were offered years after the ban passage says something about the original purpose of the ban. It was not primarily created to curb some demonstrated food stamp fraud problem among drug offenders.

Additionally, although the provisions of the Act are certainly ungenerous and embody a strong element of moral censure, the *Turner* holding

62. Having examined the legislative history, only the statement of Senator Gramm demonstrates any reasoning for passing the ban. There was little time for much comment since only two minutes were dedicated to a congressional discussion of this statute. Thus, it is not surprising that the legislative history does not reveal more than Gramm’s statements.

63. 207 F.3d 419 (7th Cir. 2000).

64. *Turner v. Glickman*, 207 F.3d 419, 423 (7th Cir. 2000); H.R. Doc. No. 104-651 (1996), reprinted in 1996 U.S.C.C.A.N. § 2183; *Enforcement of the Food Stamp Act: Hearing Before the H. Comm. on Agric.*, 104th Cong. (1995) (statement of Roger C. Viadero, Inspector Gen. of the U.S. Dep’t of Agric.).

65. *Turner*, 207 F.3d at 425–27. The court also found that the statute did not violate the double jeopardy clause because the sanction was intended to be civil in nature. *Id.* at 429–30. Additionally, the United States Supreme Court has found that there is no constitutional right to welfare. *Dandridge v. Williams*, 397 U.S. 471, 485–86 (1970).

66. *Turner*, 207 F.3d at 425–27.

67. *Id.* at 424; Travis, *supra* note 52, at 15 (identifying a form of new punishment that denies an offender access to certain public-support programs).

68. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Under rational basis review, any conceivable basis can be offered to support a legislative choice for classification, regardless of whether that reason was offered at the time of passing the statute. *Id.* at 320. *See also* *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (describing the burden of attacking a legislative arrangement on grounds of unconstitutionality); *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (stating, “[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the Legislature”).

indicates that the Act does not deprive recipients of anything they would otherwise have necessarily been *constitutionally* entitled. It is therefore not, strictly speaking, punitive. However, the ban does deny a particular group—drug offenders—something to which they would otherwise have been *statutorily* entitled—food stamps.⁶⁹

Whether Congress's overriding goal was drug use deterrence, fraud prevention, reduction of the governmental financial burden associated with food stamps, or even punishment, the Gramm amendment makes individuals convicted of drug offenses automatically ineligible for food stamps, and other federal benefits, regardless of their financial and nutritional needs.

C. *Big Picture: Collateral Consequences*

Collateral consequences are increasingly plaguing individuals recently released from prison. The federal ban on receiving food stamps is a collateral consequence of a felony drug conviction.⁷⁰ A collateral consequence is a:

[L]egal disability that occurs by operation of law because of a conviction but is not part of the sentence for the crime. It is “collateral” because it is not part of the direct sentence. It is a “sanction” because it applies solely because of conviction of a criminal offense.⁷¹

69. Recent Legislation, *supra* note 61.

70. Finzen, *supra* note 59, at 309. Loss of food stamps is only one of the collateral consequences of a felony drug conviction. *Id.* An offender also loses the right to vote while they are incarcerated or on felony parole. CAL. ELEC. CODE § 2201(c) (Deering 1995 & Supp. 2011). A discussion of collateral consequences could produce volumes of material. For purposes of this Note, I introduce this topic only to show that the drug conviction ban is part of a greater (and growing) problem of placing restrictions and challenges upon individuals who have already done the time for their crime. Consequently, the food stamp ban for drug convicts represents only a microcosm of the challenges faced by released felons, placed on them by Legislators and governmental entities. For a discussion of other collateral consequences, see OFFICE OF THE PARDON ATTORNEY, U.S. DEPT OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, http://www.justice.gov/pardon/collateral_consequences.pdf (last visited May 14, 2011) (describing federal consequences of convictions on an offender's ability to vote, serve on a federal jury, hold federal office, join the armed forces, participate in federal contracts, receive federal benefits, obtain federal employment, or acquire certain federally-issued licenses; and if the offender is not a U.S. citizen, conviction can affect one's immigration status).

71. *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated Before the Subcomm. on Crime, Terrorism, and Homeland Sec. and the H. Comm. on the Judiciary*, 112th Cong. 6 (2010) [hereinafter *Collateral Consequences*] (statement of Richard T. Cassidy), available at <http://judiciary.house.gov/hearings/pdf/Cassidy100609.pdf>. See also Travis, *supra* note 52 (explaining how the expansion of civil laws affecting only those convicted of crimes has served to function as a judicial sanction).

Some scholars have called these consequences “invisible punishment” because they take effect outside of the traditional sentencing framework.⁷² Often, collateral consequences are imposed by governmental agencies, as is the case with the food stamp ban.⁷³ Significantly, courts are not required to notify a defendant that additional, civil sanctions may arise from a conviction.⁷⁴

Although the ban has been designated a collateral consequence, rather than an additional punishment, there is undoubtedly a punitive aspect to these sanctions simply because they flow directly from a conviction. As one author put it, “[t]hrough judicial interpretation, legislative fiat, and legal classification, these forms of punishment have been defined as ‘civil’ rather than criminal in nature, as ‘disabilities’ rather than punishments, as the ‘collateral consequences’ of criminal convictions rather than the direct results.”⁷⁵

III. THE CALIFORNIA FOOD STAMP PROGRAM & ITS RESPONSE TO THE FEDERAL DRUG CONVICTION BAN

The federal felony drug conviction ban on receiving food stamps contains an opt-out provision through which the states can choose to accept the federal lifetime ban or make modifications to the terms of the prohibition. “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) of this section.”⁷⁶ If a state does not opt out

72. Travis, *supra* note 52, at 6 (illustrating the emerging concept of civil, collateral forms of punishment that exist outside the realm of traditional sentencing). See also Karol Lucken & Lucille M. Ponte, *A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis*, 30 LAW & POL’Y 46, 47 (2008).

“[I]nvisible punishments” . . . refer to the collection of laws and regulations that operate outside the jurisdiction of sentencing judges, yet diminish the rights and privileges of those who have been convicted of a felony offense. Similarly, the American Bar Association (ABA) defines collateral sanctions as a “legal penalty, disability, or disadvantage . . . that is imposed upon a person automatically upon that person’s conviction for a felony, misdemeanor, or other offense, even if it is not included in the sentence.”

Id.

73. *Collateral Consequences*, *supra* note 71. “[A]lso use[d] [is] the term ‘disqualification’ to refer to disadvantage or disability that an administrative agency, civil court or other state actor other than a sentencing court is authorized, but not required, to impose based on a conviction.” *Id.*

74. *United States v. Kikuyama*, 109 F.3d 436, 537 (9th Cir. 1997); *Campbell v. Ramirez*, No. C00-2375 MMC(PR), 2002 WL 31465294, at *3 (N.D. Cal. Oct. 30, 2002).

75. Travis, *supra* note 52, at 16.

76. 21 U.S.C. § 862a(d)(1)(A) (2006); see also AM. BAR ASS’N & PUB. DEFENDER SERV. FOR THE D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS at 117 (2009), available at <http://www.abanet.org/cccs/>

either fully or partially by specific reference in a law, then the federal lifetime ban would apply as written.⁷⁷ In 2004, California partially opted out of the drug conviction ban, conditionally restoring food stamp benefits to individuals with personal possession convictions while continuing to hold all other drug offenders to the lifetime ban.⁷⁸ In doing so, California joined thirty-two other states that had previously eliminated or modified the federal ban.⁷⁹

A. *The California Partial Opt-Out Provision*

Governor Arnold Schwarzenegger signed Assembly Bill 1796 into law on October 1, 2004, partially opting California out of the federal food stamp ban for felony drug offenders.⁸⁰ The law went into effect in January 2005.⁸¹ The partial opt-out is codified in California's Welfare & Institutions Code, Section 18901.3.⁸² Essentially, it allows only those individuals with a personal possession conviction to become eligible for food stamps.⁸³ However, this eligibility is conditioned on documented rehabilitation.⁸⁴ After completing their judicially imposed sentence, the

internalexile.pdf [hereinafter AM. BAR ASS'N] (examining the consequences of 21 U.S.C. § 862a).

77. 21 U.S.C. at §§ 862a(a), (d)(1)(A); *see also* AM. BAR ASS'N, *supra* note 76.

78. 2004 Cal. Legis. Serv. 932 (West) (codified as CAL. WELF. & INST. CODE § 18901.3 (Deering 2005)).

79. Carol Harvey, *California Lifts Lifetime Ban on Food Stamps for Drug Felons*, STREET SPIRIT (Am. Friends Serv. Comm.), Apr. 2005, available at <http://www.thestreetspirit.org/April2005/foodban.htm>.

80. *Id.* "(a) Subject to the limitations of subdivision (b), pursuant to Section 115(d)(1)(A) of Public Law 104-193 (21 U.S.C. § 862a(d)(1)(A)), California opts out of the provisions of Section 115(a)(2) of Public Law 104-193 (21 U.S.C. § 862a(a)(2)). A convicted drug felon shall be eligible to receive food stamps under this section." CAL. WELF. & INST. CODE § 18901.3 (Deering 2005).

81. WELF. & INST. § 18901.3; HUMAN SERVS. AGENCY OF S.F., *supra* note 20, at 250.

82. WELF. & INST. § 18901.3.

83. HUMAN SERVS. AGENCY OF S.F., *supra* note 20, at 250.

84. *Id.* at 251.

As a condition of eligibility to receive food stamps pursuant to subdivision (a), an applicant convicted of a felony drug offense that is not excluded under subdivision (b) or (c) shall be required to provide proof of one of the following subsequent to the most recent drug-related conviction:

- (1) Completion of a government-recognized drug treatment program.
- (2) Participation in a government-recognized drug treatment program.
- (3) Enrollment in a government-recognized drug treatment program.
- (4) Placement on a waiting list for a government-recognized drug treatment program.
- (5) Other evidence that the illegal use of controlled substances has ceased, as established by State Department of Social Services regulations.

WELF. & INST. § 18901.3(d).

individual must provide proof of completion, participation, enrollment, or wait list placement in a government-recognized drug treatment program, or other approved evidence that illegal drug use has stopped.⁸⁵

While individuals with possession convictions become potentially eligible for food stamps under the opt-out provision, all other drug felons are still excluded for life. Section 18901.3 specifically excludes from food stamp eligibility those persons convicted of “unlawfully transporting, importing into this state, selling, furnishing, administering, giving away, possessing for sale, purchasing for purposes of sale, manufacturing a controlled substance, possessing precursors with the intent to manufacture a controlled substance, or cultivating, harvesting, or processing marijuana.”⁸⁶ Also prohibited from receiving food stamps are those individuals convicted of “unlawfully soliciting, inducing, encouraging, or intimidating a minor to participate” in any activities listed above.⁸⁷

When Governor Schwarzenegger signed the opt-out provision into law, he issued a signing statement in which he expressed the significant impact that the opt-out provision would have on poor Californians:

It is time for California to join the District of Columbia and 31 other states that have eliminated or modified the ban on food stamp benefits for individuals with felony drug convictions. With my signature California will assist individuals in becoming self sufficient, provide care for their children and overcome their drug addiction while adding millions of federal dollars to our economy.⁸⁸

The acceptance of the opt-out provision was long in the making. Since the creation of the federal ban, many different bills had been introduced

85. WELF. & INST. § 18901.3(d); HUMAN SERVS. AGENCY OF S.F., *supra* note 20, at 251. Interestingly, this provision of the opt-out assumes, without explanation, that individuals convicted of drug possession have a substance abuse problem. While it is reasonable to believe that someone convicted only of simple felony possession does possess the controlled substance for personal use only, the law does not distinguish a first-time user from a life-long user. Requiring individuals who do not actually have an addiction problem to attend drug treatment is a fiscal waste. I appreciate the difficulty in deciphering whether someone is truly an addict, but some sort of weeding-out mechanism could free up any government funds that are used in drug treatment and could lessen the financial concerns related removing the food stamp ban altogether.

86. WELF. & INST. § 18901.3(b).

87. *Id.*

88. *Drug Policy News*, SAN BERNARDINO COUNTY SPEAKEASY (Oct. 1, 2004), <http://www.sbcspokeasy.bravehost.com/administration.htm> (publishing Governor Schwarzenegger’s signing message to the members of the California Assembly). The purpose clause for the California Food Stamp Program supports the Governor’s comments. Recognizing the plight of “hunger, undernutrition, and malnutrition” faced by low-income households, California established a state-based food stamp program to provide “significant health-vital benefits.” WELF. & INST. § 18900.

in California in an attempt to eliminate or modify the ban.⁸⁹ Schwarzenegger's predecessor, Governor Gray Davis, had vetoed three separate bills aimed at tempering the drug conviction ban.⁹⁰ When rejecting one of these bills, former Governor Davis reasoned that "[c]onvicted felons do not deserve the same treatment as law-abiding citizens, especially those that manufacture, transport or distribute drugs."⁹¹ This exemplifies the challenges that food policy advocates and Legislators faced in their efforts to put food in the mouths of poor drug offenders. Much of the same sentiment permeated the Schwarzenegger era.

Supporters of the opt-out provision saw the bill's passage as a step in the right direction. Assemblyman Mark Leno,⁹² who introduced the measure, spoke of the motivating reason for the opt-out provision:

It seemed like a great injustice had been done by Congress in placing this lifetime ban on eligibility for food stamps for those who have been convicted of drug felonies . . . it only becomes more clear when you realize that someone could have served time for murder, rape, child molestation, bank robbery and be eligible.

. . . .

. . . Unfortunately, we had to limit our opt-out bill to just those who had been convicted of drug possession (as opposed to) possession with intent to sell, which is a slightly larger quantity, or the felony of selling drugs, manufacturing, distributing.⁹³

89. A number of these bills will be discussed in Part V.

90. ROBIN LEVI & JUDITH APPEL, DRUG POLICY ALLIANCE, COLLATERAL CONSEQUENCES: DENIAL OF BASIC SOCIAL SERVICES BASED UPON DRUG USE 5 (2003), available at http://www.drugpolicy.org/docUploads/Postincarceration_abuses_memo.pdf.

As of March 2002, 21 states have the full ban in place—denying to people with felony drug convictions benefits for life. Eleven states and the District of Columbia have completely opted out of the ban, and 18 other states have modified the ban either by allowing benefits dependent upon drug treatment, denying benefits only for sales convictions, or by placing a time limit on the ban.

Id. For a chart of states showing the status of their ban, see LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY, A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 13 (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf. For example, some states have adopted the full federal ban, while others have opted out completely, or partially opted out. *Id.* See also *Comparing California's Food Stamp Program to Other States*, CAL. FOOD POLICY ADVOCATES, <http://www.cfpa.net/foodstamps/statecomparison.htm> (last visited Mar. 28, 2011) (showing the states that have opted out of the ban).

91. Peter Schrag, Opinion, *Food Stamps Become a Weapon in the War on Drugs*, CONTRA COSTA TIMES (Cal.), June 3, 2001, at P03, available at <http://www.commondreams.org/views01/0604-04.htm>.

92. Mark Leno is now a State Senator representing California's 3rd Senate District. SENATOR MARK LENO (last visited June 2, 2011), <http://dist03.casen.govoffice.com>.

93. Harvey, *supra* note 79.

Finally, he recognized that even the partial opt-out was a significant achievement, but lamented that a *partial* opt-out means inequity persists.⁹⁴

B. *Big Steps, Limited Effect*

Keeping accurate and up-to-date statistics on the number of people denied food stamps because of drug convictions is difficult. The figures are not comprehensive over the decades. Instead, the numbers only come in increments over broken periods of time. Yet, even these incremental figures show vast amounts of eligible individuals being denied benefits.

One researcher estimates that “between 13 and 18 million Americans may be subject to some form of temporary or permanent social exclusion due to prior convictions for drug and other felony offenses.”⁹⁵ Notably, this approximation refers to nation-wide denial of welfare benefits in a general sense. These figures examine the loss of welfare benefits collectively; they do not represent the loss of food stamps alone.

A more recent figure reported specifically on the denial of food stamps. An April 2005 article discussing Assemblyman Leno’s AB 1796—the bill that contained the partial opt-out provision—reported that “at least 1,640 former California drug felons [were] denied food stamps last year.”⁹⁶ While at first glance that figure may not seem significant, it only encompasses the number of individuals who actually applied for food stamps, self-reported their felony drug conviction during the application process,⁹⁷ and then were denied food stamps. The 1,640 figure does not represent otherwise eligible individuals who did not apply.⁹⁸

Significantly, these figures do not address the number of people beyond the individual drug offender who are affected by the ban. Aside from the direct impact on the individual drug offender, the ban has negative effects on entire households, particularly children within the household. When one member of the household—usually a parent—is denied food stamps, it is reasonable to assume that what generally happens is that any benefits issued to other members of the family are shared among everyone. This means that fewer food stamps must feed more people

94. *Id.*

95. Lucken & Ponte, *supra* note 72, at 46–47.

96. Harvey, *supra* note 79.

97. Although applicants are required to self-report convictions, the conviction could be discovered in other ways as well.

98. I suppose that individuals convicted of drug offenses often learn about the food stamp ban through word of mouth while incarcerated. I further postulate that this knowledge of automatic denial deters many drug felons from even applying for food stamps. They know that the process will not only be a fruitless endeavor, but it may also attract a prying or watchful eye into other areas of their lives.

than intended, resulting in an inadequate supply of food for the household. Further effects on households and children will be discussed in a subsequent section of this Note, but this illustrates that the data is under-inclusive when it does not account for the effect of the ban on individuals beyond the offender. These figures may be impossible to attain. The Government Accountability Office has echoed this concern, stating that measuring the full effect of the drug felony exclusion is virtually impossible.⁹⁹ Yet, the reality of the ban's implications should be reflected in the data. If this is unattainable, it must be remembered that the figure of affected persons is much larger in reality, and spans beyond just the drug offender.

Both the federal and California food stamp programs are designed to provide sustenance to poor Americans. The federal drug conviction ban categorically denies food stamps to a group of Californians who would otherwise be eligible for the benefit. California's partial opt-out provision applies only to those persons convicted of simple felony drug possession. Yet, individuals whose conviction is beyond personal use remain ineligible for the Food Stamp Program. So, although the partial opt-out is a significant stride in the right direction, in reality, it puts food stamps in the hands of only a very limited number of drug offenders.¹⁰⁰ Unless there is a sound, countervailing reason for denying food stamps to those who need them, the denial is antithetical to the recognized purpose of the Food Stamp Program, and as such, California should fully opt out of the federal drug conviction ban.

IV. THE REVOLVING DOOR SPINS: CALIFORNIA'S PARTIAL OPT-OUT LACKS SOLID BASES AND SERVES ONLY TO FEED THE CYCLES OF POVERTY, DRUG ADDICTION, AND CRIME

The originating purpose of the federal Food Stamp Program does not support the automatic denial of life-sustaining food to an entire category of otherwise eligible individuals. Aside from this purpose, there is no sound reason or research-based support for categorically denying otherwise eligible persons simply by virtue of their drug conviction. Conse-

99. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-238, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS 17–21 (2002), available at <http://www.gao.gov/new.items/d05238.pdf> (attempting to quantify the number of individuals impacted by food stamp bans and partial bans).

100. This is because, as stated above, only those persons convicted of simple felony drug possession are allowed to take advantage of the Food Stamp Program. Yet, individuals whose conviction is beyond personal use remain ineligible. This is especially true since California has one of the highest, if not *the* highest, "number of persons incarcerated for drug offenses." LEVI & APPEL, *supra* note 90.

quently, California should replace its current partial opt-out provision with a provision that completely eliminates the drug conviction ban.

Instead of supporting the original purpose, or some other reasonable goal, the continued denial of welfare assistance to individuals who are economically marginal enough to be otherwise eligible only feeds the cycles of poverty, drug use, and crime.¹⁰¹ This Note advocates for a full opt-out provision in California, allowing all financially eligible individuals, regardless of conviction status, to obtain needed food stamps.¹⁰² Presented in this section are six main arguments to support an expansion of California's opt-out provision. On a moral level, humanity dictates that all human beings deserve to eat. Secondly, the supposed connection between a drug conviction and food stamp fraud is attenuated at best. Any association between the two is pure conjecture. The third argument supporting an extension of the opt-out provision is that the criminal justice system should operate outside of, and completely separate from, the social service system. Fourth, the federal ban and California's partial opt-out are over- and under-inclusive, further criminalizing drug activity while reinstating food stamp rights for eligible murderers, rapists, and child molesters. Fifth, and arguably most important, denying financially eligible drug offenders' needed food stamps presents a significant barrier to successful reentry into society. Finally, extending access to food stamps for drug offenders makes financial sense, and would even potentially stimulate the local economy. Each of these arguments supports fully reinstating the food stamp rights of all eligible drug offenders.¹⁰³

A. *The Rules of Humanity: Everyone Deserves to Eat*

“[T]hey are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.”¹⁰⁴

101. Recent Legislation, *supra* note 61, at 988.

102. I recognize that more than just economic status determines one's eligibility for food stamps. However, financial status plays the largest role. As such, throughout this Note, I narrow my reference to eligible persons as being “financially eligible.” Additionally, I refer to the collective group of eligible individuals who are denied access to food stamps. Unless a state specifically opted out of the federal ban, it applies. Since California has adopted only a partial opt-out measure, the provisions of the federal ban still apply to drug felons convicted of anything more than a possession conviction (which is what is covered by California's partial opt-out). As a result, the justifications and reasons for adopting the federal ban can be attributed to California since the state did not fully reject the federal ban. And so, throughout this Note, I may be referring to a policy specifically adopted by Congress but not rejected by California, and so attributable to the state.

103. These arguments were sparked by conversations with members of the San Francisco Re-Entry Council.

104. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *available at* http://www.archives.gov/exhibits/charters/declaration_transcript.html.

This was one of the founding principles of our nation. Our forefathers did not add an asterisk at the end of this clause, excluding drug convicts. Beyond national recognition, the right to life is a basic principle of humanity.¹⁰⁵ The right to food flows naturally from the right to life because without food, a life cannot be sustained. In fact, maintaining life necessitates more; it requires that one's basic needs be met. Traditionally, basic needs include food, shelter, and clothing.¹⁰⁶ These are absolute minimum resources necessary for survival.¹⁰⁷ While it is difficult to assert that one basic need is superior to the others, arguably food is the most important because without nourishment, life cannot be sustained to meet one's other needs. The exclusion of felony drug offenders from receiving food stamps conflicts with the principles of humanity and the founding ideals of our nation.

Everyone, regardless of his or her status in life, deserves to eat. Whether a Legislator, law-abiding citizen, murderer, drug felon, rich, poor, or middle-class, they all are worthy of receiving life-sustaining nourishment. Congress has recognized this in its purpose clause for the Food Stamp Program. The purpose was to provide necessary nutrition to poor Americans. As President Johnson remarked when he signed the Food Stamp Act in 1964, this program will contribute to the "building [of] a better life for every American."¹⁰⁸ Accordingly, everyone who meets

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Id.

105. If you asked a typical person whether everyone deserved to eat, most people would respond affirmatively. There is historical and ideological support for this in the United Nations' Universal Declaration of Human Rights. The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr>. After participating in the "Food Stamp Challenge," a program intended to educate people about life for those who are dependent on food stamps, U.S. Representative Jim McGovern (D-MA) stated "[w]e want to urge or shame Congress into doing the right thing. Thirty-six million people are what is called 'food insecure.' That's something we should all be ashamed of in the richest country in the world." FOOD RESEARCH AND ACTION CENTER (FRAC), TAKE THE CHALLENGE: LIVING ON A FOOD STAMP BUDGET 4 (2009), *available at* http://frac.org/newsite/wp-content/uploads/2009/09/fsc_toolkit.pdf.

106. JOHN A. DENTON, SOCIETY AND THE OFFICIAL WORLD: A REINTRODUCTION TO SOCIOLOGY 17 (1990).

107. For an interesting view on what monthly and yearly expenses are associated with various categories of basic needs such as the amount of money necessary for rent, food, and healthcare, based on one's residence, and family composition, see *Basic Needs Budget Calculator*, NAT'L CTR. FOR CHILDREN IN POVERTY, <http://www.nccp.org/tools/frs/budget.php> (last visited Mar. 29, 2011).

108. Woolley & Peters, *supra* note 12.

the economic eligibility requirements should receive food stamps. Yet, as one author put it, the drug conviction ban “deprives individuals convicted of drug-related felonies of food stamps *despite their continuing financial and nutritional needs.*”¹⁰⁹

Our country has a long track record of providing for those individuals who cannot provide for themselves. This is why the Food Stamp Program came into existence. There was an accepted recognition of the fact that everyone deserves life-sustaining nutrition, including those who cannot afford to provide for themselves. Within the criminal justice realm, our society has also established that even criminals, namely incarcerated criminals, deserve to eat. We feed our prisoners, thus the ban on food stamps for drug offenders must not have to do with their status as a *criminal*, but rather their status as a *drug offender*. If that is the case, one must wonder what about a drug offender makes them more morally reprehensible than a murderer or rapist,¹¹⁰ both of whom are permitted to receive food stamps after incarceration, assuming they are financially eligible. Simply because an individual has committed a drug offense does not make him or her undeserving of food and food assistance through the Food Stamp Program.

Although this “morality card” argument lacks the scholarly support that the remaining arguments have, it keeps the denial of food stamps in perspective. At the most basic level, we are all human beings, whether drug offenders or not, who need food to survive. Traditionally, our nation has recognized that everyone has a right to life and thus food. This is evidenced by feeding incarcerated persons and the creation of the Food Stamp Program. If someone cannot meet their basic needs, the nation or state generally steps in to provide assistance in the form of welfare benefits. Because the denial of food stamps is not directly linked to a drug offender’s status as a criminal, once these individuals have paid their debt to society, their food stamp benefits should be reinstated just like all other criminals.¹¹¹ Economically eligible drug offenders deserve to eat, and as such, they should have access to life-sustaining nutrition through the Food Stamp Program.

109. *Turner v. Glickman*, 207 F.3d 419, 424 (7th Cir. 2000) (emphasis added).

110. I use the example of “murderers” and “rapists” because arguably, both of these classes of more morally reprehensible criminals have the potential of being released from prison. Of course, this depends on their charge, sentence, prior convictions, and behavior while incarcerated, among other things. Yet, upon their release, they would be eligible to resume receiving food stamps, so long as they meet the economic requirements.

111. However, as one author expressed, “[i]n this brave new world, punishment for the original offense is no longer enough; one’s debt to society is never paid. Perhaps, this is part of the problem,” Travis, *supra* note 52, at 15, 19.

B. *A Disjointed Connection: Drug Conviction=Fraud*

Food stamp fraud was not an explicitly stated legislative reason for adopting the federal drug conviction ban, but it was clear that concern about fraud played a role in the ban's passage. The Seventh Circuit, as discussed above, hypothesized that the federal ban was, at least partially, "an attempt to address what many members of Congress regarded as increasing and costly incidences of fraud in the food stamp program."¹¹² Referring to the testimony of the Inspector General for the U.S. Department of Agriculture about the occurrence of food stamps being traded for drugs, the Court said that Congress was concerned about legislative loopholes.¹¹³ As a result, Congress passed measures aimed at "exclud[ing] those persons Congress deemed most likely to engage in welfare fraud through the trafficking [of] food stamps."¹¹⁴

Even though the Court made these findings, it did not specify the connection between welfare fraud and drug convictions. The Court did not find that the highest incidence of welfare fraud was from drug offenders, or that drug offenders were particularly susceptible to committing welfare fraud. Rather, it simply found that Congress must have had some reasonable justification for excluding an entire class of persons from receiving food stamps.¹¹⁵

Although there were concerns expressed about food stamp fraud as a reason for banning drug offenders, these concerns are not well founded. There is no demonstrated connection between a felony drug conviction and likelihood of committing food stamp fraud. Rather, these beliefs are a product of misconception and misapprehension about a class of individ-

112. *Turner*, 207 F.3d at 423.

113. *Id.* at 425. We must keep in mind that these were findings of the Seventh Circuit, and represent how this particular court interpreted the legislative history. It was also in the context of making a determination about equal protection violations.

114. *Id.* at 426 n.2. The classification contained in section 862a is thus rationally connected to the desire to reduce welfare fraud. The presumption that drug convicts must be prevented from "trafficking in food stamps" is an interesting one. First of all, it assumes that all drug convicts are "traffickers" (i.e., drug dealers). If drug dealing is a precursor to dealing in food stamps, then drug dealers (and remember, the ban covers more than just dealers) must also be prone to deal their prescription drugs from Medicare or Medicaid, and probably also whatever other benefits that can be dealt away for drugs. Thus, the Seventh Circuit's contention is a potential slippery slope, and raises the question: Why ban food? And if food is to be banned, why are other potentially "dealable" benefits not also banned?

115. *Id.* at 426. This was because, in this case, which presented a challenge under the Equal Protection Clause, all the court had to determine was that there was some rational connection between reducing welfare fraud and excluding drug convicts from food stamps, regardless of whether this actually was a reason offered by Congress when the statute was passed.

uals seen as morally reprehensible. As a result, drug offenders have become the scapegoat, bearing the burden that should be shared by only those individuals who actually commit food stamp fraud. It is not necessary to deny food stamp benefits to drug offenders in an effort to prevent future fraud because food stamp fraud is separately statutorily proscribed and punished. Thus, there are mechanisms already in place to guard against food stamp fraud. Additionally, to the extent that this is still a problem, the electronic benefit card largely reduces the potential for food stamp fraud.

i. Food Stamp Fraud is Statutorily Proscribed and Punished

There will always be abuse of federal benefits. The USDA recognizes this fact on their website: “[I]n a program as large as the SNAP [Supplemental Nutrition Assistance Program], it may be inevitable that some people will try to cheat the system.”¹¹⁶ Yet, this is why laws and statutes are implemented—to prohibit such misuse and punish those particular persons who engage in this unlawful conduct.¹¹⁷ Automatically denying food stamps to drug offenders does not address the problem at issue—food stamp *fraud*. A person could have never received food stamps in the past, been convicted of a drug crime that had nothing to do with food stamps, yet still be prevented from ever receiving food stamps for the rest of his life. If prior to incarceration his economic situation did not require use of food stamps, the benefit may not have meant much to the offender, but upon release, many individuals find themselves in a position in which they must rely on them.¹¹⁸ Denying food stamps to individuals, who never had any connection to the Food Stamp Program before, whether through proper use or criminal behavior, makes no sense. Rather than incorrectly assuming that every drug offender is likely to commit food stamp fraud, Legislators should allow the welfare fraud statute to proscribe and punish food stamp fraud.

There are already provisions implemented that protect against food stamp fraud and proscribe punishment for such actions. Welfare fraud is statutorily prohibited in a section separate from the drug conviction ban.

116. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29.

117. *Id.* “The Department has already taken a number of steps to make it easier to catch and punish people who misuse SNAP benefits.” *Id.* Under the 1996 Welfare Reform Act, “[i]ndividual SNAP recipients who sell their benefits can also be removed from the program.” *Id.*

118. Government and non-profit agencies provide assistance to individuals transitioning from prison. REENTRY COUNCIL OF THE CITY & COUNTY OF SAN FRANCISCO, *supra* note 32 (detailing the resources available to individuals and their families upon release from incarceration).

Shockingly, a person found to have committed an act of welfare fraud gets three chances before he or she is permanently banned from the program.¹¹⁹ After the individual's first conviction, he or she is ineligible for food stamps for only one year.¹²⁰ A second conviction carries a two-year ban.¹²¹ Upon a third incident of welfare fraud, the individual is ineligible for life.¹²² There are some exceptions to this general framework. For example, lifetime ineligibility flows from a second finding by a court of "trading . . . a controlled substance for coupons."¹²³ Yet, what this structure shows is that individuals convicted of the unlawful conduct, that the Seventh Circuit said justified permanent denial to drug offenders, results in only a slap on the wrist for individuals convicted of welfare fraud. If a person convicted of fraud is permitted to regain his or her food stamp rights, it is incomprehensible why someone never convicted of fraud is automatically denied access for life.

While welfare fraud may have been a concern when the drug conviction ban was passed, the statute specifically addressing welfare fraud is the proper way to go about reducing the incidence of fraud. There are laws in existence aimed specifically at combating food stamp fraud. Additionally, individuals who have been convicted of food stamp fraud can be individually excluded from food stamp benefits. Technology has also been of assistance in reducing the potential for welfare fraud.

ii. Electronic Benefit Card Reduces Potential for Food Stamp Fraud

Food stamp fraud is much harder to commit with the prevalent use of technology by the departments issuing welfare benefits. During the application process, people are typically required to provide their Social Security number, and extensive computer verification systems are used to determine qualification. Other devices such as fingerprinting also ensure authorized use of benefits.¹²⁴ The inception of the Electronic Benefit Transfer (EBT) card has been most instrumental in reducing the potential for food stamp fraud.

119. 7 U.S.C. §§ 2015(b)(1)(A)(iii)–2015(b)(1)(B)(iii) (2006); *see also* Rubinstein & Mukamal, *supra* note 53, at 37, 41 (contrasting ban limits for fraud as compared with drug offenses).

120. 7 U.S.C. §§ 2015(b)(1)(A)(i)–2015(b)(1)(B)(i).

121. 7 U.S.C. §§ 2015(b)(1)(A)(ii)(I)–2015(b)(1)(B)(ii)(I).

122. 7 U.S.C. §§ 2015(b)(1)(A)(iii)–2015(b)(1)(B)(iii).

123. 7 U.S.C. §§ 2015(b)(1)(A)(iii)(II)–2015(b)(1)(B)(iii)(II).

124. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 675 (2009) (discussing the biometric and finger printing imaging process instituted in several states). States developed biometric and fingerprinting measures to meet the federally mandated fraud prevention program requirements of the 1996 welfare reforms. *Id.*

“Food stamps are . . . viewed as a benefit that cannot be easily used for illicit purposes, unlike cash benefits.”¹²⁵ This is largely attributable to the EBT card, which has been adopted by all states as the method of dispersing federal benefits.¹²⁶ As discussed above, the Bush administration replaced paper food stamps with the electronic benefit cards.¹²⁷ The purpose was to not only ease the stigma attached to the use of food stamps, but also to minimize the potential for fraud. The electronic cards do just that because they look and function like a credit or debit card.¹²⁸ They are accepted at most grocery stores, and increasingly, at restaurants and farmers markets.¹²⁹ To use an EBT card, the consumer must have a PIN number that they enter in order to complete the transaction at a store. An electronic record of purchases is created, making fraud easier to detect.¹³⁰ Some facilities are also more frequently checking identification, just as they would when someone uses a debit or credit card. An additional benefit is that households no longer have to go to their state or county office every month to get their allotment because it is automatically uploaded to their card.¹³¹

The safeguards against fraud provided by the EBT card have eased the concern of Legislators. Assemblyman Leno opined “I don’t think the idea to put in place this lifetime ban was out of mean-spiritedness. The fear was you could trade food stamps for drugs. But today, with electronic debit cards for food stamps, the problem goes away.”¹³² When he signed Assemblyman Leno’s AB 1796, Governor Schwarzenegger agreed. He stated, “[t]echnological developments in the benefit delivery system and . . . the successful implementation of the Electronic Benefit Transfer system assures that food stamp benefits cannot be easily exchanged or converted into drugs.”¹³³

There is a disconnect between the status of being a drug felon and the lifetime ineligibility for food stamps. There is no evidence that individu-

125. *Id.* at 672 n.135.

126. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29.

127. Goodridge & DeParle, *supra* note 7.

128. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29.

129. *Id.*; Katie Zezima, *supra* note 32; REENTRY COUNCIL OF THE CITY & COUNTY OF SAN FRANCISCO, *supra* note 32.

130. *Supplemental Nutrition Assistance Program: Frequently Asked Questions*, *supra* note 29.

131. *Id.*

132. Robert Sallady & Jordan Rau, *Bill OK’s Food Stamps for Some Drug Felons*, LOS ANGELES TIMES, Aug. 26, 2004, available at <http://articles.latimes.com/2004/aug/26/local/me-bills26>.

133. Harvey, *supra* note 79.

als with a drug conviction history are more likely to commit food stamp fraud than people without a conviction history. If welfare fraud is specifically addressed in a separate statute, technology has reduced the potential for welfare fraud *and* there is no demonstrated correlation between fraud and drug conviction, it stands to reason that there is no need to continue denying food stamp benefits to individuals who have not been convicted of food stamp fraud.

C. *Separate But Equal?: Removing Penology¹³⁴ From Social Services*

The social service system is separate and distinct from the criminal justice system, and should remain so. The Legislature should stop enacting laws which blur the lines between these two individual systems. The lifetime ban on food stamps for drug offenders is just one example of the intermingling of the social service system with the criminal justice system. As one author said, “[t]he drug felony lifetime ban again makes the welfare system an instrument of the criminal justice system.”¹³⁵

The drug conviction ban on food stamps flows automatically from one’s conviction. The effects of the ban are felt after the felon has been released from incarceration, or otherwise been freed from the grips of the criminal justice system. Yet, the punishment continues even after they have completed their judicially mandated sentence.¹³⁶ Some will not view the food stamp ban as a form of continuing punishment after release from the grips of the justice system. Nevertheless, if we continue to place such restrictions on individuals, this will lead to actual punishment because these individuals will likely break the law trying to meet the basic needs that were denied by the ban. This idea—that denying food stamps to drug offenders will result in additional crime and re-incarceration—is discussed further below.

Denial of social services should not be used to further punish offenders. Once a person has paid their debt to society, all forms of judicial and legislative punishment should cease. The California Legislature should ensure that food stamps are no longer a pawn in the battle against drugs by passing a full opt-out provision.¹³⁷

134. Penology is a branch of criminology that focuses on the treatment of offenders.

135. Gustafson, *supra* note 124, at 673.

136. Even though these forms of social exclusion have been characterized as civil sanctions, they result directly because of a criminal conviction and they harm the individual both directly and indirectly. See the discussion of collateral punishment above.

137. Schrag, *supra* note 91.

D. *Too Narrow, Too Broad: The Drug Conviction Ban is Over-and Under-Inclusive*

The federal lifetime ban on food stamps for individuals with felony drug convictions is both over- and under-inclusive. The ban eliminates drug offenders from the food stamp rolls for life, while leaving other ex-felons unaffected. Additionally, of the people affected by the drug offender ban on food stamps, women and minorities are devastatingly over-represented. The over- and under-inclusiveness of the drug conviction ban further supports the passage of a full opt-out provision in California and the restoration of food stamps for all eligible individuals regardless of criminal history.

i. Under-Inclusive Exclusion

The federal exclusion prevents drug offenders from receiving food stamps, while murderers, rapists, and other violent criminals can continue to access the benefit. “Thus, a person convicted of armed robbery can qualify for [food] assistance after completing his sentence, but someone with a single felony conviction for drug [sales] cannot.”¹³⁸ Being on probation or parole also does not negatively impact one’s ability to receive food stamps.¹³⁹ However, an individual is ineligible during the period of time he or she is a fleeing felon, violating a condition of probation or parole,¹⁴⁰ or delinquent in child support payments.¹⁴¹ While most people¹⁴² with criminal records are eligible to receive food stamps, drug offenders are categorically excluded.¹⁴³

The ban is under-inclusive in another way. While the ban prevents drug felons from receiving food stamps, the statute states that it should

138. Rubinstein & Mukamal, *supra* note 53, at 37, 42; REENTRY COUNCIL OF THE CITY & COUNTY OF SAN FRANCISCO, *supra* note 32.

The only exclusion is for people who have a felony conviction for: unlawfully transporting, importing into California, selling, furnishing, administering, giving away, possession for sale, manufacturing a controlled substance, or cultivating, harvesting, or possessing marijuana, or a felony conviction for unlawfully soliciting, inducing, encouraging, or intimidating a minor to participate in any of the activities listed above. If you have been convicted of drug possession or use, you may provide proof that you have stopped using drugs.

REENTRY COUNCIL OF THE CITY & COUNTY OF SAN FRANCISCO, *supra* note 32. There is no distinction in the federal law between first offenders, career drug dealers, adolescent offenders or adults. Schrag, *supra* note 91.

139. REENTRY COUNCIL OF THE CITY & COUNTY OF SAN FRANCISCO, *supra* note 32.

140. 7 U.S.C. § 2015 (2006).

141. 7 U.S.C. § 2015(n).

142. I say “most people” because as stated above, a conviction for welfare fraud can affect one’s ability to receive food stamps.

143. REENTRY COUNCIL OF THE CITY & COUNTY OF SAN FRANCISCO, *supra* note 32.

not be interpreted to deny other federal benefits such as job training programs, prenatal care, or drug treatment programs.¹⁴⁴ It is unclear what it is about food that the Legislators believed should be denied, while in the same breath, continuing job training and drug treatment programs. Attaining job skills is likely an unproductive goal if the person does not have food to sustain them; success of job training programs presupposes that a person is meeting their basic living needs. Meeting one's basic needs, such as food, clothing, and shelter surpasses the need, or desire, for job skills. A similar concern flows from promoting drug treatment programs while denying food stamps.¹⁴⁵

If the true goal of the ban was simply to deny a welfare benefit to a group of individuals that the Legislature found morally reprehensible, they have achieved their purpose. If fraud concerns were at the heart of the ban, this goal is underserved by automatically prohibiting only drug offenders from the program. What these quirks in the statute show are that the federal ban for drug offenders is under-inclusive.

ii. Over-Representative Effect on Minorities and Women

The greatest majority of eligible drug offenders who are denied access to food stamps because of the ban are women and minorities. The food stamp ban for drug offenders has a disproportionate effect on minority groups, who are more often plagued by the presence of drugs in their communities, and who are more likely to come from poor urban areas.¹⁴⁶ Minorities are more likely to live in poor communities with multiple vulnerabilities, which only increase the likelihood of involvement with drugs.¹⁴⁷

144. 21 U.S.C. § 862a(f) (2006).

Nothing in this section shall be construed to deny the following Federal benefits:

- (1) Emergency medical services
- (2) Short-term, noncash, in-kind emergency disaster relief.
- (3) (A) Public health assistance for immunizations.
(B) Public health assistance for testing and treatment of communicable diseases
- (4) Prenatal care.
- (5) Job training program.
- (6) Drug treatment programs.

Id.

145. The effect of denying food stamps to individuals in drug treatment programs is discussed in more detail below.

146. Recent Legislation, *supra* note 61, at 985.

147. *Id.* at 110; ISIDOR CHEIN ET AL., THE ROAD TO H: NARCOTICS, DELINQUENCY, AND SOCIAL POLICY, 73–74 (1964).

Women are also overwhelmingly affected by the ban¹⁴⁸ which also raises concerns about the effects of the ban on children.¹⁴⁹ In a 2002 study by Patricia Allard, of The Sentencing Project, estimated that 92,000 women were affected by the ban.¹⁵⁰ This number represents data from just twenty-three of the forty-two states that maintain some form of the federal ban, which means that the state had either passed a partial opt-out provision or allowed the federal ban to take effect in their state.¹⁵¹ Because only a fraction of the states were examined, the actual number of women whose lives are affected could be much greater.¹⁵² Out of the 92,000 women affected nationwide, over 37,000 of those women were Californians.¹⁵³ The impact on women's daily lives is even more stunning when considering the number of women who relied on welfare before incarceration. Allard estimated that "[a]lmost 30% of mothers in state prison were receiving welfare assistance before their arrest."¹⁵⁴

The negative implications of the ban are far greater for minority women. According to Allard's study, "Black women in prison were disproportionate recipients of welfare prior to their incarceration, with 36% of Black mothers receiving welfare assistance . . . 31% of Latina mothers

148. PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 1 (2002), available at http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf (conducting one of the first major studies on the food stamp ban's impact on women and their children); see also MARK ROBERT RANK, LIVING ON THE EDGE: THE REALITIES OF WELFARE IN AMERICA, 41-43 (1994) (discussing the feminization of poverty).

149. Mark Leno recognized this phenomenon, and in fact, it was the impetus for his introduction of AB 1796. He stated:

Those who served time for possession are, in many cases, young women with children. We know for a fact that a young mother, often from ethnic communities with limited resources, who must . . . provide herself food, will have that much less to spend on her children. Children who go to school hungry are more likely to fail. Those who fail are more likely to drop out. Those who drop out are more likely to find themselves in the criminal justice system. Here we see that our failed policymaking produces failed results.

Harvey, *supra* note 79.

150. ALLARD, *supra* note 148, at 4.

151. *Id.*; Finzen, *supra* note 59, at 310.

152. ALLARD, *supra* note 148, at 4; Finzen, *supra* note 59.

153. ALLARD, *supra* note 148, at 6. This data was collected from 1996-1999, so likely the numbers are even more staggering today. *Id.* at 4 (providing the data compilation dates).

154. *Id.* at 19. For an in-depth look at the welfare dependence of incarcerated women in Illinois, see Kristin F. Butcher & Robert J. LaLonde, Working Paper, *Female Offenders Use of Social Welfare Programs Before and After Jail and Prison: Does Prison Cause Welfare Dependency?* (2006), available at http://www.chicagofed.org/digital_assets/publications/working_papers/2006/wp2006_13.pdf.

and 20% of White mothers.”¹⁵⁵ One author believes these disproportionate statistics are a product of “racially biased drug policies, racially biased enforcement of drug laws, and race and gender-based socioeconomic inequalities.”¹⁵⁶ These factors result in a disproportionate impact on Black and Latina mothers.¹⁵⁷ In five of the states examined by Allard, the majority of women subject to the food stamp ban were Black women.¹⁵⁸

The fact that women are denied food stamps is particularly significant because of the effect this can have on those women’s children.¹⁵⁹ Children are usually in the care of their mothers.¹⁶⁰ Allard explained that “research clearly shows that the well-being of children is intimately linked to the well-being of their parents.”¹⁶¹ Because the food stamp ban affects 92,000 women, it is not surprising that more than 135,000 children are also affected by the food stamp ban for drug offenders.¹⁶²

Statutorily, the fact that a child’s parent is a drug offender ineligible to receive food stamps should not affect that child’s ability to receive food stamps. According to the statute:

The amount of benefits otherwise required to be provided to a household under the food stamp program shall be determined by considering the individual to whom subsection (a) of this section applies not to be a member of such household, except that the income

155. ALLARD, *supra* note 148, at 19.

156. Finzen, *supra* note 59 (commenting on Patricia Allard’s study).

157. *Id.* In California specifically, of the 37,000 women affected by the food stamp ban, a little over 19,000 were White, more than 8,000 were Black, and about 8,000 were Hispanic. ALLARD, *supra* note 148, at 7 tbl.3. Although White women numerically lead the pack, when the percentage of total White population is considered in comparison to Blacks and Hispanics, the minority takes the cake on this statistic.

158. *Id.*

159. The impact of both malnutrition and incarceration on children has been studied in detail. Because the food stamp ban relates to both of these issues, an analogy may be drawn. See JEREMY TRAVIS ET AL., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY (rev. ed. 2005), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf (addressing the number of prisoners who are also parents and the resulting impact parental imprisonment has on children remaining at home); see also CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 1, 2–3 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf> (revealing that over half of prisoners in state and federal prison in 1999 reported having a minor child).

160. “The Bureau of Justice Statistics at the Department of Justice reports that 55% of state prisoners . . . and 63% of federal prisoners . . . have at least one child below the age of eighteen.” Finzen, *supra* note 59, at 311.

161. *Id.*

162. ALLARD, *supra* note 148, at 2.

and resources of the individual shall be considered to be income and resources of the household.¹⁶³

This means that, the status of one member of the household as a drug offender does not affect the allotment of food stamps to the entire household, unless such person contributes income. Yet, because any income brought into the household by the offender is considered when calculating the food stamp allotment, a negative impact can still be felt. The more income and resources a household has, the lower the food stamp allowance for that household.¹⁶⁴ On that same note, and perhaps more importantly, if an individual is living in a household and not bringing in any income, yet not counted as part of the household for food stamp purposes, a lower allocation will be given to a household that in actuality needs more. In essence, a lower food stamp ration must feed more people than intended.

The effect of having a drug offender parent who is ineligible for food stamps goes beyond the actual allotment of stamps. Despite the apparent efforts of the statute to prevent this, negative implications with respect to food stamps do flow from a parent's status as a drug offender—"the children inevitably suffer as well."¹⁶⁵ In fact, "[d]enying mothers welfare benefits at a time when they may most need them may prove to be exceedingly punitive to the children for whom they care."¹⁶⁶ The most obvious effect is the reduced amount of available food for the household. While the statute denies food stamps to drug offenders, the reality of the lower allotment is that less food must feed more people because most households end up splitting the allotment among the entire household. The negative effect on children and others in the household is that a food allotment intended to feed three children must be split four ways in order to feed their drug offender mother.¹⁶⁷ This lowers the amount of food for the children or other household members.

163. 21 U.S.C. § 862a(b) (2008) (discussing the effects on assistance and benefits for others).

164. *Fact Sheet on Resources, Income, and Benefits*, DEP'T OF AGRIC. FOOD AND NUTRITION SERV., http://www.fns.usda.gov/snap/applicant_recipients/fs_Res_Ben_Elig.htm (last updated Sept. 17, 2010) (detailing the eligibility calculations and the amount of benefits allotted to each household based on income).

165. Schrag, *supra* note 91.

166. ALLARD, *supra* note 148, at 13. In addition to the effects discussed above, children who reside in stressful family environments have a higher chance of developing both emotional and behavioral problems and often do poorly in school. *Id.*

167. Finzen, *supra* note 59, at 312; *see also* Sabra Micah Barnett, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 384 (2004). There is also an interesting aspect to the distribution of food stamps for minor children. Barnett, *supra*. Presumably, food stamps which are intended for a minor child are distributed to or collected by the

This limitation also raises the possibility that a parent would return to a life of crime in order to provide for his or her children.¹⁶⁸ Supporters of the ban would argue that the statutory language denies benefits to the mother only, while leaving the child's benefits unaffected, and as a result, a parent should not be forced to engage in illegal activities to provide for their families.¹⁶⁹ However, as explained above, a family with a drug offender member is forced to make do with less. For example, "the lifetime ban . . . would require a mother of three to make do with 75% of the benefits that an unaffected four-member family would receive."¹⁷⁰ The potential for returning to crime to make ends meet is a legitimate concern.

Additionally, these effects on women could also determine whether they regain or retain custody of their children. Arguably, if they cannot provide food and basic daily necessities for their children, there is an ever-present threat that the children could be removed from the home and placed in protective custody or foster care.¹⁷¹ If a mother is fit to be a parent in all other respects, except that she does not have the financial ability to buy food, the state should help that mother to provide for her children so that the family can remain intact. The state should be encouraging and assisting the togetherness of its families.¹⁷²

minor's guardian. If the child's guardian is a drug offender, then the person intended to be excluded from the food stamp program is actually the one collecting and spending the food stamps. Although the stamps are supposed to be spent for the benefit of the children, a child has little say in this process. And so, the drug offender is ineligible at the application phase, but if they have a child in the household that they are a guardian for, then realistically the offender is the one obtaining and using the food stamps. This seems to negate the legislative purpose of preventing drug offenders from getting food stamps in the first place. It also contributes to potential food stamp fraud if a child's guardian, convicted of welfare fraud, has access to the benefits.

168. Recent Legislation, *supra* note 61, at 983–84. "Me myself I have sold marijuana, I'm not a drug pusher, but I'm just tryin' to make ends—I'm tryin' to keep bread on the table—I have two babies'" (quoting a 28-year-old welfare mother living in a large Chicago public housing project). *Id.* at n.11.

169. Finzen, *supra* note 59, at 312.

170. Recent Legislation, *supra* note 61, at 983 n.11.

171. Keeping children out of the foster care system and in the custody of capable parents is especially important given the criminalizing effects of government-run environments, including the foster care system. Kimberley Marsh, *To What Extent Are Different Types of Care Environment Criminogenic?*, INTERNET J. OF CRIMINOLOGY (2009), <http://www.internetjournalofcriminology.com/Marsh%20-%20Criminogenic%20Care%20Environments.pdf>.

172. This is even truer given the fact that many of these children have likely spent several years apart from their parent while he or she was incarcerated for the drug offense. NANCY G. LA VIGNE ET. AL., *BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS*, URBAN INSTITUTE 1 (2008) (looking at the effects parental absence has on children's overall well-being).

E. *And the Fence Gets Taller: Barriers to Re-entry*

One of the most significant barriers facing formerly incarcerated drug offenders who are reentering society is the denial of food assistance.¹⁷³ The denial of food stamps contributes to drug relapse and recidivism. To ensure a greater likelihood of successful transition from incarceration to home life, and to produce the greatest chance for remaining out of the criminal justice system, the state must support ex-felons transitioning back into the community on multiple fronts. A significant impact can be made simply by lifting the lifetime ban from food stamps for these individuals. Doing so will promote drug- and crime-free behavior, and assist these people in their efforts to become law-abiding and contributing members of society.

i. Overcoming Drug Addiction

Many individuals convicted of drug crimes have addiction problems.¹⁷⁴ Denying food stamps to these individuals thwarts any effort to live a drug-free life.¹⁷⁵ In his signing statement for California's partial opt-out provision, Governor Schwarzenegger stated "[t]he challenge of overcoming a drug addiction is substantial and universally denying food stamp benefits to people with felony drug convictions has created additional obstacles to independent drug free living and increases the likelihood of re-offending behavior."¹⁷⁶ Yet, even with this recognition, California still denies food stamps to the great majority of drug offenders.

The time an individual spends in a drug treatment program is one of the most difficult times of an addict's life. The odds of successful treatment can be enhanced if the person's nutritional needs are being met.¹⁷⁷ Defenders of the federal ban may argue that denying food stamps encourages the offender to take responsibility for their situation, but "without assistance for the basic necessities of life, released prisoners are much more likely to turn to abusing drugs and illegal activities once again."¹⁷⁸ Ideally, assistance through welfare benefits is a temporary support, allowing individuals to fully recover from their addictions and then become

173. N.Y. STATE BAR ASS'N-SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY, 23 (2006), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11415>.

174. See MUMOLA, *supra* note 159 (mentioning the role addiction plays in the lives of criminals and low-income individuals). At the same time, I recognize that this is not true of all individuals convicted of drug offenses.

175. Recent Legislation, *supra* note 61, at 985.

176. Harvey, *supra* note 79.

177. Schrag, *supra* note 91.

178. Finzen, *supra* note 59; see also Recent Legislation, *supra* note 61, at 985.

self-sufficient.¹⁷⁹ Once the individual has overcome his or her addiction, the individual will have a better chance of finding and keeping a job, and avoiding further involvement in the criminal justice system.¹⁸⁰ The lifetime ban on food stamps for drug offenders “counterproductively act[s] as [a barrier] to these benefits, virtually (and sadly) ensuring failure for thousands of Americans affected by addiction.”¹⁸¹

All persons need food to survive. This is especially true of drug addicts who need, among other things, a nutritious diet to support a drug-free life.¹⁸² “Although providing welfare for people in high-risk communities will not solve the nation’s drug problem, denying public assistance to all drug felons seems certain to trap those most at risk in a downward spiral of repeat offending.”¹⁸³ The lifetime ban on food stamps for drug offenders should be lifted so as to help combat the addiction problems of these individuals as well as prevent future criminal behavior.¹⁸⁴

ii. Law-abiding Behavior Breaking the Cycle of Re-incarceration

When drug offenders are released from the criminal justice system, “the ‘mark of Cain’ remains with them . . . in the form of numerous and permanent disabilities that attach simply by virtue of their status as ex-felons or ex-convicts.”¹⁸⁵ Denial of food stamps is just one of the civil disabilities that drug offenders face upon their release from incarceration, placing obstacles on their path to law-abiding citizenship.¹⁸⁶ Denying food stamps to otherwise eligible individuals at a time when they, arguably, need them the most will serve only to feed the cycle of re-incarceration.

Involvement with drugs should be punished, but not with food prohibitions. There are laws in existence to punish, deter, and discourage drug

179. Rubinstein & Mukamal, *supra* note 53, at 42.

180. *Id.*

181. *Id.*

182. Additionally, many drug treatment facilities rely on an individual’s food stamp allotment to assist in feeding the patient while at the facility. Schrag, *supra* note 91.

183. Recent Legislation, *supra* note 61, at 987.

184. See Roberta Leis & David Rosenbloom, *The Road From Addiction Recovery to Productivity: Ending Discrimination Against People with Alcohol and Drug Problems*, 47 FAM. CT. REV. 274 (Apr. 2009), for recommendations on how to better assist people with alcohol or drug disease, including those with nonviolent drug convictions.

185. Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 136 (2007). “These disabilities ensure further stigma, deprivation, and despair to people affected by incarceration.” *Id.* at 138. Further, “[p]erhaps these disabilities are manifestations of what has been called the ‘persistent exclusionary impulse,’ that is, the tendency to permanently brand wrongdoers.” *Id.*

186. *Id.* at 137–38.

activity. Punishment, and any auxiliary forms of it, should be limited to prison. Even beyond this, civilized, progressive societies, such as the U.S., should not be punishing people with starvation. This is especially true if we expect these individuals to successfully reintegrate back into society.¹⁸⁷ Yet, denying food stamps “aggravate[s] existing hurdles to law abiding behavior.”¹⁸⁸

Most individuals released from prison cannot sustain themselves, especially poor ex-felons. Purchasing food requires the drug offender to have some form of monetary income, usually in the form of a job. However, ex-felons in general face significant barriers with respect to finding employment, let alone gainful employment, after release.¹⁸⁹ The stigma associated with having a prison record may prevent a great majority of individuals from attaining a job. In addition, individuals with addiction problems face further challenges in finding and keeping a job. In order for a drug offender to meet his or her basic needs without employment and a steady income, the drug offender is left with limited alternatives to unlawful behavior.¹⁹⁰

Supporters of the federal ban may argue that denying drug offenders food stamps sets an example for others pondering a life of drug crime.¹⁹¹ As the argument goes, individuals eligible for food stamps may consider their potential disqualification from the food stamp program before engaging in a crime involving illegal drugs.¹⁹² Denying food assistance is not an effective way of deterring drug use or drug crimes; in many cases it does just the opposite.¹⁹³

Denying released prisoners access to welfare benefits and food stamps puts ex-convicts that are trying to turn their lives around in an untenable position: individuals who want to live law-abiding lives find themselves with no choice but to turn to illegal activity once

187. “Offender reentry has become the umbrella term for various strategies that aim to successfully transition offenders from prison to the community through the coordinated efforts of criminal justice and social service agencies.” Lucken & Ponte, *supra* note 72, at 46–47.

188. *Id.*

189. Christine Neylon O’Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 992 (2007).

190. This assumes that the offender does not have the family or community support needed to provide for basic needs, which is often the case for most recently released drug offenders.

191. *Turner v. Glickman*, 207 F.3d 419, 425 (7th Cir. 2000).

192. *Id.*

193. Schrag, *supra* note 91 (“It’s the poor, who need the aid, who bear the brunt of the law’s effects; big-time dealers don’t need food stamps.”).

again because all legitimate doors of public support are closed to them.¹⁹⁴

Individuals who have a steady and dependable supply of food are more likely to succeed in their efforts to reintegrate into the community, and are more likely to become contributing members of society. When this basic need is met, the individual is better equipped to choose a drug- and crime-free life. Without support, in the form of food, housing, and basic daily necessities, a great majority of drug offenders will return to a life of crime.

iii. They're Food Stamps, Not a Private Chef

In looking cumulatively at the arguments presented in this Note, and considering the full opt-out provision for California, it is critical to keep in perspective what exactly this Note is advocating. We are talking about food stamps here, not a private, personal, professionally trained chef for each drug offender. Food stamps are a minimal welfare benefit. Household food stamp allotments do not stretch that far and they are not a glamorous way to obtain necessary sustenance. But, for someone who would otherwise go hungry (or return to criminal behavior to meet this need), food stamps are indispensable to survival.

Living on food stamps is very challenging.¹⁹⁵ Several government officials learned this lesson when they took a "Food Stamp Challenge." One New York City councilman found himself feeling "lousy" and "tired" after only a few days of living on food stamps.¹⁹⁶ His diet consisted of bread, corn, and ramen noodles, because that was all he could afford.¹⁹⁷ Of his experience, New York City Councilman Eric Gioia said: "[Y]ou realize pretty quickly that you can't make healthy choices on this budget. It's virtually impossible to live a healthy lifestyle."¹⁹⁸ California Representative Barbara Lee explained: "[F]ood stamp recipients live on \$21 a week, \$3 a day."¹⁹⁹ Because it is nearly impossible to survive on so little, many households end up turning to food pantries or soup kitchens when their monthly allotments run out.²⁰⁰ Advocating for food stamps only

194. Finzen, *supra* note 59, at 311.

195. See FOOD RESEARCH AND ACTION CENTER (FRAC), *supra* note 105 (indicating the difficulties encountered by congressional representatives who attempted to live on food stamps encountered).

196. *Id.* at 8.

197. *Id.*

198. *Id.* at 4.

199. *Id.*

200. FOOD RESEARCH AND ACTION CENTER (FRAC), *supra* note 105, at 3; see Lyndsey Layton, *Lawmakers Find \$21 a Week Doesn't Buy a Lot of Groceries*, WASH. POST, May 16, 2007, at A13, available at <http://www.washingtonpost.com/wp-dyn/content/article/>

scratches the surface of what released drug offenders need to successfully reintegrate into their families and communities in order to become contributing members of society. This Note simply advocates that the most basic need be provided to those financially eligible drug offenders.

F. *Money Talks: Food Stamps for Drug Felons Boosts the Economy*

Extending food stamp benefits to eligible individuals with a drug conviction history makes financial sense for California. It will bring needed federal dollars into the state. Little overhead would be associated with the increased applications for food stamps from those eligible, but previously excluded, drug offenders. Additionally, with food stamps being spent in local grocery stores and restaurants, the increased federal funds in the state will stimulate the economy. Finally, lifting the ban could result in significant monetary savings for California and its counties because it costs less to allow more people to receive food stamps than it does to fund alternative programs that these drug offenders might be involved in.²⁰¹

i. Increase in Federal Funds

The Food Stamp Program is a federal entitlement program, which means that funding is made available to supply all eligible persons with the benefit.²⁰² The food stamp benefit itself is completely federally funded.²⁰³ In addition, the federal government foots 50% of the state's bill for administrative costs.²⁰⁴ The remaining 50% of administrative costs are paid by the state (35%) and the individual counties (15%).²⁰⁵

2007/05/15/AR2007051501957.html (explaining that on a food stamp budget of only one dollar per meal, even House Representative Tim Ryan (D-Ohio) could not afford to buy a half-dozen eggs).

201. This statement is based on the fact that the funding for food stamps is paid for by the federal government, whereas other social service programs and food assistance programs are funded by the state, county, or charitable organizations.

202. TIA SHIMADA, CAL. FOOD POLICY ADVOCATES, LOST DOLLARS, EMPTY PLATES: THE IMPACT OF FOOD STAMP PARTICIPATION ON STATE AND LOCAL ECONOMIES I (2009), available at <http://www.cfpa.net/ldep/ldep2009.pdf>. This report includes charts showing the county Food Stamp Program participation and the fiscal impact. *Id.* at 6. Eligibility is reserved for households with gross incomes that fall under 130 percent of the poverty line. *Fact Sheet on Resources, Income, and Benefits*, DEP'T OF AGRIC. FOOD AND NUTRITION SERV., http://www.fns.usda.gov/snap/applicant_recipients/fs_Res_Ben_Elig.htm (last updated Sept. 17, 2010).

203. SHIMADA, *supra* note 202.

204. *Id.*

205. *Id.*

In 2009, almost 2.9 million Californians were receiving food stamp benefits.²⁰⁶ This amounts to more than \$420 million in monthly nutrition assistance.²⁰⁷ This amount could be higher. According to one figure, the drug conviction ban has cost California approximately \$2 million annually in federal food stamp assistance.²⁰⁸ Governor Schwarzenegger acknowledged the fiscal impact when he signed California's partial opt-out provision into law, stating: "Food stamp benefits are entirely federally funded, and AB 1796 will bring millions of dollars into the state's economy at little cost to the state."²⁰⁹

ii. Miniscule Operating Costs

Because the Food Stamp Program is federally funded, the only costs borne by the states and counties are half of the administrative costs.²¹⁰ The California Welfare Directors Association stated that "California's adjusted 2008 cost per case month is approximately \$24, close to the national average of \$19.49."²¹¹ Although it was not entirely clear what a "case" consists of," it is possible that one food stamp case could refer to

206. *Id.*

207. *Id.*

208. Harvey, *supra* note 79. This total reflects lost funds from denying food stamps to drug felons, as well as those who simply do not apply for the benefit. *Id.* Research shows that by opting out of the drug conviction ban, states such as California could add revenue instead of losing funds. For example, research conducted on the impact of lifting the ban in Missouri, showed the state could "potentially bring an additional \$18 million in federally-funded food stamp dollars into the State." MO. ASS'N FOR SOC. WELFARE, FACT SHEET ON SB 613, <http://www.masw.org/programs/documents/FACTSHEETSB613.pdf> (last visited June 4, 2011). The structure of the proposed Missouri opt-out stated that individuals would have to meet all requirements imposed by the court, which may include the successful completion of a drug or alcohol treatment program. *Id.* Once all of the requirements have been met, individuals who meet the eligibility standards would be free to seek food stamp benefits by applying for the program. *Id.*

209. Harvey, *supra* note 79.

210. SHIMADA, *supra* note 202; LEGIS. ANALYST'S OFFICE, ANALYSIS OF THE 2004-05 BUDGET BILL FOOD STAMPS PROGRAM (2004), available at http://www.lao.ca.gov/analysis_2004/health_ss/hss_20_foodstamps_anl04.htm. See Harvey, *supra* note 79 (indicating the need of California to get federal money by participating in the food stamp program).

211. CNTY. WELFARE DIRS. ASS'N OF CA., CALIFORNIA COUNTIES WORK TO IMPROVE FOOD STAMP ACCESS 3 (Apr. 2010), available at <http://www.cwda.org/downloads/publications/foodstamps/Food-Stamp-Fact-Sheet-with-Addendum-April-2010.pdf>. As explained by the County Welfare Directors Association (CWDA), the \$24 per month figure is calculated after making adjustments for Nutrition Education funding and SSI Cash-Out cases. *Id.* According to the fact sheet, once the administrative costs associated with those programs are excluded, the administrative costs associated with food stamps were reduced to just \$24 per month in 2008. *Id.*

an entire household.²¹² This is a reasonable assumption since food stamp allotments are determined on a household-by-household basis. Thus, this means that the average monthly \$24 per case cost could cover multiple people receiving food stamps in one household.²¹³ This adds up to about \$288 per year per household in costs to the state for administering the Food Stamp Program.²¹⁴

There is also a potential for administrative savings for counties who currently spend money checking food stamp usage and doing background checks on people applying for food stamps. If the federal ban is removed, the time and resources counties expend checking the backgrounds and criminal histories of financially eligible individuals to determine the existence of a drug offense would no longer be relevant to the application process; thereby, creating a measurable cost savings to the counties.

While there would be some additional administrative costs borne by states and counties as a result of adopting a full opt-out provision, these costs are miniscule in the grand scheme of things. The administrative costs shouldered by the state pale in comparison to the benefits returned, not only financially, but also to the individuals receiving the food stamps.

iii. Stimulate the Local Economy

Food stamps stimulate the state and local economy not only by bringing federal funds into the state, but also by freeing up household funds for other, taxable items.²¹⁵ Food stamps allow households to redistribute funds that would otherwise be spent on food.²¹⁶ This, in turn, means that more money is spent on sales-tax items, generating revenue for the state.²¹⁷ According to the USDA, for every dollar of federal food stamp expenditures, \$1.84 in economic activity is generated.²¹⁸ On a local level, food stamps are redeemed in local grocery stores, farmers markets, and restaurants, which support the local economy. “Food stamps are feder-

212. The document from which the “cost per case” figure came from did not define the term “case.” See *id.* It is also not clear from the website what constitutes a “case.”

213. Obviously, some households may consist of only one person, but a great majority of households on food stamps likely consist of at least two people. This results in a significantly lower cost per person per month for administering the Food Stamp Program.

214. This is because the federal government funds the Food Stamp Program. The only costs borne by the state or counties are the administrative costs. There is also an argument to be made that a good majority of people who qualify for food stamps also qualify for other welfare benefits. If the administrative costs for these various programs overlap in any way, then the administrative costs associated only with food stamps could potentially be even lower than estimated.

215. LEGIS. ANALYST’S OFFICE, *supra* note 210.

216. SHIMADA, *supra* note 202, at 2–3.

217. *Id.*

218. *Id.* at 14.

ally funded, and the benefits flow not only to low-income individuals, but also to the businesses that accept them and to local food producers.”²¹⁹ Essentially, more food stamps results in more federal money stimulating the local economy.

Anti-hunger activists have supported the economic argument as well, arguing that passing the [opt-out] bill would bring federal money into California that would boost the state’s economy.²²⁰ In fact, a Missouri campaign to pass an opt-out provision published materials which maintained that:

Food Stamps are recognized by the Federal Government as an excellent way to spur economic activity (every \$5 in food stamps results in \$9.20 in economic activity) because food stamp benefits would be spent at local grocery stores, thereby supporting our local businesses and local farmers.²²¹

Thus, with the passage of Senate Bill 613, Missouri could infuse millions more in federal food stamp dollars into local economies and spur millions more in economic activity across the State.²²² These same principles support a full opt-out provision in California.

As calculated by California Food Policy Advocates, “if 100 percent of eligible individuals participated in the Food Stamp Program, California would receive an estimated \$3.7 billion in additional federal benefits each year. Those benefits would generate an additional \$6.9 billion in annual statewide economic activity.”²²³ This shows the extent of the economic activity that can be generated by increased food stamp access. By fully opting out of the federal ban, California would get the valuable return of stimulated economic activity with very little output in the form of administrative costs.

219. Gustafson, *supra* note 124, at 672 n.135.

220. Harvey, *supra* note 79. As one activist put it, “[i]t provides commerce in our cities and communities, which brings dollars into the economy of the state and into the grocery companies up and down the state.” *Id.*

221. MO. ASS’N FOR SOC. WELFARE, *supra* note 208.

222. *Id.* For an understanding of the fiscal impact of eliminating the food stamp ban see MO. ASS’N FOR SOC. WELFARE, SENATE BILL 613: MODIFIES THE ELIGIBILITY REQUIREMENTS FOR FOOD STAMP ASSISTANCE, <http://www.masw.org/programs/documents/maswNUMBERSHEETSB613.pdf> (last visited June 4, 2011). The document explains that allowing individuals with drug convictions to participate in the food stamp program will increase economic activity in Missouri. *Id.*

223. SHIMADA, *supra* note 202, at 3 (explaining that increased activity in the food stamp program will also increase the fiscal benefits to states and counties).

iv. Cost Savings

Removing the drug conviction ban on food stamps is a fiscally sound decision for California and its individual counties. From the foregoing, it is clear that the significant economic benefit of lifting the ban cannot be ignored. In essence the cost of alternate programs for drug offenders, are greater than allowing them access to food stamps.

When drug offenders are denied access to food stamps, they likely receive welfare support from some other government programs.²²⁴ This undermines the proffered reason for banning them from food stamps in the first place, and could potentially cost the state. Alternatively, and arguably worse for the state, these drug offenders could end up back in the criminal justice system. Without governmental support in the form of food assistance, many drug offenders will not be able to maintain a life free of criminal behavior. Their return to the criminal justice system, and particularly prison, costs the state much more than providing food stamps.²²⁵ In fiscal year 2008–2009, it cost an average of \$47,000 per year to house one inmate in a California prison.²²⁶ In stark contrast, one estimate indicates that it costs California only about \$288 per year, per case, to administer the Food Stamp Program.²²⁷ If allowing drug felons to receive food stamps would reduce recidivism and future incarceration, the Food Stamp Program would quickly pay for itself. Instead of housing one person in prison, 163 food stamp cases could be paid for. These figures show the significant cost savings to the state by allowing more people to access food stamps rather than housing them in prison.²²⁸

224. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 99, at 1.

225. Compare CNTY. WELFARE DIRS. ASS'N OF CA., *supra* note 211 (stating the Cost to Administer California Food Stamps), with *Criminal Justice and Judiciary: How Much Does it Cost to Incarcerate an Inmate*, LEGIS. ANALYST'S OFFICE, http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3 (last visited June 4, 2011) [hereinafter *Criminal Justice and Judiciary*] (monetizing the cost of incarceration).

226. *Criminal Justice and Judiciary*, *supra* note 225.

227. CNTY. WELFARE DIRS. ASS'N OF CA., *supra* note 211 (stating that adjusted 2008 dollar cost per month, per case, is twenty-four dollars).

228. There are additional financial savings arguments that could be made. For example, as one scholar pointed out:

Given the zeal with which drug laws are currently enforced, it is an open question whether the [lifetime ban] provision will be a money-saving device, as any savings that the government will realize by denying welfare benefits to drug offenders will in all probability be more than offset by the increased costs to the criminal justice system likely to result from increased drug use among the urban poor.

Recent Legislation, *supra* note 61, at 988.

V. PURGING THE BAN: NEW FOOD STAMP LEGISLATION FOR CALIFORNIA

To solve the problem examined in this Note, California must adopt a provision fully opting out of the federal lifetime ban on receiving food stamps by individuals convicted of drug offenses. A full opt-out measure would restore food stamp benefits to all eligible individuals. To do this, Legislators must first recognize and agree that the partial opt-out provision is not sufficient, and should be replaced. In deciding on statutory language, Legislators should consider alternative approaches to addressing the problem. Examining what other states have done in this arena can also facilitate the process.²²⁹ Finally, legislators must recognize, appreciate, and overcome the partisan biases involved in the political process. They must look beyond party lines to adopt a bipartisan measure that reinstates the food stamp rights of eligible drug offenders.

A. *Recognizing the Problem*

The preceding portions of this Note have examined the negative consequences that flow from California's partial opt-out provision. The potential benefits to the state and counties of adopting a full opt-out provision have also been offered. In light of these submissions, Legislators should reform California's current provision denying food stamps to the majority of drug offenders. There should be an even greater desire to amend the ban because it involves the basic human need of food, and everyone should have access to [food] as part of our common humanity. If this is not convincing:

[T]hen Legislators should consider the long-term effects that these laws will have on crime and the nation While a congressman's support of laws that restrict housing, welfare, access to jobs, and loans for education to ex-offenders may help the congressman appear tough on crime in the short run, in the long run the candidate's support for collateral consequences laws will only serve to allow crime to continue.²³⁰

Despite the need for change, full opt-out legislation has been vetoed multiple times in California.²³¹ As this Note shows, it is time for Califor-

229. See ALLARD, *supra* note 148 at 7, tbl.3 (listing how each state handles the food stamp ban); LEVI & APPEL, *supra* note 90 (discussing the opt-out initiatives of various states).

230. Finzen, *supra* note 59, at 323.

231. CAL. FOOD POLICY ADVOCATES, KNOCKING DOWN BARRIERS TO FOOD ASSISTANCE: A SHORT PROGRESS REPORT FOR CALIFORNIA 6 (2004), available at http://www.cfpa.net/forum_materials/2004/barriers.pdf (explaining that such legislation was vetoed in 1999 followed by subsequent vetoes in both 2001 and 2002).

nia to recognize the need for change, and take steps to eliminate the food stamp ban for drug offenders.²³² As New York City Councilman Gioia explained, “[w]e could end hunger in New York City and America by taking some simple steps, but what we have to do is build political will, show politicians of all stripes that this is something people care about, that this is a real issue and a solvable problem.”²³³ California should heed this advice.

B. *Full Opt-Out Provision for California*

The ultimate success would be for California to fully opt out of the federal lifetime ban on food stamps for drug offenders. Assembly Bill 1756 achieves this goal. This bill, proposed by Assemblywoman Sandré Swanson, would fully eliminate the federal ban on access to food stamps for drug offenders.²³⁴ AB 1756 has been held up in the Appropriations Committee of the Assembly, which for all intents and purposes, means that the bill is dead.²³⁵ Previous versions of similar bills have also met the same fate.²³⁶

232. With respect to prohibited collateral sanctions, the American Bar Association Criminal Justice section states that:

[I]neligibility to participate in government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security; provided, however, that a person may be suspended from participation in such a program to the extent that the purposes of the program are reasonably being served by an alternative program.

A.B.A. STANDARDS FOR CRIM. JUST., COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 19-2.6(e) (3d. ed. 2004), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_blk.html#1.1.

233. FOOD RESEARCH AND ACTION CENTER (FRAC), *supra* note 105, at 5.

234. AB 1756, 2009–10 Reg. Sess. (Cal. 2010), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1751-1800/ab_1756_bill_20100405_amended_asm_v98.pdf. AB 1756 states: “California opts out of the provisions of [s]ection 115(a)(2) of Public Law 104-193 (21 U.S.C. Sec. 862a(a)(2)). A convicted drug felon shall be eligible to receive food stamps under this section.” *Id.* It goes on to strike the qualifying language of section 18901.3 of the Welfare and Institutions Code. *Id.*

235. AB 1756, AROUNDTHECAPITOL.COM, http://www.aroundthecapitol.com/Bills/AB_1756/20092010/ (last visited June 5, 2011). The Appropriations Committee reviews any bill that has to do with spending state funds. As one politician involved with AB 1756 indicated, this Committee is known for considering only the front costs, such as man hours involved rather than looking at the big-picture potential cost savings over time. Telephone interview with Opio Dupre, Senior Consultant for Assemblywoman Sandré Swanson (Nov. 8, 2010).

236. To learn more about previous versions of similar bills, see CAL. HUNGER ACTION COALITION, HISTORY OF AB 1796: NUTRITION SUPPORT FOR FAMILIES IN RECOVERY (2008), http://www.hungeraction.net/pdf_files/AB%201796History.pdf.

Yet, a measure such as AB 1756 would achieve the goals of this Note, and should be proposed in the Assembly once again.²³⁷ Proposing the bill with comprehensive data and arguments that support passage might be the extra oomph that was needed for Legislators to see the value of a full opt-out provision.²³⁸

C. *An Alternative Approach*

There are alternative approaches to the problems exacerbated by the federal lifetime ban on food stamps for drug offenders. Although this is not the ideal situation for California's drug offenders, even an alternative approach would make progress on getting food back on the tables of more drug offenders. Two alternatives to a full opt-out provision are offered here.

One potential alternative is an amendment in which only those individuals with some sympathetic characteristic would be exempt from the ban. For example, individuals with mental illnesses or women with children might garner more support rather a "regular" drug offender. As discussed above, many scholars and advocates have researched the effects of the food stamp ban on women and their children which could support such a proposal to restore food stamps to this group of offenders.

A second alternative is to create a tiered system of exclusion from food stamps for drug offenders, similar to California's Three Strikes law.²³⁹ This tiered level of punishment is also used in 7 U.S.C. §2015(d)(1)(C), which addresses welfare fraud.²⁴⁰ As previously discussed, individuals convicted of certain types of welfare fraud get three chances before they are permanently denied welfare benefits. If that scheme is applied to the denial process for drug offenders, individuals would get three chances to continue receiving food stamps before being denied them for life. If they are convicted three times of a drug offense, *then* their food stamps would be permanently revoked. After a first offense, they would be banned from the program for one year. After two offenses, they would face a two-year ban. Although this is not ideal, it is recognition that any pro-

237. If such a bill were proposed during the next session of the Assembly in January 2011, it would be the fifth run of such a bill.

238. "Let us not reserve these better angels only for natural disasters, leaving our deepest problems to petty political fights. Let us instead be true to our spirit, facing facts, coming together, bringing hope, moving forward." Devroy, *supra* note 50 (quoting President Clinton's recount of Americans efforts to aid each other during natural disasters in 1994).

239. *California's New Three-Strikes Law: Benefits, Costs, and Alternatives*, Research Brief, RAND CORP., http://www.rand.org/pubs/research_briefs/RB4009/index1.html (last visited May 29, 2011).

240. 7 U.S.C. § 2015(d)(1)(C) (2006).

gress is better than no progress at all. This program would support the successful reintegration of drug offenders much better than the lifetime ban presently used. It allows someone to make a second mistake without losing everything, which is important. This is especially true when dealing with drug-addicted offenders, since most first attempts at kicking a habit result in relapse at some point along the recovery process.²⁴¹

While such a bill may garner more support from both sides of the aisle, the stark reality is that this would likely be the death-knell for the regular, run-of-the-mill drug offender. Additionally, a narrowed bill would likely disproportionately affect males. If males are eventually left as the only category of felony drug offenders that still fall under the federal ban, there is no realistic hope that a bill focusing just on them would pass. This is why supporters of the ban removal must remain adamant and persistent in proposing bills similar to AB 1756, which advocate for a fell-swoop removal of the ban.²⁴²

D. *Getting Everyone on-Board*

The final element for ensuring movement in this area is to draft legislation attractive to Legislators, counties, and other involved parties. The best way to do this is find the reasons for passing a full opt-out provision that are most appealing to each group, and then formulate arguments to convince each group that a full opt-out benefits everyone. For example, the cost saving perspective discussed previously might be most convincing for Republican government officials.

Partisanship was partly to blame for the failure of previous attempts at passing a full opt-out provision.²⁴³ This proved true with AB 1756 as well; Democrats overwhelmingly supported the bill, while Republicans did not. While the tides may turn with a new Democratic Governor in

241. See *Principles of Drug Addiction Treatment*, NAT'L INST. ON DRUG ABUSE, <http://www.nida.nih.gov/podat/faqs.html> (last visited June 4, 2011) (discussing the high relapse rate of drug addicts).

242. Legislators who are serious about making a change to California's partial opt-out provision should undertake an examination of other states that have fully opted out of the federal ban. "State Legislatures continue to reconsider their implementation of the ban, with varied outcomes. For example, in New Mexico, House Bill 11, which passed in 2002, sponsored by Representative Joe Thompson (R-Albuquerque), waives the federal ban on benefits for drug offenders who have successfully completed their sentences." LEVI & APPEL, *supra* note 90. Looking not only at other states' statutory language but also legislative history and the reasons for passing a full opt-out provision, would be exponentially beneficial for California Legislators attempting to pass a bill similar to AB 1756. Although this Note does not embark on this task, it would be beneficial to study what made particular language successful in other states, and allowed the state to adopt the full opt-out provision.

243. Misinformation and or lack of information are also a contributing factor.

California,²⁴⁴ hopefully this Note has presented information and arguments that will garner bipartisan support for a full opt-out provision.

VI. CONCLUSION

The federal lifetime ban on food stamps for convicted drug offenders is antithetical to the original purpose of the Food Stamp Program. States have the ability to fully opt out of the federal lifetime ban on food stamps for drug offenders. California's partial opt-out continues to categorically deny food stamps to the vast majority of drug offenders. Until California fully opts out of the federal ban, needless hunger in California will persist.

There are a multitude of reasons for California's Legislators to fully opt out of the federal food stamp ban. The ban creates insurmountable barriers to individuals who most need the food assistance. The additional barriers can lead not only to additional poverty and hunger problems, but also to re-incarceration. Removing the ban is also a fiscally conservative move because the savings realized by the state in providing food stamps to drug offenders far exceeds the expenses associated with re-incarcerating them. Finally, eliminating the ban would increase the flow of federal dollars into the state, and thereby stimulate both the local and statewide economies. California should no longer deny otherwise eligible drug offenders necessary food stamps.

244. Jerry Brown was elected as the new California Governor on November 4, 2010.