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## **Work Expectations and the Able-Bodied Adult: Myths and Realities in Food Stamp Reform**

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**WORK EXPECTATIONS AND THE ABLE-BODIED  
ADULT:  
MYTHS AND REALITIES IN FOOD STAMP REFORM**

ELIZABETH G. PATTERSON†

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## I. INTRODUCTION

Since at least 2012, Republican budget proposals have targeted the Supplemental Nutrition Assistance Program (“SNAP”), formerly known as Food Stamps,<sup>1</sup> for massive cuts in funding.<sup>2</sup> At its inception in the 1960s,<sup>3</sup> and for a number of years thereafter, this program received broad bipartisan support<sup>4</sup> and was regarded as one of the most vital strands in the social safety net.<sup>5</sup> It was not until the increasing size and cost of the program coincided with an increase in the conservatism of congressional Republicans that

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1. *What Is SNAP?*, GETTINGSNAP.ORG, <http://gettingfoodstamps.org/whatisnap.html> (last visited Mar. 19, 2018) (“SNAP, the Supplemental Nutrition Assistance Program, is the program formerly known as food stamps.”). The program continues to be popularly referred to as “Food Stamps,” and the terms “SNAP” and “Food Stamps” will be used interchangeably herein.

2. See, e.g., Caitlin Dewey, *GOP Proposes Stricter Work Requirements for Food Stamp Recipients, a Step Toward a Major Overhaul of the Social Safety Net*, WASH. POST: WONKBLOG (Apr. 12, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/04/12/gop-proposes-stricter-work-requirements-for-food-stamp-recipients-a-step-toward-a-major-overhaul-of-the-social-safety-net/?utm\\_term=.801172d8c02c](https://www.washingtonpost.com/news/wonk/wp/2018/04/12/gop-proposes-stricter-work-requirements-for-food-stamp-recipients-a-step-toward-a-major-overhaul-of-the-social-safety-net/?utm_term=.801172d8c02c); Dorothy Rosenbaum & Brynne Keith-Jennings, *House 2017 Budget Plan Would Slash SNAP by More Than \$150 Billion over Ten Years*, CTR. ON BUDGET & POLY PRIORITYES 1 (Mar. 21, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/3-21-16snap.pdf>.

3. Throughout this article, other than the description of the New Deal Food Stamp Program of 1939–1943, see *infra* notes 26–27 and accompanying text, all references to Food Stamps, SNAP, or federal food assistance, are to the modern version of the program initiated as part of the War on Poverty. Initially established by executive order as a pilot program in 1961, the Food Stamp Program was made permanent by the Food Stamp Act of 1964. Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (current version at 7 U.S.C. § 2011 (2012)). The name of the program was changed from Food Stamps to SNAP in the Food, Conservation, and Energy Act of 2008, partly due to the phase-out of food coupons in favor of electronic benefit transfer (EBT) cards as the mechanism for making benefits available to the recipient. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, sec. 4001, § (a), 122 Stat. 1651, 1853. However, the term “Food Stamps” continues to be frequently used to refer to the program.

4. JAMES C. OHLS & HAROLD BEEBOUT, *THE FOOD STAMP PROGRAM: DESIGN TRADEOFFS, POLICY, AND IMPACTS* 158–60 (1993).

5. Charles Lane, Opinion, *How Liberals Undermine the Food Stamp Program*, WASH. POST (Feb. 15, 2017), [https://www.washingtonpost.com/opinions/how-liberals-undermine-the-food-stamp-program/2017/02/15/ab332840-f3af-11e6-b9c9-e83fce42fb61\\_story.html?utm\\_term=.98503c577122](https://www.washingtonpost.com/opinions/how-liberals-undermine-the-food-stamp-program/2017/02/15/ab332840-f3af-11e6-b9c9-e83fce42fb61_story.html?utm_term=.98503c577122).

SNAP became an object of partisan conflict.<sup>6</sup> Thereafter, during periods of Republican ascendancy in one or both branches of Congress—first during the welfare reform era of the late 1990s, and again at the tail end of the Great Recession—legislative proposals relating to SNAP have focused on curtailing the size and cost of the program.<sup>7</sup>

These reform proposals have targeted various aspects of SNAP including eligibility criteria, benefit amounts, and types of food items that could be purchased.<sup>8</sup> Commonly, they also sought to strengthen the link between receipt of food assistance and participation in work or work-related activities.<sup>9</sup> Work requirements in public assistance programs reflect a core belief in American culture: that individuals are responsible for meeting their own needs and those of their families.<sup>10</sup> Sustenance is provided by the public only to persons who are not able to provide for themselves, either because they are unable or not expected to work, or because their job pays too little to meet their families' basic needs.<sup>11</sup> It is not unusual for non-contributory<sup>12</sup> public assistance programs to incorporate provisions intended to support the primacy of work as the source of sustenance.<sup>13</sup> For instance, benefits may be denied to persons who policymakers believe could and should be working in order to assure that public aid does not

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6. *Supplemental Nutrition Assistance Program (SNAP): A Short History of SNAP*, U.S. DEP'T AGRIC., <https://www.fns.usda.gov/snap/short-history-snap> (last updated Nov. 28, 2017) [hereinafter *Short History*].

7. *See id.*

8. *Id.*

9. *See id.* Provisions of this sort will be referred to herein as “work requirements,” whether the required activity is work or some activity related to work such as registration, training, or job search. The current provision limiting program participation to three months for non-working ABAWDs (able-bodied adults without dependents) will also be referred to herein as a “work requirement” rather than as a “time limit.”

10. *See id.*

11. *Supplemental Nutrition Assistance Program (SNAP): Facts About SNAP*, U.S. DEP'T AGRIC., <https://www.fns.usda.gov/snap/facts-about-snap> (last updated Sept. 13, 2017).

12. Lillian Liu, *Special Study #8: Foreign Social Security Developments Prior to the Social Security Act*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/pre1935.html> (last visited Mar. 24, 2018). A non-contributory aid program is one which is funded through general revenues rather than by contributions from the recipient of aid, his employer, or other surrogate. *Id.* Examples of contributory programs are Social Security and Unemployment Compensation.

13. HEATHER HAHN ET AL., WORK REQUIREMENTS IN SOCIAL SAFETY NET PROGRAMS I (2017), [https://www.urban.org/sites/default/files/publication/95566/work-requirements-social-safety-net-programs\\_4.pdf](https://www.urban.org/sites/default/files/publication/95566/work-requirements-social-safety-net-programs_4.pdf).

become a substitute for earned income among persons capable of self-support.<sup>14</sup> However, current SNAP reform proposals are disconnected from any such legitimating purpose, and the proposals seem solely motivated by a desire to cut costs by removing from the program persons unfortunate enough to be unemployed or under-employed.<sup>15</sup>

Work requirements have been part of the Food Stamp and SNAP programs since 1971.<sup>16</sup> Legislation enacted in that year requires that Food Stamp recipients between the ages of 18 and 65 register for work and actively seek employment.<sup>17</sup> Disabled persons, caregivers for young and disabled children, and full-time students are exempted from the requirement.<sup>18</sup> In 1996, a second work requirement was enacted, framed as a three-month time limit on receipt of aid by non-working adults who were able-bodied and had no dependents living with them (“ABAWDs”).<sup>19</sup> This ABAWD work requirement could be waived by states in areas experiencing high unemployment, a provision that was widely utilized during the Great Recession.<sup>20</sup>

Proposals put forward by congressional Republicans, since gaining control of the House in 2011, have sought to make the existing work requirements more stringent.<sup>21</sup> Most of the proposals have focused on increasing the impact of the ABAWD work requirement; for example, by expanding the population to which the requirement applies, reducing the three-month period of eligibility, or limiting states’ ability to waive the requirement in hardship cases or in times of economic downturn.<sup>22</sup> All of these proposals would result in denial of food assistance to many

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14. *Id.*

15. See generally Emily Atkin, *The Republican Threat to Food Stamps in 2018*, NEW REPUBLIC (Jan. 4, 2018), <https://newrepublic.com/article/146448/republican-threat-food-stamps-2018>.

16. *Short History*, *supra* note 6.

17. Act of Jan. 11, 1971, Pub. L. No. 91-671, 84 Stat. 2048, 2050 (amending the Food Stamp Act of 1964).

18. *Id.*

19. *Short History*, *supra* note 6.

20. Ed Bolen & Stacey Dean, *Waivers Add Key State Flexibility to SNAP’s Three-Month Time Limit*, CTR. ON BUDGET & POL’Y PRIORITIES 4–5 (Feb 6, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/3-24-17fa.pdf>.

21. See generally Atkin, *supra* note 15.

22. Rosenbaum & Keith-Jennings, *supra* note 2, at 1 n.2.

thousands of needy persons,<sup>23</sup> further undermining the stated purpose of the program to alleviate hunger and malnutrition among low-income households.

This article will examine recent proposals to expand SNAP's work requirements and increase their exclusionary effects. Initially, the creation and evolution of the Food Stamp Program will be reviewed, with emphasis on how competing values were accommodated and how program objectives evolved to reflect changing economic conditions and changing social philosophies. Thereafter, existing and proposed work requirements will be assessed with reference to the characteristics of the persons subject to the requirements and the marketplace within which those persons search for jobs. The article will demonstrate how the practical effects of the ABAWD requirement, which are exacerbated by the proposed changes, create serious barriers to achievement of the stated goals of SNAP. Suggestions will be made for alternative reforms that would retain work requirements, while aligning them more closely with the goals of the program.

## II. EVOLUTION OF THE FOOD STAMP PROGRAM

### A. *The New Deal Program*

The original Food Stamp Program was created in the Depression Era of the 1930s, as a part of the New Deal.<sup>24</sup> The purpose of the program was to link two national crises—urban hunger and dwindling markets for farm produce—in a way that would alleviate both.<sup>25</sup> Program architect Milo Perkins stated, “We got a picture of a gorge, with farm surpluses on one cliff and under-nourished city folks with outstretched hands on the other. We set out to find a practical way to build a bridge across that chasm.”<sup>26</sup> The program they came up with allowed needy persons to purchase coupons that could be exchanged for food items designated by the federal government as surplus.<sup>27</sup>

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23. *Id.* at 1.

24. *The History of SNAP*, SNAP TO HEALTH, <https://www.snapttohealth.org/snap/the-history-of-snap> (last visited Mar. 12, 2018).

25. *Id.*

26. *Id.*

27. *Id.* Eligible persons could purchase orange coupons, usable for any food purchase, at full price. *Short History*, *supra* note 6. For every \$2 worth of orange coupons purchased, the person received \$1 worth of blue coupons, usable to purchase the

*B. The War on Poverty and the Focus on Access*

The New Deal Era Food Stamp Program ended in 1943 when agricultural surpluses were diverted to the war effort.<sup>28</sup> However, this early program provided a model for renewed federal efforts to fight hunger and malnutrition as a part of the War on Poverty of the 1960s.<sup>29</sup> Alleviation of hunger and nutritional deficiencies was, as before, a primary motivating purpose for the revival of the Food Stamp Program.<sup>30</sup> Although the highly visible deprivations of the Depression years were a thing of the past, there was a growing awareness that hunger and malnutrition remained widespread, even in times of a robust national economy.<sup>31</sup> Similarly, the specific issues related to the agricultural economy that had prompted creation of the Depression Era program had faded, but had been replaced by other economic needs associated with the evolving economy of food production and distribution.<sup>32</sup> Consequently, the Food Stamp Program continued to serve both humanitarian and economic goals.<sup>33</sup>

The Food Stamp Act of 1964 addressed these goals by authorizing the issuance of federally financed food coupons that could be purchased by needy persons at discounted prices and exchanged for a wide variety of food items at participating retail

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designated surplus items. *Id.* The program was available nationally at the option of local governments, and at its peak in 1942 it served about half of U.S. counties. *Id.*

28. *The History of SNAP*, *supra* note 24.

29. *Id.* Again, the 1960s version of the program has as a corollary purpose the strengthening of the agricultural economy. *Id.*

30. *Id.*

31. OHLS & BEEBOUT, *supra* note 4, at 129.

32. *See generally id.*

33. *See* Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703 (current version at 7 U.S.C. § 2011 (2012)). Declaration of Policy:

It is hereby declared to be the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized . . . to the maximum extent practicable to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that increased utilization of foods in establishing and maintaining adequate national levels of nutrition will tend to cause the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. . . .

*Id.*

outlets.<sup>34</sup> In order to make the program more accessible to needier families, the purchase price for coupons varied according to household income.<sup>35</sup> However, the purchase requirement continued to limit participation by the most needy, and it was ultimately eliminated in 1977.<sup>36</sup>

During the first thirty years after enactment of the revived Food Stamp Program, and consistently with the twin goals of providing nutritional support to the needy and strengthening local and national economies, legislators and administrators took a variety of actions aimed at expanding access to the program by needy persons.<sup>37</sup> In addition to eliminating the purchase requirement, congressional amendments during this period required states to make the program available in all of their political subdivisions and to conduct outreach activities to identify and enroll eligible persons using expedited enrollment procedures.<sup>38</sup>

However, the Food Stamp Program had been from the beginning subject to the tensions, inherent in any public benefit program, among the competing values of compassion for the needy, personal responsibility, and stewardship of public funds.<sup>39</sup> This tension was increased as the initial emphasis on compassion led to the gradual transformation of the program from a geographically limited one, requiring financial participation by the beneficiary, to a nationwide entitlement to assistance for any household meeting eligibility criteria, based on income and assets.<sup>40</sup> At all times a central purpose of the program has been

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34. *Short History*, *supra* note 6.

35. *Id.* The basic eligibility unit for receipt of SNAP benefits is the “household.” RANDY ALISON AUSSENBERG, CONG. RESEARCH SERV., R42505, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP): A PRIMER ON ELIGIBILITY AND BENEFITS 3 (2014). In general, a household is made up of one or more persons who live together and customarily purchase and prepare food together. *Id.* The income, assets, and expenses of all members of the household are aggregated for purposes of determining matters such as eligibility and benefit levels. *Id.*

36. *Short History*, *supra* note 6.

37. *Id.*

38. *Id.* Cutbacks enacted during the Reagan administration reversed the federal position on outreach, prohibiting the use of federal funds for this purpose. *Id.* However, this prohibition was reversed and federal funds were specifically provided for outreach in legislation enacted in 1988 and 1990. *Id.*

39. See DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 23–25 (1988); OHLS & BEEBOUT, *supra* note 4, at 7–12.

40. OHLS & BEEBOUT, *supra* note 4, at 14.



assurance of a basic level of nutritional support for low-income households.<sup>41</sup>

*C. Early Efforts to Control Costs and Program Size*

Almost from its inception, participation in and cost of the Food Stamp Program exceeded expectations.<sup>42</sup> As a result, the compassionate impulse that had guided initial development of the program was increasingly subjected to limitations aimed at controlling costs.<sup>43</sup>

Cost control measures adopted during the 1970s and 1980s were carefully crafted so as not to undermine achievement of the program's economic and humanitarian goals.<sup>44</sup> Some of these measures focused on improving program efficiency.<sup>45</sup> Among these was the move from using coupons to electronic benefit transfer ("EBT") cards as the mechanism for providing benefits to program participants, reducing opportunities for fraud while also improving administrative efficiency.<sup>46</sup>

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41. 7 U.S.C. § 2011 (2012) (originally enacted as Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703). Equally important collateral purposes, reflecting conditions in the national economy, have included providing a market for the nation's agricultural products, promoting the orderly marketing and distribution of foods, and stabilizing and stimulating the economy during recessionary cycles. *Id.*; *Specialty Crop and Nutrition Programs: Hearing on 2013 Farm Bill Before the Subcomm. on Nutrition & Horticulture of the H. Comm. on Agric.*, 112th Cong. 1 (2012) [hereinafter *Hearing*] (statement of Ron Haskins, Senior Fellow, Brookings Institute), <https://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/hearings/haskins120508.pdf>. As it has become increasingly apparent that many of the jobs generated by the economy in the modern era are not capable of meeting workers' subsistence needs, the Food Stamp Program has come to be seen also as an important source of income support for the working poor. *Hearing, supra*. See generally Robert Greenstein & Jocelyn Guyer, *Supporting Work Through Medicaid and Food Stamps*, in *THE NEW WORLD OF WELFARE* 335 (Rebecca M. Blank & Ron Haskins eds., 2001).

42. *Short History, supra* note 6. When the Food Stamp Act was passed in 1964, the Department of Agriculture estimated that participation would eventually reach four million. *Id.* This threshold was reached in 1970, and participation had climbed to 15 million by 1974. The requirement of financial participation by the recipient of aid was eliminated in 1979. *Id.* In that year participation surpassed 20 million. *Id.* By 1994, Food Stamps were being received by 28 million households. *Id.* Participation numbers dipped after the ABAWD work requirement was adopted in 1996, but continued to rise thereafter, and stood at 26 million in 2006, right before the official beginning of the Great Recession. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

Measures to reduce the number of program participants were focused on removing from the program persons who were not truly needy, in that they were perceived to be capable of self-support.<sup>47</sup> To this end, provisions were adopted in 1971 and 1977 excluding from the program certain groups whose poverty was regarded as “voluntary.”<sup>48</sup> This category included students from non-poor families, persons who quit their jobs without good cause, and “hippies.”<sup>49</sup>

In an attempt to identify and exclude employable persons who did not fit into these categories, the 1971 amendment required program participants to register and make themselves available for work.<sup>50</sup> Applicable to most able-bodied adults (with or without dependents), this original Food Stamp work requirement mandated that they accept a suitable job if offered and fulfill other requirements, such as job search or job preparation that might be imposed by the state agency.<sup>51</sup> People who failed to comply were excluded from receiving benefits.<sup>52</sup> Because this requirement excluded from the program only persons who refused to register or to accept a job when offered, it presented no threat that needy persons who were not in fact capable of self-support would be excluded.<sup>53</sup>

#### *D. The ABAWD Rule and the Presumption of Ineligibility*

It was not until 1996 that the focus on exclusion of persons capable of self-support assumed primacy over assuring that needy persons had access to adequate nutrition.<sup>54</sup> In that year, a second

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47. Act of Jan. 11, 1971, Pub. L. No. 91-671, § 4, 84 Stat. 2048, 2050; *Short History*, *supra* note 6.

48. Act of Jan. 11, 1971, § 4, 84 Stat. at 2050; Food Agriculture Act of 1977, Pub. L. No. 95-113, sec. 1301, § 6, 91 Stat. 913, 964–65; *see also Short History*, *supra* note 6.

49. Act of Jan. 11, 1971, § 2, 84 Stat. at 2048. The provision aimed at excluding hippies from the program defined “households” as eligible for Food Stamps as groups of individuals who were all related to one another. *Id.*; *see also* 116 CONG. REC. 42,020 (1970) (statement of Rep. Pucinski) (“[A]ll of these hippies and yuppies down there . . . who are getting food stamps, down in the communes and what not. This legislation clears that up.”). This provision was held unconstitutional in *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 529–31 (1973).

50. Act of Jan. 11, 1971, § 4, 84 Stat. at 2050

51. *Id.*

52. *Id.*

53. *Id.*

54. *Compare id.*, with Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2129, 2131, 2133–34. *See generally*

work requirement was added to the program—this one stringent, enforceable, and not limited to persons who were voluntarily foregoing opportunities to work.<sup>55</sup> Under this requirement, any able-bodied adult without dependents (“ABAWD”) who is not working or participating in an approved workfare or training program can receive Food Stamps for no more than three months out of any thirty-six-month period.<sup>56</sup> Once the three months are utilized, benefits are available only for months in which the ABAWD works an average of twenty hours or more per week.<sup>57</sup> For purposes of this requirement, the reason for the failure to work is irrelevant.<sup>58</sup> Thus, beginning in 1996, persons who were destitute could be denied food assistance regardless of their actual ability to provide for themselves and regardless of any efforts they might be making to find work.<sup>59</sup>

The ABAWD work requirement assumed that those who were able to work could in fact work—that jobs existed into which they could be hired if they made the effort.<sup>60</sup> As was true with the Temporary Assistance to Needy Families (“TANF”) work requirements, also enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), proponents of the ABAWD work requirement assumed both the

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AUSSENBERG, *supra* note 35, at 5 (“The 1996 welfare reform law (P.L. 104-193) added the time limit for hardworking able-bodied adults without dependents and amended some of the work registration requirements.”).

55. AUSSENBERG, *supra* note 35, at 10.

56. *Id.* (noting compliance with the work requirement was calculated on a monthly basis, and was satisfied if the ABAWD worked at least twenty hours per week during the month). The ABAWD work requirement was enacted in tandem with and used techniques similar to those of the welfare reform initiative of 1996. *Short History*, *supra* note 6. The reformed welfare program, called Temporary Assistance to Needy Families (TANF), allowed the denial of benefits to participants who failed to engage in specified work activities for a certain number of hours per week. *Id.*

57. AUSSENBERG, *supra* note 35, at 8. ABAWDs who lose benefits pursuant to this rule can re-enter the program if, during a thirty-day period, they work or participate in an approved workfare or training program for eighty hours. *Id.* at 11. These returnees are, under certain circumstances, entitled to another three months of non-working eligibility. *Id.*

58. *Overview of the Food Stamp Time Limits for People Between Ages 18 and 50*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Dec. 9, 2000), <https://www.cbpp.org/archiveSite/12-8-00fa1849.pdf> [hereinafter *Overview*].

59. *Id.* Some relief is available through hardship waivers, which states are authorized to grant to fifteen percent of the affected ABAWDs. *See infra* notes 139–42 and accompanying text.

60. *Overview*, *supra* note 58.

availability of jobs and the employability of program participants.<sup>61</sup> A common view was that a “kick in the pants” would move these “freeloaders” into the workforce and off the dole.<sup>62</sup>

### III. THE EXPECTATION OF WORK AND FACTORS AFFECTING IT

The work expectation that underlay the work-related provisions added to the Food Stamp Program in the 1970s, 1980s, and 1990s represents a fundamental value in American society. Work is viewed not only as the preferred means for meeting one’s subsistence needs, but also as a moral imperative, an expression of the deep-seated belief in personal responsibility, and a source of human dignity.<sup>63</sup>

As a result of these fundamental cultural norms, the linkage of public assistance with work has a lengthy pedigree in the United States, going back to the work houses of colonial America<sup>64</sup> and, more benevolently, to New Deal programs such as the Civilian Conservation Corps (“CCC”)<sup>65</sup> and Works Progress Administration (“WPA”).<sup>66</sup> Work provisions in modern public assistance programs respond to this same impulse, reflecting the expectation that those who are able to work will do so rather than turning to the public for aid.<sup>67</sup>

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61. See, e.g., Jillian Kay Melchior, *Food Stamps, Without Work Requirements*, NAT’L REV. (Oct. 28, 2014, 8:00 AM), <https://www.nationalreview.com/2014/10/food-stamps-without-work-requirements-jillian-kay-melchior> (expressing this view by prominent welfare theorist Lawrence Mead with reference to the period of the Great Recession).

62. See, e.g., ELLWOOD, *supra* note 39, at 217; Peter Edelman & Barbara Ehrenreich, Opinion, *Why Welfare Reform Fails Its Recession Test*, WASH. POST (Dec. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120402604.html>.

63. ELLWOOD, *supra* note 39, at 27–33.

64. See William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 60–63 (1996).

65. See, e.g., T.H. WATKINS, *THE GREAT DEPRESSION* 130–31 (1993). The Civilian Conservation Corps (“CCC”) provided pay, room, and board to young unemployed men to work on projects in the national forests, national parks, and other federal lands. *Id.* The CCC operated from 1933–1942. *Id.*

66. See, e.g., *id.* at 248–55. The Works Progress Administration (“WPA”) was a broad-based public works program that provided 8.5 million unemployed persons with work on a variety of public projects, including construction of roads and bridges, artwork on public buildings, and sewing uniforms for nurses from 1935–1943. *Id.*

67. See, e.g., Tami Luhby, *Republicans Want the Poor to Work for Their Government Benefits*, CNN MONEY (May 30, 2017, 12:34 PM), <http://money.cnn.com/2017/05/30/news/economy/republicans-work-requirements-poor-benefits/index.html>.

*A. Functions of Work Requirements*

Work requirements vary in their specifics, but in general they condition an individual's eligibility for public benefits on participation in work or work-related activities, such as skills training.<sup>68</sup> In some instances, actions manifesting a willingness to work, such as the registration requirement in the original Food Stamp work requirement, and the inclusion of "job search" as an accepted work activity in the TANF program,<sup>69</sup> are sufficient.<sup>70</sup> The specifics of each work requirement depend on its purpose within the context of the particular program, as well as on prevailing ideologies and attitudes, and to some extent on cost factors and the amount of funding available for enforcement, job preparation, work support, or publicly funded employment.<sup>71</sup>

*B. A Pathway to Self-Sufficiency*

The TANF program, for instance, is explicitly built around the objective of moving persons who are dependent on government aid into the workforce, where they will be able to meet at least some portion of their own needs.<sup>72</sup> One of its stated goals is to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage."<sup>73</sup> A primary purpose of a work requirement in this context is to develop skills, experience, networks, and other assets that will contribute to the individual's long-term employability.<sup>74</sup> The TANF work requirement functions as part of a plan that may also include education, training, transportation, social and health services, child care, and other services aimed at removing obstacles

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68. HAHN ET AL., *supra* note 13, at 1; *e.g.*, HEATHER HAHN ET AL., TANF WORK REQUIREMENTS AND STATE STRATEGIES TO FULFILL THEM (2012), [https://www.acf.hhs.gov/sites/default/files/opre/work\\_requirements\\_0.pdf](https://www.acf.hhs.gov/sites/default/files/opre/work_requirements_0.pdf).

69. 42 U.S.C. § 607(d)(6) (2012) (relating to accepted work activity in the TANF program); Act of Jan. 11, 1971, Pub. L. No. 91-671, 84 Stat. 2048 (1971) (relating to registration requirements in the original Food Stamp work requirement).

70. *See, e.g.*, 42 U.S.C. § 607(d).

71. *See generally* HAHN ET AL., WORK REQUIREMENTS, *supra* note 13 (comparing specifics of work requirements in TANF, SNAP, Federal Housing Assistance, and Medicaid programs).

72. 42 U.S.C. § 601(a).

73. *Id.* § 601(a)(2).

74. *See* Elizabeth G. Patterson, *Mission Dissonance in the TANF Program: Of Work, Self-Sufficiency, Reciprocity, and the Work Participation Rate*, 6 HARV. L. & POL'Y REV. 369, 379 (2012).

to employment.<sup>75</sup> Most states use a portion of their TANF block grant funds for individualized case planning, for a variety of support services,<sup>76</sup> and in some states, for subsidizing employers or overseeing workfare programs.<sup>77</sup>

#### i. A Way of “Earning” Benefits

Sometimes put forward as a basis for the work requirements in both the TANF and SNAP programs is another function that can be served by work in a public assistance program—that is, as consideration for the aid received.<sup>78</sup> In public works projects, for instance, relief funds are used to hire unemployed or needy persons to perform specified public services.<sup>79</sup> Arguments that work requirements are a means for aid recipients to “earn” their TANF or SNAP benefits<sup>80</sup> present a bastardized version of this concept. Unlike a public works project that is built around an employment model, work requirements in the TANF and SNAP programs simply tack on to an existing assistance program a requirement that recipients engage in unspecified work activities that may or may not benefit the public.<sup>81</sup> Rarely does the government provide or guarantee a job that would enable the recipient to satisfy this requirement.<sup>82</sup> Thus, if the marketplace is unable or unwilling to absorb these persons, the work requirement merely serves to prevent needy persons from receiving aid.

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75. 42 U.S.C. § 608(b).

76. Liz Schott et al., *How States Use Federal and State Funds Under the TANF Block Grant*, CTR. ON BUDGET & POL'Y PRIORITIES 17 (Oct. 15, 2015), [https://www.cbpp.org/sites/default/files/atoms/files/4-8-15tanf\\_0.pdf](https://www.cbpp.org/sites/default/files/atoms/files/4-8-15tanf_0.pdf).

77. See Jason A. Turner & Thomas Main, *Work Experience Under Welfare Reform*, in *THE NEW WORLD OF WELFARE*, *supra* note 41, at 291, 298; Patterson, *supra* note 74, at 383–84.

78. See Patterson, *supra* note 74, at 374–76.

79. See *supra* notes 63–66 and accompanying text.

80. See Patterson, *supra* note 74, at 374–75 (presenting an argument that TANF recipients must give something in exchange for their benefits). See generally Vann R. Newkirk II, *The Trouble with Medicaid Work Requirements*, *ATLANTIC* (Mar. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/03/why-work-requirements-in-medicaid-wont-work/520593>.

81. HAHN ET AL., *supra* note 13, at 5–6, 10–11.

82. See Ron Haskins, *Helping Work Reduce Poverty*, *NAT'L AFF.*, <https://www.nationalaffairs.com/publications/detail/helping-work-reduce-poverty> (last visited Mar. 19, 2017).

## ii. Exclusion of Non-Needy Persons

A more coherent understanding of SNAP work requirements can be gained by viewing them as a means for achieving the legitimate objective of targeting available resources to the most needy.<sup>83</sup> Motivated by a concern that benefits are being squandered on persons who are capable of self-support, a work requirement attempts to exclude such persons from the program.<sup>84</sup> The current ABAWD work requirement, for instance, seeks to accomplish this by defining as capable of self-support, and thus denying benefits to, any person who is of working age, able-bodied, and not responsible for the care of dependents.<sup>85</sup>

The legitimacy of a work requirement, particularly one which serves a targeting function, depends on the rationality of the line that is drawn between needy and not-needy, and the accuracy with which the requirement results in inclusion of the needy and exclusion of the not-needy. The line that prevails in SNAP, as in most public assistance programs, generally reflects cultural assumptions about work, treating only persons who are not expected to work or to otherwise meet their own needs as deserving of public assistance.<sup>86</sup>

*C. Persons from Whom Work Is Not Expected*

Since the advent of widespread government assistance programs in the early 1900s, public policy has taken a categorical approach to excepting certain types of persons from the normal

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83. See, e.g., SHEENA MCCONNELL ET AL., FOOD STAMP TIME LIMITS: A BURDENSOME POLICY THAT WEAKENS THE SAFETY NET 1 (2002). The work requirements in the SNAP program function differently from those in the TANF program, as evidenced by SNAP's purpose statements and by the minimal funds available through SNAP for the individualized casework, support services, or job creation activities that are necessary for a program aimed at enhancing employability. See *infra* note 129 and accompanying text.

84. See, e.g., Press Release, Mick Mulvaney, Dir. of the Office of Mgmt. & Budget, Office of Mgmt. & Budget, Press Briefing on the FY2018 Budget (May 23, 2017) (“[What’s causing the difficulties in SNAP is] the folks who are on there who don’t want to work. And that’s what we’re trying to point out to people, is, look, if there’s 44 million people on there, eight years from the end of the recession, maybe, maybe it’s reasonable to ask if there are folks who are on there who shouldn’t be.”).

85. 7 U.S.C. §§ 2015(o)(2)–(3) (2012).

86. See, e.g., ELLWOOD, *supra* note 39, at 14–18, 26–44; see also Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 FUTURE CHILD 28, 31 (1977).

expectation of work.<sup>87</sup> These categories, sometimes characterized as the “deserving poor,” generally include children, elderly and disabled persons, and in some instances, the caretakers of these persons.<sup>88</sup>

Exclusion of some of these categories of persons from the normal expectation of work reflects role assignments that are customary and, in many cases, embodied in laws such as those that prohibit child labor,<sup>89</sup> demand or encourage retirement at a certain age,<sup>90</sup> and assign responsibility for the care and nurturance of minor children.<sup>91</sup> Alternatively, a certain group might not be expected to work because they are perceived as incapable of doing so.<sup>92</sup> This is the case with exclusion of physically or mentally disabled persons, and may contribute to exclusion of the other groups as well.<sup>93</sup>

The parameters of the ABAWD work requirement are built upon these four traditional categories—able-bodied (not disabled), adults (neither children nor elderly), without dependents<sup>94</sup>—and hence have the inherent legitimacy that comes with time-tested patterns of thought. However, their legitimacy in any particular policy application depends on how they are defined, how they relate to the specific policy context, and whether in that context they adequately capture the population of persons to whom a particular benefit or detriment should apply.

In the context of the ABAWD work requirement these four categories form the limit of persons who can receive food assistance without working or participating in an approved training or workfare program.<sup>95</sup> Thus, their definition can make

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87. Khiara M. Bridges, *The Deserving Poor, the Underserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1052 (2017).

88. *Id.* at 1052, 1072; *see, e.g.*, David Orentlicher, *Medicaid at 50: No Longer Limited to the “Deserving” Poor?*, 15 YALE J. HEALTH POL’Y & ETHICS 185, 185 (2015).

89. *See, e.g.*, 29 U.S.C. § 212 (2012).

90. *See, e.g.*, 5 U.S.C. § 8335 (2012); 19 U.S.C. § 623(j) (2012).

91. *See, e.g.*, John E. B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449 (2008). Parents have a legal duty to provide care and supervision for their minor children, as illustrated by laws in every state and at the federal level prohibiting abandonment and neglect of children by their parents. *Id.* at 454.

92. Rebecca Vallas et al., *A Fair Shot for Workers with Disabilities*, CTR. FOR AM. PROGRESS (Jan. 28, 2015, 9:09 AM), <https://www.americanprogress.org/issues/poverty/reports/2015/01/28/105520/a-fair-shot-for-workers-with-disabilities>.

93. *Id.*

94. *See* 7 U.S.C. § 2015(o)(3) (2012).

95. *Id.* § 2015(o)(3).



the difference between whether or not particular individuals have enough to eat.

Perhaps to minimize the denial of food benefits to genuinely needy persons, the categories of individuals excluded from the ABAWD rule are defined broadly. The ages included in the ABAWD definition begin with 18 and end with 50.<sup>96</sup> The caretaker category includes not only parents, but also any other member of a household with responsibility for a dependent child.<sup>97</sup> The statutory language that captures the “able-bodied” concept is “medically certified as physically or mentally unfit for employment.”<sup>98</sup> This standard is satisfied if the individual has qualified for either temporary or permanent disability benefits from any governmental or private source, provides a certification of unfitness for employment from any of a variety of medical or social work personnel, or is deemed by the state agency to be “obviously mentally or physically unfit for employment.”<sup>99</sup>

The problem with the exemptions from the ABAWD rule is not that the categories of children, elderly, caretakers, and disabled are defined too narrowly. The problem is that the population of persons who are exempted from the harsh exclusionary effects of the ABAWD rule is limited to these four categories. Persons falling within these categories are the only ones whose inability to work will not disable them from receiving food assistance from SNAP.<sup>100</sup> Yet, there are many low-income persons whose ability to get and hold a job is severely

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96. *Id.* § 2015(o)(3)(A).

97. *Id.* § 2015(o)(3)(C).

98. *Id.* § 2015(o)(3)(B). Pregnant women and persons exempt from the original Food Stamp work requirement—which includes caregivers for incapacitated persons, certain students, and regular participants in addictions treatment—are also exempted from the ABAWD rule. *Id.* §§ 2015(d)(2), (o)(3)(D)–(E).

99. 7 C.F.R. § 273.24(c)(2) (2017). Most states allow caseworkers to make the determination of whether an individual is “obviously unfit,” with few providing written guidance on how this decision is to be made. Michael Morris & Nanette Goodman, *Impact of the Work Requirement in Supplemental Nutrition Assistance (SNAP) on Low-Income Working-Age People with Disabilities*, RES. ON DISABILITY 10–11 (Aug. 2014), <https://researchondisability.org/docs/publications/snap-paper-8-23-2014-with-appendix.pdf?sfvrsn=2>. By way of contrast, the original Food Stamp work requirement applies to individuals as young as sixteen and as old as fifty-nine, 7 C.F.R. § 273.7(b)(1)(i), and the dependent care exemption applies only where the dependent child is under the age of six, *id.* § 273.7(b)(1)(iv).

100. *See* 7 U.S.C. § 2015(o)(3).

compromised—perhaps more so than some who fall within the broad definitions of children, elderly, caretakers, and disabled.

*D. Inability to Work Based on Personal and Structural Barriers*

The lives of many low-income persons, including persons seeking government aid from the SNAP program, involve circumstances and conditions that limit their ability to work and make them unattractive to potential employers.<sup>101</sup> Peter Edelman, an advisor to President Bill Clinton, observed in regard to the strict work requirements enacted in PRWORA for both SNAP and TANF recipients, “The labor market, even in its current relatively heated state, is not friendly to people with little education and few marketable skills, poor work habits, and various personal and family problems that interfere with regular and punctual attendance.”<sup>102</sup>

Judith Gueron, president of Manpower Demonstration Research Corporation (“MDRC”), who participated in the evaluation of numerous programs aimed at promoting employment of low-income persons, cautioned, “There are a great many welfare recipients who are very marginal in terms of their ability to work . . . . This is not a group that just needs a good kick to get their act together.”<sup>103</sup>

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101. KAREN SECCOMBE, “SO YOU THINK I DRIVE A CADILLAC?”: WELFARE RECIPIENTS’ PERSPECTIVES ON THE SYSTEM AND ITS REFORM 183 (2007). One TANF recipient who had attempted to comply with the new work requirements imposed in 1996 stated: “You can apply and apply, but you can’t make someone hire you.” *Id.* at 202.

102. Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 53; accord MICHAEL STAVRIANOS & LUCIA NIXON, THE EFFECT OF WELFARE REFORM ON ABLE-BODIED FOOD STAMP RECIPIENTS 56–57 (1998), <https://fns-prod.azureedge.net/sites/default/files/finalrep.pdf>; DANIEL P. McMURRER ET AL., WELFARE REFORM AND OPPORTUNITY IN THE LOW-WAGE LABOR MARKET, 5 OPPORTUNITY AM. 3 (1997), <https://www.urban.org/sites/default/files/publication/66951/307018-Welfare-Reform-and-Opportunity-in-the-Low-Wage-Labor-Market.PDF>. Studies have consistently shown the high correlation between barriers such as those cited here and poor employment prospects. One 1999 study, for instance, found that only twenty-two percent of welfare recipients with one barrier to employment were working, and only three percent of those with three or more barriers. *Issues in TANF Reauthorization: Helping Hard-to-Employ Families: Hearing Before the Subcomm. on Soc. Sec. & Family Policy of the Comm. on Fin.*, 107th Cong. 20–21 (2002) [hereinafter *Hearing*] (testimony of David Butler, Vice President of Manpower Demonstration Research Corporation).

103. Erik Eckholm, *Solutions on Welfare: They All Cost Money*, N.Y. TIMES, July 26, 1992, at A1. The same is true of ABAWDs, who differ from welfare recipients primarily in the absence of dependent children in their households. See *supra* text accompanying note 19.

The numerous barriers to employment that are common among recipients of public assistance have been well documented.<sup>104</sup> Among the most prevalent of these are educational deficiencies, learning disabilities, limited English proficiency, lack of work experience, lack of skills (including soft skills), physical and mental health problems, criminal records, chemical dependency, and family issues, such as domestic violence or disabled family members for whom the recipient provides care.<sup>105</sup> Research has shown that almost half of welfare recipients face two or more such barriers.<sup>106</sup>

In addition, certain subgroups of SNAP participants face their own unique sets of barriers. For instance, returning Gulf War veterans<sup>107</sup> contend not only with real physical and mental health problems traceable to their military service,<sup>108</sup> but also with some

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104. *E.g.*, *Hearing, supra* note 102, at 20–21 (reporting data findings from multiple surveys); MCCONNELL ET AL., *supra* note 83 (studying the number of people affected by food stamp time limits); LaDonna Pavetti, *Helping the Hard-to-Employ*, in WELFARE REFORM & BEYOND: FUTURE SAFETY NET 135–36 (Isabel W. Sawhill et al. eds., 2002) (discussing evidence of obstacles for hard-to-employ families).

105. *See, e.g.*, *Hearing, supra* note 102, at 10, 20–21 (discussing challenges facing TANF recipients); Heidi Goldberg, *Improving TANF Program Outcomes for Families with Barriers to Employment*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 22, 2002), <http://www.cbpp.org/files/1-22-02tanf3.pdf> (examining the prevalence and effects of barriers to employment for TANF recipients); J.B. Wogan, *Up to 1 Million People Could Lose Food Stamps in 2016*, GOVERNING (Jan. 12, 2016), <http://www.governing.com/topics/health-human-services/gov-report-about-half-million-people-will-lose-food-stamps-2016.html>. A 1987 California workfare program was surprised to find that forty to fifty percent of participants were so poorly educated that they could not fill out job applications, read an employer's instructions, or make change at a cash register. Carl Ingram, *Workfare Slowed by Participants' Need for Schooling*, L.A. TIMES, Feb. 23, 1987, at 3. Work assignments were delayed by the necessity for prior remedial education. *Id.*

106. *Hearing, supra* note 102, at 21; *see* Steven Carlson et al., *Who Are the Low-Income Childless Adults Facing the Loss of SNAP in 2016?*, CTR. ON BUDGET & POL'Y PRIORITIES 5–6, 9 (Feb. 8, 2016), <https://www.cbpp.org/research/food-assistance/who-are-the-low-income-childless-adults-facing-the-loss-of-snap-in-2016>. There is substantial variation in the numbers reported by different studies because of differences in the lists of barriers. For instance, a study of the District of Columbia found seventy-four percent of welfare recipients with two or more barriers, using a list that included structural barriers such as transportation and child care problems as well as personal barriers of the type noted here. GREGORY ACS & PAMELA LOPREST, *A STUDY OF THE DISTRICT OF COLUMBIA'S TANF CASELOAD*, at ii–iii (2003), <https://www.urban.org/sites/default/files/publication/59436/410863-A-Study-of-the-District-of-Columbia-s-TANF-Caseload.PDF>.

107. It is estimated that 60,000 ABAWDs are military veterans. Bill Tomson, *Veterans Face Losing Food Stamp Benefits*, POLITICO (May 1, 2015, 11:37 AM), <https://www.politico.com/story/2015/05/veterans-face-losing-snap-benefits-117553>.

108. *See* PRUDENTIAL, *VETERANS' EMPLOYMENT CHALLENGES: PERCEPTIONS AND EXPERIENCES OF TRANSITIONING FROM MILITARY TO CIVILIAN LIFE* 6 (2012), <https://www.prudential.com/documents/public/VeteransEmploymentChallenges.pdf>.

employers' fears of hidden Post-Traumatic Stress Disorder (PTSD) or other combat-related "baggage."<sup>109</sup> They are also handicapped, particularly in regard to the three-month time limit, by their extended separation from the job market and lack of job-seeking experience,<sup>110</sup> and by the sometimes difficult psychological transition from military to civilian life.<sup>111</sup>

Some of the barriers faced by ABAWDs are amenable to therapeutic or educational interventions that can increase the individual's employability.<sup>112</sup> However, a number of common barriers, such as serious physical or mental disabilities or addictions, are severe and chronic, and will present continuing obstacles to employment.<sup>113</sup> Correctable or not, persons possessing these characteristics are of little interest to most employers and find it difficult to sustain any type of work activity.<sup>114</sup> Nor can their deficiencies be readily remedied within the three-month time frame allowed by the ABAWD work requirement.<sup>115</sup>

In addition to the assumption that able-bodied persons are employable, the work expectations embodied in the ABAWD work requirement reflect assumptions about job availability that were formed during a time of economic boom,<sup>116</sup> and even then were unrealistic.<sup>117</sup> Noting that jobs would be needed for four million adults in the TANF program alone, Edelman observed in 1996, "[t]he fact is that there are not enough appropriate private-sector jobs in appropriate locations even now, when unemployment is about as low as it ever gets in this country."<sup>118</sup>

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109. *Id.* at 4.

110. Steve Giegerich, *Young Veterans Hit Hard by Unemployment*, ST. LOUIS POST-DISPATCH (Jan. 31, 2011), [http://www.stltoday.com/business/local/young-veterans-hit-hard-by-unemployment/article\\_ffb4747a-9842-5e9e-890d-30ab51732c4c.html](http://www.stltoday.com/business/local/young-veterans-hit-hard-by-unemployment/article_ffb4747a-9842-5e9e-890d-30ab51732c4c.html); see 7 U.S.C. § 2015(o)(2) (2006) (imposing a three-month work requirement for ABAWDs).

111. PRUDENTIAL, *supra* note 108, at 5; Tomson, *supra* note 107.

112. See, e.g., *Hearing*, *supra* note 102, at 10; Martha R. Burt, *The "Hard-to-Serve": Definitions and Implications*, in WELFARE REFORM: THE NEXT ACT 163, 164–65 (Alan Weil & Kenneth Finegold eds., 2002).

113. See, e.g., Burt, *supra* note 112, at 1645–67; Pavetti, *supra* note 104, at 138–39.

114. See generally Carlson et al., *supra* note 106, at 2; *Overview*, *supra* note 58, at 2.

115. Carlson et al., *supra* note 106, at 3.

116. See, e.g., MCMURRER ET AL., *supra* note 102, at 1–2.

117. *Id.* at 3.

118. Edelman, *supra* note 102, at 52–53; accord SECCOMBE, *supra* note 101, at 202; Frances Fox Piven, *Welfare Reform and the Economic and Cultural Reconstruction of Low Wage Labor Markets*, in THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS,

Those jobs that are available often are not geographically accessible to many of the aid recipients who need them.<sup>119</sup> Rural areas, in particular, suffer from a dearth of employment opportunities,<sup>120</sup> and the “spatial mismatch” affecting jobs in urban areas leaves the inner city poor with limited access to the many jobs that have moved to the suburbs.<sup>121</sup> Transportation problems further limit recipients’ access to the available jobs.<sup>122</sup>

Yet absent from the criteria defining an ABAWD or any other criteria for application of the work requirement are any factors related to the availability of jobs for which the individual might be qualified within the individual’s community, the willingness of employers to hire persons with a particular individual’s characteristics, and the availability of transportation, child care, or other structural supports necessary for participation in the workforce.<sup>123</sup> As the recent recession should have reminded us, whether or not an individual has a job is not simply a question of ability and willingness to work.

Even for those who find employment, accumulation of the required eighty hours per month can be challenging.<sup>124</sup> Jobs for low-skilled workers tend to be sporadic or part-time and lacking in job security.<sup>125</sup> Indeed, at the time PRWORA was enacted, the

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AND IMPOVERISHED PEOPLE IN THE UNITED STATES 142 (Judith G. Goode & Jeff Maskovsky eds., 2001).

119. Edelman, *supra* note 102, at 52–53.

120. See, e.g., Judith M. Gueron, *Work and Welfare: Lessons on Employment Programs*, 4 J. ECON. PERSP. 79, 91 (1990) (attributing failure of a West Virginia demonstration program aimed at increasing employment and earnings to the shortage of jobs in this rural state).

121. See STAVRIANOS & NIXON, *supra* note 102, at 57; Michael A. Stoll, *Job Sprawl, Spatial Mismatch, and Black Employment Disadvantage*, 25 J. POL’Y ANALYSIS & MGMT. 827, 827 (2006).

122. E.g., STAVRIANOS & NIXON, *supra* note 102, at 67–68; Burt, *supra* note 112, at 164. Many state TANF programs were forced to fund the creation or use of transportation, childcare, and other support services in order to enable participants to meet the work requirement, though limited resources restrict their capacity to meet the needs of all participants. Burt, *supra* note 112, at 164. Other than child care, the need for such services is equally critical for ABAWDs seeking to enter the work force, and the funds for such services are even more limited in the SNAP program. STAVRIANOS & NIXON, *supra* note 102, at 68.

123. See Carlson et al., *supra* note 106, at 5–6.

124. See *Able-Bodied Adults Without Dependents (ABAWDs)*, U.S. DEP’T AGRIC., <https://www.fns.usda.gov/snap/able-bodied-adults-without-dependents-abawds> (last updated Feb. 26, 2018).

125. SECCOMBE, *supra* note 101, at 204, 209–10; Piven, *supra* note 118, at 136; see *Overview*, *supra* note 58, at 2.

labor market was well into a restructuring that was marked by wage stagnation, increasingly impermanent and part-time employment, and widening income disparities.<sup>126</sup> The increasing expendability of low-wage workers has depressed wages, has resulted in a cavalier attitude toward employees' needs, and has increased employers' unwillingness to tolerate the tardiness, absences, and distractions that are common in the lives of persons who are struggling to get by.<sup>127</sup> Thus, the work options available to ABAWDs and other recipients of public assistance are few in number, limited in scope, and easily lost.<sup>128</sup>

#### IV. CRITIQUE OF ABAWD WORK REQUIREMENT

##### A. Poor Targeting

The work expectations embodied in the ABAWD requirement are thus both over-inclusive and under-inclusive, as is typical of any categorical approach. The categories of persons exempted from the rule undoubtedly include many individuals who are capable of working. And more importantly, as demonstrated above, the category of able-bodied adults without dependents to whom the rule applies contains a sizeable number of persons for whom an expectation of twenty hours' weekly work is not reasonable.

The latter group is more important because protecting destitute persons such as these from hunger and malnutrition has

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126. See Piven, *supra* note 118, at 136. Manpower, a temporary employment agency, is one of the largest private employers in the United States. SECCOMBE, *supra* note 101, at 205. Welfare reform contributed to these trends by forcing thousands of additional unskilled workers into the labor market to compete for the available jobs. Piven, *supra* note 118, at 142.

127. See Piven, *supra* note 118, at 136–37. All families without a stay-at-home parent struggle with unexpected events such as a personal or family illness and failure of caregiving or transportation arrangements. Low-income persons face additional emergencies, such as threatened eviction, food shortages, and cessation of utility services. Randy Albelda, *Fallacies of Welfare-to-Work Policies*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72–73 (2001); see also Sharon Parrott, *The New TANF Requirements and Individuals with Disabilities*, CTR. ON BUDGET & POL'Y PRIORITIES 5 (Mar. 1, 2007), <http://www.cbpp.org/files/3-1-07tanf.pdf>.

128. Toby Herr, who founded an employment program in Chicago, coined the phrase, “[l]eaving welfare is a process, not an event,” to refer to the frequency of job loss. JASON DEPARLE, AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION’S DRIVE TO END WELFARE 190 (2004).

always been the primary purpose of the Food Stamp Program.<sup>129</sup> A work requirement that weeds out of the program persons who are capable of supporting themselves is consistent with this purpose, but only if it is carefully tailored to avoid simultaneous exclusion of the program's intended beneficiaries.

The policy merit of a specific work requirement, therefore, depends on the success with which it distinguishes those who are able to provide for themselves from those who are not. By this measure, the original SNAP work requirement provides reasonable and legitimate processes and criteria for identifying and excluding persons who are capable of self-support. By penalizing only persons to whom a job or training slot has actually been offered and rejected without good cause,<sup>130</sup> it assures that benefits will not be denied to persons who are in fact unable to get a job. This provision protects deserving poor persons against unwarranted exclusion from SNAP by giving them the benefit of a presumption of eligibility that can be rebutted only by the clearest possible evidence of employability: a bona fide offer of a job or a training slot.

The ABAWD work requirement operates in precisely the opposite fashion, replacing the presumption of eligibility with a presumption of ineligibility. Under the presumption of ineligibility, every unemployed able-bodied adult is presumed to be capable of work and hence is ineligible for benefits on account of the failure to work.<sup>131</sup> Further, this presumption is not rebuttable.<sup>132</sup> Every able-bodied adult is conclusively presumed to be capable not only of performing job-related tasks, but also of obtaining a job. It is presumed that he or she will have skills and characteristics that are attractive to employers, access to reliable transportation, and the ability to avoid absences on account of illness or injury, family problems, or other disruptions that, in the low-wage job market, are likely to result in job loss. As discussed in detail above,<sup>133</sup> this presumption is inaccurate. As a result,

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129. Compare 7 U.S.C. § 2011 (2012), with Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703 (current version at 7 U.S.C. § 2011 (2012)).

130. See 7 U.S.C. § 2015(d)(1)(A).

131. See *Able-Bodied Adults Without Dependents (ABAWDs)*, supra note 124.

132. See generally *id.* (defining ABAWDs and providing few, limited exceptions, not including a rebuttable presumption).

133. See supra notes 101–22 and accompanying text.

hundreds of thousands of adults are excluded from the program<sup>134</sup> who—though able-bodied—are not able to earn their way out of poverty in the job market.<sup>135</sup> In 2000, four years after enactment of the ABAWD rule (and before the beginning of the recession of 2001), the Congressional Budget Office estimated that in an average month this provision resulted in denial of food stamps to 400,000 low-income jobless persons who were willing to work but could not find a job.<sup>136</sup> More recently, it was estimated by the non-partisan Center on Budget and Policy Priorities that the 2016 reinstatement of the ABAWD rule in 22 states, following a lengthy period in which the rule was waived, would result in removal of 500,000 to one million low-income jobless ABAWDs from the food stamp rolls in those states alone.<sup>137</sup> Based on the characteristics of these excluded persons, both entities concluded that few of them were simply unwilling, rather than unable, to work.<sup>138</sup>

The effects of the ABAWD rule are mitigated somewhat by a provision allowing each state to grant individual exemptions to fifteen percent of the ABAWDs subject to the state's work requirement.<sup>139</sup> However, this provision fails to remedy the arbitrary denial of benefits to indigent persons that results from the ABAWD rule. Most importantly, the number of available exemptions is not calibrated to assure that an exemption will be

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134. It is difficult to quantify the number of needy persons deprived of food assistance because of the ABAWD rule. An accurate number would have to draw distinctions for which there are no available data—for instance, distinctions between departing ABAWDs who had a job, those who were unable to find a job, and those who were employable but were not looking for work. Also, it is impossible to know how many able-bodied adults were deterred by the ABAWD rule from even seeking SNAP benefits. Cf. JOHN L. CZAJKA ET AL., IMPOSING A TIME LIMIT ON FOOD STAMP RECEIPT: IMPLEMENTATION OF THE PROVISIONS AND EFFECTS ON FOOD STAMP PARTICIPATION 154 (2001) (noting that the failure of excluded ABAWDs to return to the program after expiration of three years was probably because they “simply gave up on receiving food stamps”).

135. Over eighty percent of persons subject to the three-month limit are in deep poverty—with income less than half the federal poverty level. Ed Bolen et al., *More Than 500,000 Adults Will Lose SNAP Benefits in 2016 as Waivers Expire*, CTR. ON BUDGET & POL'Y PRIORITIES 9 (Mar. 18, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/1-5-15fa.pdf>. SNAP participants subject to the ABAWD time limit have limited skills and limited job prospects. About one quarter lack a high school diploma or GED, and many are without even basic skills such as reading, writing, and basic mathematics. *Id.* at 10.

136. See *Overview*, *supra* note 58, at 1.

137. Bolen et al., *supra* note 135, at 1.

138. *Id.*

139. 7 U.S.C. § 2015(o)(6) (2012).



available to all ABAWDs who are unable to obtain a job or training slot through no fault of their own.<sup>140</sup>

With the supply of exemptions limited, difficult decisions must be made about their distribution, involving concepts of equity and comparative hardship. Federal law provides no guidance as to how the claims of individuals in varying circumstances should be weighed.<sup>141</sup> Further complicating the states' task is the desire to hold down administrative costs, which in this context may include not only the normal costs associated with individualized decision-making, but also the cost of processes for tracking work activities, receipt of benefits, waiver utilization, and changing circumstances of individual ABAWDs.<sup>142</sup>

In the absence of objective criteria for making individualized determinations of employability or merit, and to hold down costs, many states opt for a categorical or one-size-fits-all approach that avoids the need for such determinations.<sup>143</sup> For instance, waivers may be reserved for a particular subgroup of ABAWDs such as those aged 45–50. Or a waiver of one month or other brief period might be provided to every ABAWD who reaches the three-month time limit without finding work. Ironically, techniques such as these have the potential to distribute waivers to the very persons the ABAWD rule is intending to exclude—persons whose failure to work is voluntary.

Not only does the ABAWD rule demand work or approved work activities (not including job search) from this deeply deprived population, it provides them with little or no assistance in meeting the requirements necessary to their continued receipt

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140. See FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., GUIDANCE FOR STATES ON USE OF DISCRETIONARY FOOD STAMP PROGRAM TIME LIMIT EXEMPTIONS 1 (1998), <https://fns-prod.azureedge.net/sites/default/files/a-15pctex.pdf>. Thus, if in a state, 1000 ABAWDs were subject to the work requirement during a fiscal year, the number of individual waivers in effect during each month of that year must average no more than 150. See generally *id.* If each waiver were in effect for the full year, only 150 persons could be waived. See generally *id.* Waivers of two months' duration could be provided to 900 persons. See generally *id.*

141. See *id.* (providing guidance for States to set policies, not how to weigh individuals in varying circumstances).

142. See *id.*

143. See VIVIAN GABOR & CHRISTOPHER BOTSKO, STATE FOOD STAMP POLICY CHOICES UNDER WELFARE REFORM: FINDINGS OF 1997 50-STATE SURVEY 12–13 (1998), <https://fns-prod.azureedge.net/sites/default/files/finsum.pdf>.

of food assistance.<sup>144</sup> When strict work requirements were added to the welfare program in 1996, it was generally recognized that a variety of supportive services would be necessary to assist this population in moving into the work force.<sup>145</sup> States used federal block grant funds to provide a wide variety of services including transportation, education, skills training, treatment of physical and mental health conditions, subsidized employment, mentoring programs, and many other initiatives to assist welfare recipients in overcoming barriers to employment.<sup>146</sup> No such concerted effort has been made in regard to unemployed ABAWDs.<sup>147</sup> Federal funding for such activities is limited, and few states have made them a priority.<sup>148</sup>

Somewhat more attention has been given to the creation of workfare<sup>149</sup> or job training slots with which ABAWDs can meet their twenty-hour participation requirement.<sup>150</sup> The Food & Nutrition Service recognizes the absence of such opportunities as a shortcoming of the ABAWD rule and has increased funding to states for provision of work or training slots to ABAWDs.<sup>151</sup>

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144. Rosa L. DeLauro, *Why America Should Save SNAP*, 52 HARV. J. LEG. 267, 286 (2015).

145. *Id.*

146. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2115–24 (1996).

147. *See generally Short History*, *supra* note 6.

148. NAT'L SKILLS COAL., TRAINING POLICY IN BRIEF: SNAP EMPLOYMENT AND TRAINING PROGRAM 7 (2014), [https://www.nationalskillscoalition.org/resources/publications/file/NSC\\_Training\\_SNAP\\_2014.pdf](https://www.nationalskillscoalition.org/resources/publications/file/NSC_Training_SNAP_2014.pdf).

149. *Id.* at 3. Workfare programs bear a stronger resemblance to the “public works” model than does a work requirement standing alone, and hence can more accurately claim that recipients of aid are “earning” their benefits. *See* AUSSENBERG, *supra* note 35, at 2. It is for this reason that the number of hours that an individual can work in a workfare program is limited by the amount of aid that he or she receives. *See* 7 U.S.C. § 2029(c) (2012). The initial welfare reform proposals of both the Clinton administration and Congress contained workfare elements, but these were eventually abandoned because of the cost, and few jurisdictions chose to structure their TANF programs around a workfare model. *See Short History*, *supra* note 6.

150. NAT'L SKILLS COAL., *supra* note 148, at 3. When the amendment creating the ABAWD work requirement was proposed on the House floor, its sponsors explained that ABAWDs who could not find a job on their own would be offered a workfare slot. *Supplemental Nutrition Assistance Program: Hearing Before the H. Comm. on Agric.*, 114th Cong. 17 (2015) (statement of Robert Greenstein, President, Center on Budget and Policy Priorities). Only those who rejected the workfare slot would have their benefits terminated after 3 months. *Id.* However, in the vast majority of states, sufficient workfare slots were never created. *Id.*

151. *See* NAT'L SKILLS COAL., *supra* note 148, at 3. Only five states have pledged to provide workfare or training slots for all ABAWDs, under a provision that allocates extra

However, such programs are expensive,<sup>152</sup> and both the strategies and the resources for implementing this vision remain deficient.

In sum, the ABAWD rule is not an effective tool for identifying and excluding employable persons from the SNAP rolls. If the focus is on exclusion of persons who could be meeting their own needs without government help, such as the California surfer who became the poster boy for SNAP critics in 2013,<sup>153</sup> the requirement is vastly over-inclusive, as it sweeps within its compass large numbers of persons who are not able to support themselves. Nor can its over-inclusiveness be defended on the ground that the rule is intended to apply to persons who can be made work-ready through government assistance or can adequately perform in a government-provided workfare or job training slot, since neither type of government assistance is generally available to non-working ABAWDs through the SNAP program. Thus, the ABAWD rule cannot claim to be an accurate mechanism for performing the legitimate function of targeting SNAP benefits to the truly needy. It may be effective in excluding persons who are clearly employable. And it is certainly effective in reducing the costs of the program. However, it does so at a significant cost to the program's stated goal of alleviating hunger and malnutrition among low-income households.<sup>154</sup> In fact, a reasonable argument could be made that by irrationally singling out a particular group of needy persons for exclusion from access to SNAP benefits, the ABAWD requirement as currently structured deprives unemployed ABAWDs of their right to equal protection of the law.<sup>155</sup>

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federal funding to states that will make this pledge: Colorado, Delaware, South Dakota, Texas, and Wisconsin. Bolen et al., *supra* note 135, at 5.

152. See, e.g., RON HASKINS, WORK OVER WELFARE: THE INSIDE STORY OF THE 1996 WELFARE REFORM LAW 66 (2006); Craig Schneider, *Work Requirements Thin Food Stamp Ranks*, ATLANTA J.-CONST. (June 4, 2016, 12:00 AM), <https://www.myajc.com/news/work-requirements-thin-food-stamp-ranks/4ElfqXiTVdNCx67uKwuEyH>.

153. See Arthur Delaney, *Jason Greenslate, Food Stamp Surfer, Responds to the Haters*, HUFFINGTON POST (Sept. 20, 2013, 5:29 PM), [https://www.huffingtonpost.com/2013/09/20/jason-greenslate-food-stamp\\_n\\_3960737.html](https://www.huffingtonpost.com/2013/09/20/jason-greenslate-food-stamp_n_3960737.html).

154. *Short History*, *supra* note 6.

155. The requirement treats indigent persons who are unable (or presumed to be unable) to work differently depending on the basis for their inability. If it is a physical or mental disability, age, or presence in the home of dependent children, their failure to work does not affect their entitlement to Food Stamps. Indeed, persons in these categories retain their entitlement even if the "disabling" condition does not in fact prevent them from working. If it is an educational deficiency, lack of work experience or job skills, lack of transportation, the unavailability of suitable jobs, or any of a variety of other barriers to employment, the failure to work limits their Food Stamp eligibility to

## V. THE GEOGRAPHICAL WAIVERS AND THE GREAT RECESSION

The Great Recession put new strains on the SNAP program, as thousands of newly unemployed persons sought assistance in feeding their families.<sup>156</sup> In the period from 2002 to 2007, the SNAP caseload swelled from fifty-four percent to seventy-two percent.<sup>157</sup> Also contributing to the increased caseload was a temporary hiatus in enforcement of the ABAWD requirement pursuant to a provision that allows for waivers of the ABAWD rule in areas experiencing high unemployment.<sup>158</sup> Although providing needed temporary relief for unemployed ABAWDs, the lengthy invocation of this geographical waiver provision ultimately led to increased political interest in expanding and strengthening the ABAWD rule.<sup>159</sup>

### A. Geographical Waivers of the ABAWD Rule

Although the ABAWD work requirement itself fails to accommodate the needs of ABAWDs who are unable to get work in ordinary times, it contains one of the few provisions in public benefits law recognizing the effect of economic downturns on the employability of recipients.<sup>160</sup> The ABAWD work requirement can be waived at the request of the Governor for any part of the state, including the state as a whole, that is experiencing unusually high unemployment.<sup>161</sup> These geographical waivers entirely suspend

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three months in any three-year period. This distinction is not rationally related to the purposes of the Food Stamp Program or to any other legitimate state interest connected to that program.

156. SHELIA ZEDLEWSKI ET AL., URBAN INST., SNAP'S ROLE IN THE GREAT RECESSION AND BEYOND 1 (2012), <https://www.urban.org/sites/default/files/publication/25626/412613-SNAP-s-Role-in-the-Great-Recession-and-Beyond.PDF>.

157. *Id.*

158. *ABAWD Waivers*, U.S. DEP'T AGRIC., <https://www.fns.usda.gov/snap/abawd-waivers> (last visited Mar. 23, 2018).

159. UNION OF CONCERNED SCIENTISTS, STRENGTHENING SNAP FOR RURAL AND URBAN AMERICA 1–2 (2017), <https://www.ucsusa.org/sites/default/files/attach/2017/05/strengthening-snap-ucs-5-17.pdf>.

160. 7 C.F.R. § 273.24(f) (2017).

161. *See* 7 U.S.C. § 2015(o)(4)(A) (2012) (authorizing waivers for areas with unemployment rates over ten percent or without sufficient jobs to provide employment for ABAWDs residing in the area); 7 C.F.R. § 273.24(f) (defining the “lack of sufficient jobs” criterion as satisfied if an area is designated as a Labor Surplus Area or has a 24-month average unemployment rate that exceeds the national average by twenty percent); 7 C.F.R. § 273.24(f) (establishing that “lack of sufficient jobs” may be satisfied through a showing that an area (1) qualifies for extended unemployment benefits, (2) has a low or

the work requirement in the affected area, reflecting an assumption that even able-bodied adults without dependents cannot be expected to get jobs in areas where unemployment has reached a certain level.<sup>162</sup>

The presumption that low-skilled persons will have a difficult time getting work during recessionary times is certainly an accurate one. In a crowded recessionary job market, low-skilled persons are forced to compete with a broader pool of more qualified applicants.<sup>163</sup> Job prospects are even more tenuous for low-skilled persons whose employability is further diminished by barriers such as illiteracy, poor health, or lack of transportation.

The effect of a geographical waiver is not, however, limited to ABAWDs who are unable to work.<sup>164</sup> The suspension of the work requirement pursuant to such a waiver benefits all ABAWDs, including those who could be working despite the reduction in available jobs.<sup>165</sup> Thus, in assuring that the needy receive aid, the waiver also allows persons who would not be considered deserving to receive aid as well.<sup>166</sup> This approach demonstrates a preference for over-inclusion rather than under-inclusion, contrary to the presumption embodied in the ABAWD work requirement itself.

### *B. Geographical Waivers and SNAP Utilization During the Great Recession*

Use of the geographical waiver provision became widespread as unemployment soared during and after the Great Recession of 2007–2009.<sup>167</sup> All but four states took advantage of a

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declining employment-to-population ration, (3) has a lack of jobs in declining occupations or industries, or (4) is described in an academic study or other publication as an area where there is a lack of jobs).

162. *Hearing, supra* note 41 (explaining that these waivers also enhance the economic stabilization function of SNAP by increasing spending and the resulting economic stimulus in areas experiencing high unemployment).

163. *See, e.g.*, Chris L. Jenkins, *Low-Skilled Workers Struggle Amid More Competition and Fewer Openings*, WASH. POST, Dec. 20, 2008, at B1; Chad Stone et al., *No Mystery Why SNAP Enrollment Remains High: It's Still the Economy*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Mar. 18, 2015), <https://www.cbpp.org/sites/default/files/atoms/files/7-29-13fa.pdf>.

164. *See* UNION OF CONCERNED SCIENTISTS, *supra* note 159, at 2.

165. *Id.*

166. *Id.* at 3.

167. *See* Stone et al., *supra* note 163, at 2. Although these are the official dates of the Great Recession, the effects on employment did not abate in 2009; in fact, the majority of Americans believed that the United States was still in recession well after 2009 and even up to the present. *See generally* Andrew Kohut, *Resurgent Public Optimism on the Economy?*

suspension of the ABAWD rule that was authorized for 2009–2010 by the America Recovery and Reinvestment Act (“ARRA,” or the “Stimulus Bill”).<sup>168</sup> Almost ninety percent of the American population lived in areas covered by waivers during this period.<sup>169</sup> Thereafter, statewide waivers continued in most of these states under a provision making waivers available to states eligible for extended unemployment compensation.<sup>170</sup> More than seventy-five percent of the American population lived in areas that continued to be covered by waivers until the quickened pace of the recovery substantially reduced the number of eligible jurisdictions by the beginning of 2017.<sup>171</sup>

While the waivers were in effect, the SNAP caseload soared. The number of people receiving SNAP benefits increased by seventy percent between fiscal years 2007 and 2011.<sup>172</sup> By FY 2011, an average forty-five million people received SNAP benefits each month, approximately one of every seven persons in the United States.<sup>173</sup> Most of the increase in participation during this period was attributable to the recession and the subsequent slow recovery.<sup>174</sup> However, Food Stamp utilization remained high even

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*Don't Hold Your Breath*, PEW RES. CTR. (Mar. 17, 2014), <http://www.pewresearch.org/fact-tank/2014/03/17/resurgent-public-optimism-on-the-economy-dont-hold-your-breath>; David Morgan, *Most Americans Say U.S. in Recession Despite Data: Poll*, REUTERS (Apr. 28, 2011, 9:49 AM), <http://www.reuters.com/article/us-usa-economy-gallup/most-americans-say-u-s-in-recession-despite-data-poll-idUSTRE73R3WW20110428>.

168. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, sec. 101, § (e), 123 Stat. 115, 121. The ARRA suspended the ABAWD rule from April 2009 until the end of September 2010. *Id.* § (e)(1). Requirements and Services for Able-Bodied Adults Without Dependents, 83 Fed. Reg. 8013, 8015 (proposed Feb. 23, 2018) (to be codified at 7 C.F.R. § 273). However, states could choose to continue enforcing the rule during this period. 83 Fed. Reg. at 8014.

169. See *States Have Requested Waivers from SNAP's Time Limit in High Unemployment Areas for the Past Two Decades*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 6, 2018), <https://www.cbpp.org/research/food-assistance/states-have-requested-waivers-from-snaps-time-limit-in-high-unemployment> (illustrating the results on an interactive map for the year 2009).

170. CONG. RESEARCH SERV., 7-5700, FY2007-FY2012: ABLE-BODIED ADULTS WITHOUT DEPENDENTS (ABAWD) REQUIREMENTS, STATISTICS, AND WAIVERS 5–7 (2012).

171. Bolen & Dean, *supra* note 20, at 2.

172. CONG. BUDGET OFFICE, THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 1 (2012), <https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/04-19-snap.pdf>.

173. *Id.* at 4.

174. *Id.*

as unemployment began to decline during the recovery.<sup>175</sup> This sustained increase in the caseload reflected a decline in the quality of the jobs that were becoming available during the recovery period.<sup>176</sup> While half of the 7.5 million jobs lost during the Great Recession paid a middle-class wage, only two percent of the new jobs created during the recovery provided this level of pay.<sup>177</sup> In contrast, nearly seventy percent of the post-recession job gains have been in low-paying sectors of the economy<sup>178</sup> where many workers continue to depend on public assistance, including SNAP, to meet basic needs.<sup>179</sup>

A shift of jobs into the lower-paying sector of the economy had been underway for some time.<sup>180</sup> Thus, even before the recession, an increasing number of persons held low-paying jobs that left them in or near poverty.<sup>181</sup> Public benefits expert Ron Haskins testified before Congress in 2012 that supplementing the income of working poor and low-income families had come to be an important function of SNAP.<sup>182</sup> Citing the nation's experience with the TANF program, he stated, "Sadly, wages at the bottom of the earnings scale have been stagnant or declining for the past three decades, making it increasingly difficult for single mothers—or any other household that depends on the earnings of one low-

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175. See Stone et al., *supra* note 163, at 1; Jessica Wehrman, *Federal Budget Cutters Take Aim at Food Stamps*, COLUMBUS DISPATCH (June 18, 2017), <http://www.dispatch.com/news/20170618/federal-budget-cutters-take-aim-at-food-stamps> (quoting White House Budget Director Mick Mulvaney).

176. See DAVID AUTOR, HAMILTON PROJECT & CTR. FOR AM. PROGRESS, *THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET: IMPLICATIONS FOR EMPLOYMENT AND EARNINGS* 4 (2010), <https://economics.mit.edu/files/5554>.

177. Bernard Condon & Paul Wiseman, *Recession, Tech Kill Middle-Class Jobs*, YAHOO! NEWS (Jan. 23, 2013), <https://www.yahoo.com/news/ap-impact-recession-tech-kill-middle-class-jobs-051306434-finance.html>.

178. *Id.*; see also NAT'L EMP'T LAW PROJECT, *DATA BRIEF: THE LOW-WAGE RECOVERY AND GROWING INEQUALITY* (2012), <http://www.nelp.org/content/uploads/2015/03/LowWageRecovery2012.pdf> (noting job losses during the Great Recession were concentrated in mid-wage occupations, while job gains during the recovery were concentrated in low-wage occupations).

179. *Hearing, supra* note 41, at 2; Peter Van Buren, *Nickel and Dimed in 2016: You Can't Earn a Living on the Minimum Wage*, TRUTHOUT (Feb. 16, 2016), <http://www.truthout.org/opinion/item/34845-nickel-and-dimed-in-2016-you-can-t-earn-a-living-on-the-minimum-wage>.

180. See, e.g., Piven, *supra* note 118, at 136.

181. Patricia Cohen, *Counting up Hidden Costs of Low Pay*, N.Y. TIMES, Apr. 13, 2015, at B1.

182. *Hearing, supra* note 41, at 3.

skilled worker—to escape from poverty even when they work full-time.”<sup>183</sup>

Although growth of the SNAP caseload during this period reflected primarily the short-term effects of the Great Recession and the long-term effects of the economic restructuring, many conservatives unhappy with the dramatic growth of the program focused their discontent on the geographical waivers.<sup>184</sup> In particular, they blamed the geographical waivers for opening the Food Stamp Program to a presumably large number of persons who took advantage of this hiatus from the work requirement to meet their food needs with SNAP benefits when they could easily have gotten a job.<sup>185</sup> Critics of the program repeatedly held up the story of a California “surfer dude” (one Jason Greenslate) who purchased high-end seafood with Food Stamps while enjoying a carefree lifestyle of sun, sand, surf, and partying in Malibu.<sup>186</sup> This, of course, is precisely the type of individual at whom the ABAWD work requirement was aimed, and the story became something of a mantra for Republican policy makers and other critics seeking to reduce funding for the SNAP program.<sup>187</sup>

## VI. “REFORM” PROPOSALS

The dramatic increase in the size and cost of the Food Stamp Program during the Great Recession prompted the Republican majority’s current fixation on reining in the SNAP program.<sup>188</sup> Although these phenomena were natural, expectable,

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183. *Id.* at 2.

184. Wehrman, *supra* note 175.

185. See, e.g., Caitlin Dewey, *GOP Lawmaker: The Bible Says ‘If a Man Will Not Work, He Shall Not Eat,’* WASH. POST: WONKBLOG (Mar. 31, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/03/31/gop-lawmaker-the-bible-says-the-unemployed-shall-not-eat/?utm\\_term=.9b9b8a43b444](https://www.washingtonpost.com/news/wonk/wp/2017/03/31/gop-lawmaker-the-bible-says-the-unemployed-shall-not-eat/?utm_term=.9b9b8a43b444); Jake Grovum, *States Move Ahead with Food Stamp Cuts*, USA TODAY (Sept. 23, 2013, 10:27 AM), <https://www.usatoday.com/story/news/nation/2013/09/23/stateline-food-stamps/2854121>.

186. See Delaney, *supra* note 153.

187. See Liz Halloran, *Lobster Boy Looms Large in Food Stamp Debate*, NPR (Sept. 19, 2013, 6:30 AM), <https://www.npr.org/sections/itsallpolitics/2013/09/19/223796325/lobster-boy-looms-large-in-food-stamp-debate>. It is worth noting that the original SNAP work requirement, which was unaffected by the geographical waiver, could have been used in this case; if Greenslate were offered a job and turned it down, he could have been penalized under that provision. See *supra* notes 52, 56 and accompanying text.

188. See, e.g., Grovum, *supra* note 185.



and even desirable effects of the counter-cyclical<sup>189</sup> design of the program, they were perceived by some as indicators of a bloated program that needed trimming.<sup>190</sup>

Believing that the program, when untethered from the ABAWD work requirement, had once again begun to harbor substantial numbers of employable persons who had no incentive to look for work,<sup>191</sup> these critics sought to revive, expand, and strengthen the ABAWD work requirement to assure that employable persons would receive no benefits.<sup>192</sup>

#### A. State Initiatives: Reinstating and Expanding the ABAWD Rule

Even while federal measures suspending the ABAWD rule and expanding the criteria for waivers were in force during the Great Recession,<sup>193</sup> some Republican governors relinquished the waivers to which their states were entitled, citing concerns about potential disincentives to employment.<sup>194</sup> When these expanded waiver opportunities ended in 2015, and the ABAWD work requirement was reinstated in most of the country, some governors sought permission from FNS to expand or strengthen the ABAWD requirement beyond what was federally required.<sup>195</sup>

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189. A counter-cyclical fiscal policy is one that counters, rather than reinforces, economic trends. HAROLD WOLMAN, GERMAN MARSHALL FUND OF THE U.S., NATIONAL FISCAL POLICY AND LOCAL GOVERNMENT DURING THE ECONOMIC CRISIS 2 (2014), [https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Wolman\\_NatFiscalPolicy\\_Feb2014\\_Vol1.pdf](https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Wolman_NatFiscalPolicy_Feb2014_Vol1.pdf). During a recession, counter-cyclical policies attempt to stimulate economic growth by increasing demand for goods and services. *Id.* A program has a counter-cyclical design if the amount of money it pumps into the economy automatically increases in times of economic slowdown. *Id.* at 3. A means-tested entitlement program such as SNAP is counter-cyclical because it is required to provide benefits to every eligible applicant. *Id.* A rise in the unemployment rate increases the number of eligible applicants, thus increasing the flow of federal money into local economies throughout the country. *Id.*

190. Helena Bottemiller Evich, *Food Banks Fight Against Food Stamp Cuts*, POLITICO (Sept. 3, 2017, 7:20 AM), <https://www.politico.com/story/2017/09/03/food-banks-fight-congress-food-stamp-cuts-242268>.

191. *See, e.g.*, Melchior, *supra* note 61 (quoting welfare policy scholar Lawrence Mead).

192. *See id.*

193. *See id.*

194. *See, e.g.*, Jess Bidgood, States Tighten Rules for Receiving Food Stamps as the Economy Improves, N.Y. TIMES, Apr. 12, 2015, at 17.

195. *See, e.g.*, Scott Bauer, *Walker Welfare Changes Get Approval by Wisconsin Lawmakers*, U.S. NEWS (May 25, 2017, 9:32 PM), <https://www.usnews.com/news/best-states/wisconsin/articles/2017-05-25/details-of-walker-welfare-reforms-set-for-legislative-vote>.

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Wisconsin, for instance, seeks to apply the ABAWD work rule to parents of children over age six, a departure from current federal law, which exempts parents of all dependent children.<sup>196</sup>

During and after the 2014 reauthorization of SNAP, the renewed emphasis on ridding the program of persons who “should” be working shifted to Congress.<sup>197</sup> The House version of the 2014 Farm Bill<sup>198</sup> proposed to eliminate geographical waivers, reduce the number of hardship waivers, and expand the ABAWD definition to include adults who had no dependent children under the age of one.<sup>199</sup>

Although not enacted during the 2014 reauthorization process, many of these proposals were carried forward in Republican planning documents and remain under consideration.<sup>200</sup> The President’s 2017 budget would narrow the circumstances in which geographical waivers would be allowed, making them available only in areas with unemployment rates of over ten percent,<sup>201</sup> and the House Budget Plan for that year would eliminate these waivers altogether.<sup>202</sup> Another Republican

196. *Id.* (stating that the penalty for violation would be a temporary reduction in benefits).

197. See Pete Kasperowicz & Erik Wasson, *House Votes to Cut Food Stamps by \$39 Billion*, HILL (Sept. 19, 2013, 10:09 PM), <http://thehill.com/blogs/floor-action/house/323511-house-votes-to-cut-39-billion-from-food-stamp-program>.

198. Mary Clare Jalonick, *House Republicans Plan to Overhaul Nation’s Food Stamps Program*, PBS NEWS HOUR (Dec. 7, 2016, 12:07 PM), <https://www.pbs.org/newshour/nation/house-republicans-plan-overhaul-nations-food-stamps-program>. The bill as amended was subsequently rejected by the House. *House Committee Passes USDA-FDA Funding Bill, Rejects Reform Amendments*, NAT’L SUSTAINABLE AGRIC. COALITION (July 8, 2015), <http://sustainableagriculture.net/blog/house-fy16-ag-approps-full/>. Food stamp policy is normally set every five years in a wide-ranging Farm Bill. *What Is the Farm Bill?*, NAT’L SUSTAINABLE AGRIC. COALITION, <http://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/> (last visited Mar. 24, 2018). The next Farm Bill will be taken up in 2018. Christine Haughney et al., *Welcome to 2018, with All Eyes on Farm Bill*, POLITICO (Jan. 2, 2018, 10:00 AM), <https://www.politico.com/newsletters/morning-agriculture/2018/01/02/welcome-to-2018-with-all-eyes-on-farm-bill-062225>. However, changes to the Food Stamp Program may also be considered in the context of a wide-ranging welfare reform bill, as occurred in 1996. *Id.*

199. Ed Bolen et al., *Summary of the 2014 Farm Bill Nutrition Title: Includes Bipartisan Improvements to SNAP While Excluding Harsh House Provisions*, CTR. ON BUDGET & POL’Y PRIORITIES 3 (Feb. 3, 2014), <https://www.cbpp.org/sites/default/files/atoms/files/1-28-14fa.pdf>.

200. See *id.* at 2.

201. Stacy Dean, *President’s Budget Would Shift Substantial Costs to States and Cut Food Assistance for Millions*, CTR. ON BUDGET & POL’Y PRIORITIES 2 (July 19, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/5-23-17fa.pdf>.

202. Rosenbaum & Keith-Jennings, *supra* note 2, at 4.

bill introduced in 2017 would shorten the time limit for ABAWDs from three months to one, increase the number of required work hours, and include parents whose children are over age six within the ABAWD definition.<sup>203</sup>

*B. Termination or Elimination of Geographical Waivers*

The geographical waiver itself has been the target of many of the reform proposals.<sup>204</sup> These initiatives cast blame for the current “bloated” caseload on the virtual abandonment of the rigid ABAWD requirement since the onset of the Great Recession.<sup>205</sup> This reasoning is not supported by the facts. Although ABAWDs were one of the fastest-growing groups in the SNAP caseload during and after the Great Recession, increasing from 1.1 million in FY2008 to 3.9 million in FY2010,<sup>206</sup> their numbers constituted only a small proportion of the total caseload, which grew from roughly 26 million people in 2007 to nearly 45 million in 2011.<sup>207</sup> Thus even during this period of rapid growth in ABAWD participation, ABAWDs constituted only about nine percent of the SNAP caseload in 2011.

If, as seems certain, the real culprits behind the caseload increase are economic—poverty, the economic cycle, the restructuring of the economy, and the rise of the working poor—remedies will not be found within the SNAP program itself, but must be sought in the realm of economic policy and job creation.<sup>208</sup> Fraud, waste, and abuse may seem like easier targets,

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203. The Welfare Reform and Upward Mobility Act of 2017, H.R. 2832, 115th Cong. §§ 201(a), 201(c)(1)(A), 302(c)(B) (1st Sess. 2017); see also Mike Lee & Jim Jordan, *Mike Lee & Jim Jordan: Make Work and Marriage Great Again*, WASH. EXAMINER (May 25, 2017, 8:00 AM), <https://www.washingtonexaminer.com/mike-lee-and-jim-jordan-make-work-and-marriage-great-again>. This bill also includes mitigating provisions that would provide states with \$500 million for vocational programs and would allow married parents to split the required hours of work between them. *Id.* Similar provisions are included in the 2018 farm bill proposed by House Republicans. See Dewey, *supra* note 2.

204. Jalonick, *supra* note 198.

205. *Hearing*, *supra* note 41, at 13.

206. ZEDLEWSKI ET AL., *supra* 156, at 3.

207. CONG. BUDGET OFFICE, *supra* note 172, at 4.

208. See Editorial, *The Problem Isn't Food Stamps, It's Poverty*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/opinion/trump-budget-food-stamps-wages.html>. Of course, direct cuts to benefit levels or limitations of eligible populations can be used to reduce caseloads, so long as the restrictive parameters are rational and evenly applied. However, this approach will increase hunger and food insecurity while leaving untouched

but the primary contributors to high demand and high expenditures in means-tested benefit programs generally are traceable to more daunting failures within the economy itself.

Repeal of the geographical waiver is an example of an effort to cure an economically-based problem with a remedy targeted toward the non-problems of fraud, waste, and abuse.

The primary effect of repealing the geographical waiver provision would be the removal of an important safety net from the ABAWD work requirement, thus solidifying that rule's harsh and unjust exclusion from the SNAP program of low-income adults who are unable to find a job. Such a result—denial of food assistance to needy ABAWDs when jobs are scarce—is difficult to justify given the lack of evidence that substantial numbers of employable ABAWDs enter the program while waivers are in effect.<sup>209</sup>

The humanitarian goals of the SNAP program are not the only ones that would be affected by elimination of the geographical waiver. Objectives related to national and local economies have always been central to Food Stamp policy.<sup>210</sup> In addition to assuring that jobless victims of a recessionary economy do not go hungry, geographical waivers provide a mechanism for stimulating economic recovery by injecting funds into local

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the economic causes of the problem. It may even exacerbate some economic problems by reducing demand for food products in certain local economies. *Id.*

209. See generally Halloran, *supra* note 187. Although Republicans who support further limitations on the ABAWD rule refer to an unspecified number of lazy freeloaders who prefer to live off Food Stamps rather than work, they have identified only one individual who falls into this category: Jason Greenslate, a California surfer who was the subject of a 2013 Fox News special entitled “The Great Food Stamp Binge.” See Excelsior 10000, *The Great Food Stamp Binge (Complete)*, YOUTUBE (Aug. 10, 2013), <https://www.youtube.com/watch?v=rXoTX1sP-jo>. Republican leaders' transformation of Greenslate from a single individual into an army of Food Stamp cheats is seen in statements such as the following from an alert issued by the offices of former House Majority Leader Eric Cantor and Majority Whip Kevin McCarthy in the run-up to a key vote on a 2013 House bill making deep cuts in SNAP. Newscasts tell stories of “young surfers who aren't working but cash their food stamps in for lobster.” Janelle Bouie, *GAO Aims to Cut \$40 Billion out of Food Stamps to Foil Illusory 'Cheaters,'* DAILY BEAST (Sept. 5, 2013, 12:41 PM), <http://www.thedailybeast.com/gop-aims-to-cut-dollar40-billion-out-of-food-stamps-to-foil-illusory-cheaters>. Since 2013 Greenslate has continued to be held up as the only concrete example of program abuse in arguments for a variety of SNAP restrictions. See, e.g., Eleanor Clift, *New GOP Lie: Food Stamps on Cruise Ships*, DAILY BEAST (Apr. 7, 2015, 5:15 AM), <http://www.thedailybeast.com/new-gop-lie-food-stamps-on-cruise-ships>.

210. See generally *Hearing*, *supra* note 41, at 1–2.

economies.<sup>211</sup> Food Stamps are a particularly effective stimulus because they provide low-income families with the means to purchase basic necessities, they are quickly spent, and they are spent in local stores, thus increasing demand at a time when demand is stagnating.<sup>212</sup> Eliminating the waiver provision from the statute thus would not only penalize victims of the recessionary economy, but also would eliminate one mechanism for reigniting demand.

### *C. Expansion of Those Considered ABAWDs*

The work requirement represents an attempt to identify individuals and categories of persons who should be excluded from the SNAP program because of their presumed ability to meet their own needs. As it currently exists, the definition is both under- and over-inclusive. There are persons classified as ABAWDs who are not able to work, and there are persons in the groups excepted from the ABAWD requirement who are capable of work and self-support.<sup>213</sup>

As demonstrated by its continued support for the ABAWD work requirement itself,<sup>214</sup> the current majority is not focused on assuring that all needy persons have access to food assistance. Hence its proposals have bypassed issues of over-inclusion and focused on areas where it believes that the ABAWD definition could be broadened, such as expansion of the 18-50 age range that is included within the definition.<sup>215</sup>

#### *i. Raising the Age Cut-off*

The lower age cutoff of 18 is consistent with current laws that treat 18-year-olds as adults.<sup>216</sup> Reduction of that minimum age would clash with policies relating to both education and child

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211. *Id.* at 2.

212. *Id.*

213. AUSSENBERG, *supra* note 35, at 2.

214. See Caitlin Dewey, *The Trump Administration Takes Its First Big Step Toward Stricter Work Requirements for Food Stamps*, WASH. POST: WONKBLOG (Feb. 22, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/02/22/the-trump-administration-takes-its-first-big-step-toward-stricter-work-requirements-for-food-stamps>.

215. *Id.*

216. See *Termination of Child Support—Age of Majority*, NAT'L CONF. ST. LEGISLATORS (May 6, 2015), <http://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx>.

labor that structure current understandings of how children and youths are expected to spend their time.<sup>217</sup> Giving legal force to an expectation that low-income children younger than 18 should be self-supporting could have broad policy implications that demand full consideration in a more appropriate context.<sup>218</sup>

Increasing the upper age limit beyond the current 50-year cutoff is less inherently objectionable, given that current social security laws and retirement practices reflect work expectations extending some years beyond that age.<sup>219</sup> In practical terms, however, job seekers over fifty often face discriminatory hiring practices that limit their opportunities for employment.<sup>220</sup> Thus, while it may not be unreasonable to expect persons in this age group to work, it may well be unreasonable to expect them to get a job if they don't already have one.

## ii. Including Parents

Another approach that has been proposed for expanding the class of persons subject to the ABAWD work requirement is the removal or limitation of the exception for parents and other caregivers (the “without dependents” part of the ABAWD definition).<sup>221</sup> It has been proposed that “dependents” for purposes of this rule be limited to preschool children or to infants, or that there be no exception at all for able-bodied adults “with dependents.”<sup>222</sup> These proposals reflect current social norms, which do not regard the presence of children in the home as being inconsistent with participation in the workforce.<sup>223</sup>

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217. See STEVEN MINTZ, *HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD* 238–39 (2004); see also ROBERT MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE* 652–56 (6th ed. 2009).

218. See generally MINTZ, *supra* note 217, at 180–84.

219. See, e.g., CONG. BUDGET OFFICE, *RAISING THE AGES OF ELIGIBILITY FOR MEDICARE AND SOCIAL SECURITY* (Jan. 2012); Alicia H. Munnell, *The Average Retirement Age—An Update*, 15-4 CTR. FOR RETIREMENT RES. 1 (2015).

220. David Neumark et al., *Age Discrimination and Hiring of Older Workers*, FRBSF ECON. LETTER (2017).

221. See H. Claire Brown, *Wisconsin Just Made It Way Harder to Get Food Stamps*, NEW FOOD ECON. BLOG (Feb. 21, 2018), <https://newfoodeconomy.org/wisconsin-scott-walker-snap-welfare-reform>.

222. *Id.*

223. See Albelda, *supra* note 127, at 73–74 (showing that these social norms represent a change from the New Deal era when the first public assistance programs were created); see also Blank & Blum, *supra* note 86, at 29–30 (asserting that it was previously not expected that mothers would work outside the home to provide for their families); Nancy

It might seem, therefore, that inclusion of parents in the ABAWD work requirement would be consistent with current work expectations in the TANF program as well as within American society at large. However, both in TANF and in society at large, parental participation in the workforce is necessarily supported by substitute care for the worker's children.<sup>224</sup> Welfare reform policymakers were well aware that an expectation of work from the parents of young children could not be separated from the issue of access to child care.<sup>225</sup> PRWORA contained several provisions aimed at increasing the funds available to state TANF programs for child care,<sup>226</sup> and most states have spent a significant portion of their TANF block grant funds on providing the child care that is necessary to enable parents to work.<sup>227</sup> Moreover, a single parent of a child under age six is excused from compliance with the TANF work requirement if appropriate and affordable child care is unavailable.<sup>228</sup>

SNAP does not currently make funds available for child care.<sup>229</sup> Thus, any proposal to apply the ABAWD requirement to parents would have to address the child care issue in some way, either with funding or with special exceptions or allowances to assure that children's needs for care and supervision are met when their parents are ordered into the workforce.

School attendance does not obviate the need for parental or substitute care. Not only does the school day encompass fewer hours than the work day, but school does not provide supervision for students during summer vacation, holiday breaks, teacher training days, or weather releases—all times when an employed

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L. Cohen, *Why America Never Had Universal Child Care*, NEW REPUBLIC (Apr. 23, 2013), <https://newrepublic.com/article/113009/child-care-america-was-very-close-universal-day-care> (stating that as recently as 1971, a bill to create a national network of child care centers was vetoed by President Nixon who warned that it “would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over the family-centered approach”).

224. NAT'L WOMEN'S LAW CTR., *CHILD CARE IS FUNDAMENTAL TO AMERICA'S CHILDREN, FAMILIES, AND ECONOMY 1* (2016), <https://nwlc.org/resources/child-care-is-fundamental-to-americas-children-families-and-economy>.

225. HASKINS, *supra* 152, at 126.

226. *See id.* at 367–68.

227. *Id.* at 347.

228. 42 U.S.C. § 607(e)(2) (2012).

229. *Supplemental Nutrition Assistance Program (SNAP): Facts About SNAP*, *supra* note 11 (noting that SNAP assistance is determined by how much it costs to purchase food for a household).

parent could be unavailable to provide care. Thus, a parental exemption from the work requirement that ended when children reached school age would not avoid the above problems.

The TANF program and the ABAWD work requirement were created by the same legislation, the Personal Responsibility and Work Opportunity Reconciliation Act.<sup>230</sup> The Act made no attempt to terminate the Food Stamp Program in its entirety, and its new, strict work requirement explicitly exempted the population eligible for the TANF program—parents of dependent children.<sup>231</sup> Thus the Act structured the potential cutoff of income to non-working TANF recipients against a backdrop which included the family's continued eligibility for food assistance. The structure of the Act demonstrates that the dissonance between the work requirements in the two programs was an intentional effort to preserve food assistance as the ultimate safety net for families who lost the basic income support provided by TANF because of their failure to meet work requirements.<sup>232</sup>

This structure reflects the differing positions of cash assistance (TANF) and food assistance (SNAP/Food Stamps) in public thinking about charity. An obligation to feed the hungry is a widely accepted tenet of the American ethos,<sup>233</sup> as evidenced by the many individual and private initiatives that provide food stuffs or meals to the needy.<sup>234</sup> Charitable impulses of this sort often extend to persons such as homeless vagrants, who in other contexts might be regarded as “undeserving.”<sup>235</sup> The American public is not similarly supportive of providing cash assistance to the poor,<sup>236</sup> and charitable provision of cash income support, even to poor persons who might be considered “deserving,” is highly unusual.<sup>237</sup> Consistently with this dichotomy, PRWORA subjected

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230. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

231. Compare 7 U.S.C. § 2015(o)(3)(C) (2012) (exempting from the ABAWD rule “a parent or other member of a household with responsibility for a minor child”), with 42 U.S.C. § 608(a)(1) (2012) (TANF assistance may be provided only to families that include a resident minor child or pregnant woman).

232. See HASKINS, *supra* note 152, at 30 (confirming the intentionality of the differing treatment of work in TANF and Food Stamps).

233. OHLS & BEEBOUT, *supra* note 4, at 129.

234. *Id.*

235. *Id.*

236. *Id.* at 129–30.

237. *Id.* at 130.



parents receiving cash benefits from TANF to strict work requirements, while preserving Food Stamps as a safety net for those parents who could not, or did not, comply with the TANF requirements.<sup>238</sup>

Exclusion of parents from the strict ABAWD work requirement also serves to protect children from the harsh effects of this rule. American values and policies demonstrate particular concern for protecting the well-being of children, including the children of “undeserving” parents.<sup>239</sup> Although some meals can be provided to children separately from their parents at school or other organized gatherings,<sup>240</sup> it is unrealistic to think that the nutritional needs of children can be fully met outside of the home setting. Protecting access to food assistance for parents and other household caretakers is thus an important means of assuring that children have enough to eat.<sup>241</sup> The exclusion of parents and other caregivers from the ABAWD work requirement thus serves several important policy goals, which should not be carelessly cast aside in the name of cost containment.

### iii. Reducing the Duration of ABAWD Eligibility and the Availability of Hardship Waivers

As part of the Food and Nutrition Reform, Responsibility, and Accountability Act of 2016,<sup>242</sup> Rep. Steve Chabot (R-Ohio) introduced provisions that would reduce ABAWDs’ eligibility for SNAP benefits from three months every three years to only one

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238. *Policy Basics: An Introduction to TANF*, CTR. ON BUDGET & POL’Y PRIORITIES (June 15, 2015), <https://www.cbpp.org/research/policy-basics-an-introduction-to-tanf>.

239. See, e.g., David F. Labaree, *Parans Patriae: The Private Roots of Public Policy Toward Children*, 26 HIST. EDUC. Q. 111, 113–14 (1986); Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 238 FUTURE CHILD. 23, 25 (1998).

240. Federal programs provide food for children not only at schools, but also at child care and after-school programs, and a variety of summer activity programs. See *Child and Adult Care Food Program (CACFP)*, U.S. DEP’T AGRIC., <https://www.fns.usda.gov/cacfp/child-and-adult-care-food-program> (last updated Mar. 29, 2017); *Summer Food Service Program*, U.S. DEP’T AGRIC., <https://www.fns.usda.gov/sfsp/summer-food-service-program> (last updated July 20, 2017).

241. In regard to whether SNAP recipients should be drug-tested, House Agriculture Committee chair Mike Conaway stated, “We don’t want to be helping folks on drugs, but then again, folks on drugs have children.” Jalonick, *supra* note 198.

242. Food and Nutrition Reform, Responsibility, and Accountability Act of 2016, H.R. 4849, 114th Cong. (2016).

month every three years.<sup>243</sup> The bill also would allow states to grant hardship waivers to only five percent, instead of the current fifteen percent, of covered individuals.<sup>244</sup>

The provision in current law that allows ABAWDs to receive benefits for three months before the requirement of eighty hours work per month becomes effective appears to be intended to allow ABAWDs time to find a job before being denied food assistance.<sup>245</sup> Experts agree that three months is not long enough to enable many of the persons subject to the rule to find employment.<sup>246</sup> There is no justification for further shortening this period.

Similarly, the number of hardship waivers currently available is far short of what is needed to provide a safety net for all of the ABAWDs who are inappropriately excluded from the program by the work requirement.<sup>247</sup> Reducing the number of waivers will only increase the irrational exclusion from the program of ABAWDs who are unemployed through no fault of their own.

## VII. CREATING A WORK REQUIREMENT THAT WORKS

The proposed changes in the ABAWD work requirement that are currently being discussed take a deeply flawed provision and make it worse. The legitimacy of a work requirement in the SNAP program derives from its performance of a targeting function—assuring that the benefits of the program are not squandered on persons who are capable of providing for themselves. The targeting function involves both exclusion of those who are capable of providing for themselves and inclusion of those who are not. The legitimacy of an exclusionary targeting mechanism such as a work requirement depends on the accuracy with which it performs both these functions. The ABAWD rule fails by this measure. Though effective in excluding able-bodied adults who could be self-supporting it also excludes from the program large numbers of low-income people who are not able to

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243. *Chabot Introduces Common Sense Reforms for the Food Stamp Program*, CONGRESSMAN STEVE CHABOT (Mar. 30, 2016), <https://chabot.house.gov/news/documentsingle.aspx?DocumentID=398603>.

244. H.R. 4849; *Able-Bodied Adults Without Dependents (ABAWDs)*, *supra* note 124.

245. Bolen et al., *supra* note 135, at 1.

246. *Id.* at 12–13.

247. *See supra* text accompanying notes 83–128.

provide for themselves.<sup>248</sup> Although hardship waivers, workfare programs, and geographical waivers provide some measure of relief from this perverse result, the impact of these measures is insufficient to shield the ABAWD rule against charges of irrationality and illegitimacy.

Each of the proposed reforms discussed above in one way or another exacerbates this central failing of the ABAWD rule. They either expand the categories of persons—including thereby additional needy persons—who are subject to the rule, reduce the availability of protective waivers, or increase the harshness of the rule itself.<sup>249</sup> While these amendments may be motivated by a desire to prevent abuse by non-needy persons such as the “surfer dude,” much of their impact would be felt by persons who are unable to meet their own needs. The net result would be a serious weakening of SNAP’s ability to meet both its humanitarian and economic goals. The ABAWD work requirement and the current proposals for reforming it are examples of legitimate goals being pursued in illegitimate, even irrational ways. So are there more legitimate approaches that would exclude those who abuse the program while minimizing the exclusion of its intended beneficiaries?

*A. Building on the Original Food Stamp Work Requirement*

It was because Congress viewed the original Food Stamp work requirement as insufficient to prevent voluntary non-workers from accessing benefits that the ABAWD requirement was added to the program in 1996.<sup>250</sup> However, the ineffectiveness of the original work requirement was more a matter of inadequate implementation than of flawed structure. A requirement of that type—which penalizes only persons who reject without good cause a bona fide offer of a job or training slot—can be an effective means for excluding persons capable of self-support. In fact, a recent report by a politically diverse group of welfare experts endorsed the central feature of the original requirement: that work requirements in public assistance programs should result in

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248. *See supra* text accompanying notes 87–100.

249. *Id.*

250. *See supra* text accompanying notes 54–62.

a denial of benefits only to recipients who were offered a job or other “constructive activity” but refused to work.<sup>251</sup>

The original work requirement is still in effect,<sup>252</sup> and could be used as the platform for a strictly enforced requirement that combines resources and techniques that have been developed in relation to the SNAP Employment & Training initiative and the ABAWD rule into a single coordinated focus on identifying, developing, and making available work and training opportunities for all non-exempt food stamp recipients. A comprehensive approach to work that is built on the original work requirement with its presumption of eligibility and its requirement of a bona fide job or training opportunity would avoid the harsh, unwarranted, and irrational exclusion of unemployable adults that occurs under the ABAWD rule.

### *B. Building on the ABAWD Model*

If something like the ABAWD work requirement is to be retained, it must be reformulated to do a better job of excluding only persons who are in fact able to get a job. The categories of persons to whom the requirement applies should be re-examined to assure that they correlate with populations that are largely made up of persons who could be self-supporting, while exempting persons whose employability is questionable. There are many circumstances other than disability that can seriously impair a person’s ability to get and keep a job, some of which are discussed herein as “barriers to employment.”<sup>253</sup> A person subject to incapacitating “barriers” should not be expected to work, any more than a person with physical or mental disabilities.

The over-exclusionary effects of the current assumption that all able-bodied adults between the ages of eighteen and fifty are able to work could be remedied by narrowing the concept of “able-bodied.”<sup>254</sup> For instance, one or more exceptions to the ABAWD definition could be created for persons with barriers that

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251. AEI/BROOKINGS WORKING GRP. ON POVERTY & OPPORTUNITY, OPPORTUNITY, RESPONSIBILITY, AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM 49 (2015).

252. *Id.*

253. *See supra* text accompanying notes 58–74.

254. The actual statutory language provides an exception to the ABAWD rule for persons who are “physically or mentally unfit for employment.” 7 U.S.C. § 2015(o)(3)(B) (2012).

make employment unlikely, such as illiteracy, lack of English proficiency, or addiction issues. Exceptions such as this could be framed in terms of specific barriers that exempt an individual from the ABAWD rule, or could be framed to exempt from the work requirement persons having multiple barriers from a published list. This approach has already been suggested by FNS and is used in some states either as a method for allocating hardship waivers<sup>255</sup> or as conditions that render a person unfit for employment.<sup>256</sup>

For some persons, a barrier or disability may not altogether prevent them from working, but only limit the amount of time that they are able to work per day or per week, thus making it difficult for them to satisfy the 80-hour-per-month requirement. The ABAWD requirement needs to incorporate a mechanism for accommodating the partial inability to work of these persons, perhaps by using some form of the “barriers” approach outlined above.

It has often been suggested that a workfare or training slot or other means for satisfying the work requirement be offered to all ABAWDs who are unable to find sufficient work in the job market.<sup>257</sup> Just as this element would be included in the single comprehensive approach outlined above, it should also be incorporated into any separate approach based on the current ABAWD rule.

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255. FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., *supra* note 140, at 2 (giving as examples of barriers that could serve as bases for hardship exemptions: persons at the older end of the ABAWD age range, persons living in remote areas where there are few jobs, persons who have not completed high school, non-English speakers, and persons who lack access to transportation); Stacy Dean & David Super, *Implementing the Individual Exemptions from the Food Stamp Three Month Time Limit*, CTR. ON BUDGET & POL'Y PRIORITIES 7 (Dec. 11, 1998), <https://www.cbpp.org/archiveSite/12-11-98faexemp.pdf> (giving as additional examples homeless persons and migrant farmworkers, and noting that as of 1998 Nebraska was exempting persons aged 46–49 and persons in rural areas who lacked transportation).

256. Andrew Hamond & MacKenzie Speer, *SNAP's Time Limit: Emerging Issues in Litigation and Implementation*, CLEARINGHOUSE COMMUNITY (Apr. 2017), [http://povertylaw.org/files/docs/article/ClearinghouseCommunity\\_Hammond.pdf](http://povertylaw.org/files/docs/article/ClearinghouseCommunity_Hammond.pdf) (identifying a number of states that incorporate barriers such as homelessness and domestic violence survival into their criteria for determining unfitness to work).

257. See, e.g., MCCONNELL ET AL., *supra* note 83, at 4; Bolen et al., *supra* note 135, at 4.

### VIII. CONCLUSION

The suggestions above are examples of reforms that could result in a more legitimate work rule. Neither of the suggested approaches would result in a perfectly accurate demarcation between low-income persons who are employable and those who are not. The reform based on the original Food Stamp work requirement would continue to be somewhat under-inclusive, failing to remove from the program all persons who were capable of self-support. The ABAWD work requirement, if reformed as suggested, would continue to be somewhat over-inclusive, removing from the program some persons who would not be able to provide for themselves. Each, however, would constitute a step in the direction of greater accuracy, which could be built upon as experience revealed flaws in the original plan.

The proposals that are currently being floated in policy circles in Washington would not only fail to improve the accuracy of the existing work rules, but would deny SNAP food assistance to an even greater number of needy persons, further reducing the legitimacy of the ABAWD rule as a means for protecting the integrity of the program.