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Nicole E. Negowetti*

Introduction

The Supplemental Nutrition Assistance Program (SNAP)¹ is a highly effective government program that reduces poverty and improves food security for millions of our country’s most vulnerable families. SNAP is the nation’s most important and largest anti-hunger and anti-poverty food and nutrition benefits program.² It is the nation’s “first line of defense” against hunger and serves as the foundation of America’s nutrition safety net.³ It aims to address food insecurity and improve food access by increasing the food purchasing power of low-income households.⁴ SNAP assists low-income households to meet their food needs by providing cash benefits via a debit card that can only be spent on food. Households may not use SNAP benefits to purchase alcohol, tobacco, household supplies, pet food, vitamins, medicines, food to be eaten in the store, or prepared foods.⁵ Approximately 42 million Americans—or 13 percent of the population—depend on these benefits to purchase food.⁶ Nearly 40 percent of all SNAP

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¹ 7 U.S.C. § 2011 (2012).

² *Id.* (Subtitle A of the 2014 Farm Bill reauthorized appropriations for SNAP through fiscal year 2018).

³ U.S. DEP’T OF AGRIC., BUILDING A HEALTHY AMERICA: A PROFILE OF THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 1 (2012), <https://fns-prod.azureedge.net/sites/default/files/BuildingHealthyAmerica.pdf>.

⁴ *Id.*

⁵ Supplemental Nutrition Assistance Program (SNAP): What Can SNAP Buy?, U.S. Dep’t of Agric., Food & Nutrition Serv., <https://www.fns.usda.gov/snap/eligible-food-items> (last updated Nov. 17, 2017).

⁶ Maria Godoy & Allison Aubrey, *Trump Wants Families On Food Stamps To Get Jobs. The Majority Already Work*, NPR: THE SALT (May 24, 2017), <https://www.npr>.

recipients live in households with earnings and half of SNAP recipients are children.⁷

SNAP is reauthorized pursuant to the farm bill and is jointly administered by the United States Department of Agriculture (USDA) and states.⁸ Congress changed the program's name from "Food Stamps Program" to "SNAP" in 2008, declaring that SNAP's purpose is to "permit low-income households to obtain a more nutritious diet," to raise their "levels of nutrition," and alleviate "hunger and malnutrition."⁹ The goal of providing eligible households with an "opportunity to obtain a more nutritious diet" was also emphasized in the text of the law establishing the program.¹⁰ Despite these declarations, there are no nutrition standards accompanying the redemption of SNAP benefits.¹¹ This has fueled a debate about whether the program should actually provide nutrition assistance, or whether it should simply provide supplemental income for food purchases.¹²

When SNAP was first implemented in 1939, the program was designed to address calorie insufficiency and was also intended to reduce agricultural surpluses.¹³ Eight decades later, nutrition-related health challenges have changed significantly. In the U.S. approximately one third of adults are obese.¹⁴ The prevalence of

[org/sections/thesalt/2017/05/24/529831472/trump-wants-families-on-food-stamps-to-get-jobs-the-majority-already-work](https://www.cbpp.org/sections/thesalt/2017/05/24/529831472/trump-wants-families-on-food-stamps-to-get-jobs-the-majority-already-work); *Policy Basics: The Supplemental Nutrition Assistance Program (SNAP)*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/policy-basics-introduction-to-the-supplemental-nutrition-assistance-program-snap> (last updated Feb. 13, 2018).

⁷ Brian Barth, *How Would Trump's Food Stamp Cuts Hurt Americans? Let Us Count the Ways*, MODERN FARMER (July 13, 2017), <https://modernfarmer.com/2017/07/trump-snap-benefit-cuts/>.

⁸ 7 U.S.C. § 2011 (Subtitle A of the 2014 Farm Bill reauthorized appropriations for SNAP through fiscal year 2018).

⁹ *Id.*

¹⁰ 7 U.S.C. § 2013(a).

¹¹ Jennifer L. Pomeranz & Jamie F. Chriqui, *The Supplemental Nutrition Assistance Program: Analysis of Program Administration and Food Law Definitions*, 49 AM. J. PREV. MED. 428, 428 (2015).

¹² *Id.*

¹³ *Supplemental Nutrition Assistance Program (SNAP): A Short History of SNAP*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., www.fns.usda.gov/snap/short-history-snap (last updated Nov. 28, 2017).

¹⁴ *Adult Obesity Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/facts/>.

diabetes continues to climb, with 30.3 million Americans suffering from the disease, and approximately 84.1 million adults have prediabetes.¹⁵ There is an undeniable link between rising rates of obesity and rising medical spending. Medical costs associated with obesity (which largely fall on Medicare and Medicaid) are estimated to be at least \$147 billion per year.¹⁶

A. Poverty and Health: the Paradox of Food Insecurity and Obesity

The U.S. now faces a food insecurity-obesity paradox, where many individuals suffer from both conditions simultaneously.¹⁷ The problem is now a lack of access to affordable, healthy food, rather than calorie deficits. In the United States, 15.6 million households—comprising about 12.3 percent of the U.S. population¹⁸—experience food insecurity, defined as “difficulty at some time during the year providing enough food for all their members due to a lack of resources.”¹⁹ Low-income individuals are likely able to obtain enough calories but these calories may come from cheap foods that are calorically dense and nutritionally poor.²⁰ A USDA study using data from the National Health and Nutrition Examination Survey (NHANES) showed that SNAP participants were more likely than income-eligible and higher

cdc.gov/obesity/data/adult.html (last updated Mar. 8, 2018).

¹⁵ *Statistics About Diabetes: Overall Numbers, Diabetes and Prediabetes*, AMERICAN DIABETES ASS'N, <http://www.diabetes.org/diabetes-basics/statistics/?referrer=https://www.google.com/> (last updated Mar. 22, 2018).

¹⁶ See Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer and Service-Specific Estimates*, 28 HEALTH AFFAIRS w822, w822 (2009).

¹⁷ See FOOD RESEARCH & ACTION CENTER, UNDERSTANDING THE CONNECTIONS: FOOD SECURITY AND OBESITY 1 (2015), http://frac.org/wp-content/uploads/frac_brief_understanding_the_connections.pdf.

¹⁸ *Key Statistics & Graphics: Food Security Status of U.S. Households in 2016*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., [HTTPS://WWW.ERS.USDA.GOV/TOPICS/FOOD-NUTRITION-ASSISTANCE/FOOD-SECURITY-IN-THE-US/KEY-STATISTICS-GRAPHICS.ASPX](https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx) (last updated Oct. 4, 2017).

¹⁹ ALISHA COLEMAN-JENSEN ET AL., U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2015 i (2016), [HTTPS://WWW.ERS.USDA.GOV/WEBDOCS/PUBLICATIONS/79761/ERR-215.PDF?v=42636](https://www.ers.usda.gov/webdocs/publications/79761/ERR-215.pdf?v=42636).

²⁰ Alice S. Ammerman et al., *Behavioral Economics and the Supplemental Nutrition Assistance Program: Making the Healthy Choice the Easy Choice*, 52 AM. J. PREV. MED. S145, S145 (2017).

income nonparticipants to be obese (40 percent versus 32 percent and 30 percent, respectively).²¹ Although there is mixed evidence about a causal relationship between obesity and food insecurity,²² there is agreement that food insecurity and diet-related diseases co-occur in communities, families, and individuals.²³ Because both food insecurity and obesity are consequences of economic and social disadvantage, it not surprising that these conditions coexist.²⁴

Several theories have been offered to explain the paradox of food insecurity and obesity. Some argue that food insecurity and obesity are independent consequences of poverty and the resulting lack of access to enough nutritious food or stresses of poverty and that obesity among food insecure and low-income people occurs in part because they are subject to the same challenging cultural changes as other Americans (e.g., more sedentary lifestyles,²⁵ increased portion sizes), and also because they face unique challenges in adopting and maintaining healthful behaviors.²⁶ Low-income families may spend their limited food budget on high-calorie, low-quality products.²⁷ They may also experience variation in food availability, causing them to over-

²¹ U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., DIET QUALITY OF AMERICANS BY SNAP PARTICIPATION STATUS: DATA FROM THE NATIONAL HEALTH AND NUTRITION EXAMINATION SURVEY, 2007-2010 – SUMMARY 1 (2015), <https://fns-prod.azureedge.net/sites/default/files/ops/NHANES-SNAP07-10-Summary.pdf>.

²² See Marlene B. Schwartz, *Moving Beyond the Debate*, 52 AM. J. PREV. MED. S199, S201 (2017) (noting that because it is a difficult empirical question, there is considerable debate in the scientific literature about the strength of evidence demonstrating whether SNAP participants are at higher risk of poor diet than the general population).

²³ *Id.* at S199.

²⁴ FOOD RESEARCH & ACTION CENTER, *supra* note 17, at 1.

²⁵ *Id.* at 4. (“There is emerging evidence that food insecurity is associated with less physical activity (a risk factor for obesity) and greater perceived barriers to physical activity (e.g., too tired to be physically active). In addition, many studies find that low-income populations engage in less physical activity and are less physically fit than their higher income peers. This is not surprising, given that many environmental barriers, such as lack of attractive and safe places to be physically active, to physical activity exist in low-income communities.”).

²⁶ *Id.* at 3.

²⁷ David S. Ludwig et al, *Opportunities to Reduce Childhood Hunger and Obesity Restructuring the Supplemental Nutrition Assistance Program (the Food Stamp Program)*, 308 J. AM. MED. ASSN. 2567, 2567 (2012).

consume food at the beginning of the month after receiving SNAP benefits and then to go without adequate food at the end of the month when benefits have run out.²⁸

In addition to higher rates of obesity, low-income people face heightened risk of diet-related chronic diseases that directly relate to poor dietary choices—approximately 70 percent higher prevalence of diabetes and 19 percent higher prevalence of hypertension, compared with the highest-income population.²⁹ These health disparities have precipitated a national conversation about how the government can harmonize its efforts to improve nutrition with those to reduce food insecurity.³⁰ This essay examines the debate surrounding a longstanding and controversial proposal to improve the health of SNAP recipients—restricting the purchase of sugar-sweetened beverages (SSBs) with SNAP benefits. This article first provides a brief history of proposals to restrict SNAP purchases to improve nutrition.

I. A brief history of proposals to restrict SSB

Although proposals to restrict SNAP purchases have received considerable attention over the past several years,³¹ the idea of restricting SNAP is not new. Policymakers at the federal and state governments have proposed restrictions multiple times since the program began. Changes to SNAP would need to be authorized or mandated by the federal government and implemented by states or localities.³² Congress can require the USDA to either pilot a program,³³ or engage in notice and comment rulemaking to amend SNAP guidelines, perhaps to reflect nutrition science and public health concerns.³⁴

²⁸ *Id.*

²⁹ Susan M. Levin et al., *A Proposal for Improvements in the Supplemental Nutrition Assistance Program*, AM. J. PREV. MED. S186, S186 (2017).

³⁰ Schwartz, *supra* note 22, at S199.

³¹ *See id.*

³² *See Pomeranz & Chriqui, supra* note 11, at 432.

³³ *See id.*

³⁴ *Id.* Congress required the USDA to open rulemaking to revise the Women, Infants and Children (WIC) Program food package. *See Women, Infants and Children (WIC)*

State agencies administering SNAP have requested waivers of the USDA to implement pilot programs restricting the purchase of certain unhealthy foods. In 2004, Minnesota's Department of Human Services petitioned the USDA for permission to exclude soft drinks and candy from the foods eligible for purchase with SNAP.³⁵ In 2007, the USDA explained its rationale for rejecting the waiver in a position paper, *Implications of Restricting the Use of Food Stamp Benefits*, asserting that "there are serious problems with the rationale, feasibility and potential effectiveness of" prohibitions on types of foods that could be purchased with SNAP.³⁶ In 2010, New York State submitted a proposal to the USDA to administer a demonstration project in New York City that would restrict SSBs from SNAP to test whether a restriction would lead to changes in consumption of sweetened beverages and other food groups among SNAP recipients, as well as whether a restriction could be implemented.³⁷ The USDA has consistently denied all requests for waivers.³⁸ Most recently, the USDA denied Maine's second request for a restriction on the purchase of candy and SSBs with SNAP.³⁹

Background: Revisions to the WIC Food Package, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/wic/background-revisions-wic-food-package> (last updated Feb. 14, 2018).

³⁵ Letter from Ollice Holden, Regional Administrator, U.S. Department of Agriculture, to Maria Gomez, Assistant Commissioner, Minnesota Department of Human Services (May 4, 2004), <https://www.heartland.org/template-assets/documents/publications/15364.pdf>.

³⁶ U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., *IMPLICATIONS OF RESTRICTING THE USE OF FOOD STAMP BENEFITS – SUMMARY 1* (2007), <https://fns-prod.azureedge.net/sites/default/files/FSPFoodRestrictions.pdf>.

³⁷ N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, *A PROPOSAL TO CREATE A DEMONSTRATION PROJECT IN NEW YORK CITY TO MODIFY ALLOWABLE PURCHASES UNDER THE FEDERAL SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 2* (2010), <https://www.empirecenter.org/wp-content/uploads/2016/04/snap-proposal.pdf>.

³⁸ Marion Nestle, *USDA Asks Maine for More Information—lot more—about its SNAP Waiver Request*, FOOD POLITICS (Apr. 24, 2017), <https://www.foodpolitics.com/2017/04/usda-asks-maine-for-more-information-about-its-snap-waiver-request-lots-more/>.

³⁹ Eric Russell, *Feds Tell Maine: You Can't Ban Food Stamp Recipients From Buying Sugary Drinks, Candy*, PORTLAND PRESS HERALD (Jan. 19, 2018), <https://www.pressherald.com/2018/01/19/feds-again-reject-lepage-request-to-ban-food-stamp-recipients-from-buying-sugary-drinks-candy/>.

State legislators in states including California,⁴⁰ Illinois,⁴¹ Maine,⁴² and West Virginia⁴³ have also proposed a range of bills that would permit their states to seek a waiver from the USDA, conduct a pilot program, or pass a resolution urging Congress to remove certain foods from SNAP eligibility.⁴⁴

Federal and local leaders have also called on Congress and the USDA to allow pilot programs to restrict purchases with SNAP, to no avail. In 2013, Senators Harkin and Coburn attempted to amend the Farm Bill to allow SNAP demonstration projects in two states to promote the purchase of healthier food.⁴⁵ Mayors of 18 major cities across the United States, including Boston, Chicago, Los Angeles, and New York similarly called on Congress to allow the opportunity to “test and evaluate” restrictions on SSBs while also incentivizing the purchase of healthier foods.⁴⁶ When Harkin and Coburn’s amendment failed to pass, the Senators urged the USDA to engage in two demonstration projects on its own to limit the use of SNAP benefits on foods that are over-consumed and may increase risk of chronic disease.⁴⁷ The USDA rejected this request.⁴⁸

⁴⁰ S.B. 134, 2013 Reg. Sess. (Cal. 2011) (banning the purchase of calorically sweetened beverages).

⁴¹ H.B. 0177, 98th Gen. Assemb. (Ill. 2013) (proposal to ban the purchase of carbonated soft drinks, snack cakes, candies, chewing gum, flavored ice bars, fried, high-fat chips with SNAP).

⁴² S. Res. 505, 126th Leg., 1st Reg. Sess. (Me. 2013) (prohibiting the purchase of foods not “consumed for human nourishment,” including soft drinks, iced tea, sodas, fountain beverages, candy, confections, and prepared food).

⁴³ S.B. 262, 2014 Reg. Sess. (W. Va. 2014) (banning the purchase of soft drinks, carbonated beverages, candy, cookies, crackers, ice cream with SNAP).

⁴⁴ Pomeranz & Chriqui, *supra* note 11, at 430.

⁴⁵ 77 CONG. REC. S3911 (2013).

⁴⁶ Letter from Mayors of Baltimore et al. to Speaker Boehner and Minority Leader Pelosi (June 18, 2013), http://www.nyc.gov/html/om/pdf/2013/snap_letter_to_house_6_18_13.pdf.

⁴⁷ Letter from Center from Science in the Public Interest to Thomas Vilsack, Secretary of Agriculture (Aug. 1, 2013), <https://cspinet.org/sites/default/files/attachment/organizations-letter-to-vilsack-8-1-13.pdf>.

⁴⁸ Pomeranz & Chriqui, *supra* note 11, at 439.

II. Targeting SSBs to Improve Nutrition and Health

Unlike proposals from states and advocates calling for a ban on a variety of “junk foods” (e.g., candy, chips, snack cakes, etc.) with SNAP, a restriction of just SSBs is based on clear evidence of the harms of added sugar and the potential impact to improve public health. The USDA’s Dietary Guidelines note that beverages, including soft drinks, fruit drinks, and energy drinks, are the major source of added sugars in typical U.S. diets—almost half of added sugars consumed by the U.S. population come from sweetened beverages.⁴⁹ Scientific evidence suggests that the consumption of SSBs, can have profound and serious negative effects on health, especially among children.⁵⁰ As the Centers for Disease Control and Prevention, (CDC) has recognized, frequently drinking SSBs is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout.⁵¹ Reducing the consumption of SSBs also follows the guidelines of leading health agencies such as the World Health Organization, the National Institutes of Health, the Centers for Disease Control and Prevention, the Institute of Medicine, and the Surgeon General of the United States.⁵² The USDA itself urges Americans to “drink water instead of sugary drinks.”⁵³ As the bipartisan National

⁴⁹ U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 2015-2020 54-55 (8th ed. 2015) https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf.

⁵⁰ See, e.g., Lenny R. Vartanian et al., *Effects of Soft Drink Consumption On Nutrition And Health: A Systematic Review And Metaanalysis*, 97 AM. J. PUBLIC HEALTH 667, 667 (2007); Vasanti S. Malik & Frank B. Hu, *Fructose And Cardiometabolic Health: What The Evidence From Sugar-Sweetened Beverages Tells Us*, 66 J. AM. COLL. CARDIOL. 1615, 1616 (2015); Vasanti S. Malik & Frank B. Hu, *Sugar-Sweetened Beverages And Health: Where Does The Evidence Stand?* 94 AM. J. CLIN. NUTR. 1161, 1162 (2011).

⁵¹ *Get the Facts: Sugar-Sweetened Beverages and Consumption*, CENTERS FOR DISEASE CONTROL & PREVENTION, [HTTPS://WWW.CDC.GOV/NUTRITION/DATA-STATISTICS/SUGAR-SWEETENED-BEVERAGES-INTAKE.HTML](https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html) (last updated April 7, 2017).

⁵² NAT’L COMM’N ON HUNGER, FREEDOM FROM HUNGER: AN ACHIEVABLE GOAL FOR THE UNITED STATES OF AMERICA: RECOMMENDATIONS OF THE NATIONAL COMMISSION ON HUNGER TO CONGRESS AND THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE 44 (2015).

⁵³ U.S. DEP’T OF AGRIC., FIND YOUR HEALTHY EATING STYLE & MAINTAIN IT FOR A LIFETIME (2016).

Commission on Hunger⁵⁴ reasoned in supporting a restriction on the purchase of SSB, SNAP benefits should help families meet their nutritional needs, not contribute to negative health outcomes through poor nutrition choices.⁵⁵ “With its right hand, the federal government funds nutrition education and wellness programs to encourage healthy eating; but with its left hand, the federal government funds SNAP participants’ purchase and consumption of sweetened beverages.”⁵⁶

SNAP is the only federal nutrition assistance program that fails to regulate the quality of foods that can be purchased and is the only one to subsidize the purchase of SSBs.⁵⁷ This lack of focus on nutrition in SNAP may simultaneously exacerbate hunger and promote obesity.⁵⁸ Sweetened beverages do not alleviate hunger because they do not satiate⁵⁹ and they have minimal nutritional value.⁶⁰ To illustrate, if a child consumes 20 ounces of a sugary drink, she will become hungrier more quickly than if she ate a large apple and a large tablespoon of peanut butter, even though both contain same number of calories.⁶¹ The addition of SSBs merely adds excess calories and sugar, which contribute to obesity, diabetes, and other chronic diseases.⁶² By putting SSBs on the same economic basis as more-healthy choices, SNAP may

⁵⁴ The bipartisan National Commission on Hunger, established to identify solutions to hunger. MARIANA CHILTON & ROBERT DOAR, NAT’L COMM’N ON HUNGER, HEARING SERIES: PAST, PRESENT, AND FUTURE OF SNAP 2 (2015). The 10-member Commission, appointed by the House and Senate leadership, represented government, industry, academia, and nonprofit organizations. *See id.*

⁵⁵ *Id.* at 6.

⁵⁶ Anne Barnhill, *Impact and Ethics of Excluding Sweetened Beverages From The SNAP Program*, 101 AM. J. PUB. HEALTH 2037, 2038 (2011).

⁵⁷ Kelly Blondin, *Supplemental Nutrition Assistance Program Reform: A 21st Century Policy Debate*, J. SCI. POL’Y GOVERNANCE (2014), http://www.sciencepolicyjournal.org/uploads/5/4/3/4/5434385/_blodin_snap.pdf.

⁵⁸ Ludwig et al., *supra* note 27, at 2567.

⁵⁹ D. P. DiMeglio & R. D. Mattes, *Liquid Versus Solid Carbohydrate: Effects on Food Intake and Body Weight*, 24 INT. J. OBESITY RELATED METABOLIC DISORDERS 7941 794 (2000).

⁶⁰ *School Meals: Foods of Minimal Nutritional Value*, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., <http://www.fns.usda.gov/cnd/menu/fmnv.htm> (last updated Sept. 13, 2013).

⁶¹ Ludwig et al., *supra* note 27, at 2567.

⁶² *Id.* at 2567-68.

actually aggravate diet-related diseases.⁶³ A nutrition assistance program that permits the purchase of SSBs is blatantly ignoring decades of research documenting the harm associated with these products.⁶⁴

While recent polls reveal that an overwhelming majority of American voters of both parties favor restricting SNAP benefits from being used to buy soda and candy,⁶⁵ the issue has polarized typical allies—anti-hunger and public health nutrition groups.⁶⁶ Arguments against a purchasing restriction in SNAP can be divided into two main themes: whether a restriction can successfully be implemented (i.e., whether it is feasible and likely to be effective) and whether it should be enacted (i.e., whether it is ethical to impose such a restriction). In the following sections, key arguments under each theme are explained and responded to in turn.

III. Could it be done? The Feasibility and Effectiveness of a Restriction on SNAP

The USDA and groups who oppose a SSB restriction in SNAP argue that such a policy would impose significant administrative burdens on the USDA, states administering the program, and retailers accepting SNAP benefits. In addition to these concerns about the feasibility of implementing a SSB

⁶³ Levin et al., *supra* note 29, at S191.

⁶⁴ Vartanian et al., *supra* note 50, at 667, 671; Malik & Hu, *supra* note 50, at 1615-16.

⁶⁵ STEVEN KULL, PROGRAM FOR PUBLIC CONSULTATION, AMERICANS ON SNAP BENEFITS 6-7 (2017), http://vop.org/wp-content/uploads/2017/04/SNAP_Report.pdf. The study found that of the 7,000 voters polled, 73 percent were in favor for banning SNAP recipients from using their benefits to buy soda. *Id.* Eighty-two percent of Republican respondents and 67 percent of Democrats agreed with soda restrictions. *Id.*

⁶⁶ Schwartz, *supra* note 22, at S200. For example, when New York City requested a waiver from the USDA to conduct a pilot study to test the effect of restricting sugary drinks from purchase using SNAP benefits, the Food Research & Action Center published a report in opposition to changing SNAP. *See* HEATHER HARTLINE-GRAFTON ET AL., FOOD RESEARCH & ACTION CENTER, A REVIEW OF STRATEGIES TO BOLSTER SNAP'S ROLE IN IMPROVING NUTRITION AS WELL AS FOOD SECURITY 14 (2013), http://frac.org/wp-content/uploads/SNAPstrategies_full-report.pdf. In contrast, the Center for Science in the Public Interest organized a letter signed by more than 50 organizations and health experts to USDA Secretary Vilsack to allow pilot tests of restricting SSBs from SNAP. Letter from Center from Science in the Public Interest to Thomas Vilsack, *supra* note 47.

restriction, some opponents of the policy have questioned whether it would have any impact on consumption of SSBs or health outcomes. Each argument is addressed below.

A. The Feasibility of Implementing a Ban on SSBs

One general argument against restricting certain foods from SNAP is that it would require the USDA to rate or rank foods on some type of nutrition scale, and second, it would need to define the uncertain boundaries of “healthy” and “unhealthy” foods.⁶⁷ The USDA and others claim that doing so would be problematic because such a ranking system does not exist⁶⁸—the Dietary Guidelines recommend overall eating patterns, not specific foods.⁶⁹ Another related concern is that this process will open up the floodgates of food industry lobbying to ensure that their products are not restricted, or alternatively, are incentivized.⁷⁰ While these issues may be relevant to a proposal for banning all “junk” food (over which debates could be had over the nutritional value of some granola bars, pretzels, chips, etc.), the evidence is quite established regarding the lack of nutritional value of SSBs.⁷¹

Another concern regarding feasibility of implementation is that imposing restrictions in the SNAP program would burden retailers. As a result, some retailers might stop accepting SNAP which could limit access for households.⁷² SNAP represents a large share of the national food budget and it seems unlikely that retailers would be deterred from participating because of an additional

⁶⁷ See HARTLINE-GRAFTON ET AL., *supra* note 66, at 14.

⁶⁸ *Id.*

⁶⁹ U.S. DEP’T OF AGRIC., *supra* note 49.

⁷⁰ See Margaret Sessa-Hawkins, *Congress Could Cut Soda and Candy from SNAP, but Big Sugar is Pushing Back*, CIVIL EATS (Aug. 28, 2017), <https://civileats.com/2017/08/28/congress-could-cut-soda-and-candy-from-snap-but-big-sugar-is-pushing-back/> (discussing the push-back from the sugar industry to restrictions on candy and soda in SNAP).

⁷¹ See U.S. DEP’T OF AGRIC., *supra* note 36, at 3-5.

⁷² See Jacob A. Klerman et al., *Improving Nutrition by Limiting Choice in the Supplemental Nutrition Assistance Program*, 52 AM. J. PREV. MED. S171, S175-76 (2017).

restriction.⁷³ EBT systems are already capable of implementing restrictions. When the NY waiver was proposed, retailers were consulted about the ease or difficulty of implementing such a SSB restriction.⁷⁴ Those with EBT systems indicated that it could be done fairly easily because restrictions are already in place for other purchases, such as alcohol or nonfood items.⁷⁵ In addition, retailers who accept SNAP must already adhere to certain stocking requirements.⁷⁶ The 2014 Farm Bill amended the Food and Nutrition Act of 2008 to increase the requirement that certain SNAP authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties—meat, poultry or fish; bread or cereals; vegetables or fruits; and dairy products.⁷⁷

The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) serves as another example of the feasibility of implementing nutrition standards in a public nutrition assistance program.⁷⁸ WIC provides federal grants to states for supplemental foods, health care referrals, and nutrition education

⁷³ *Id.* at 176.

⁷⁴ ANGELA RACHIDI, AMERICAN ENTERPRISE INSTITUTE, THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP): TIME TO TEST A SWEETENED BEVERAGE RESTRICTION, STATEMENT BEFORE THE HOUSE COMMITTEE ON AGRICULTURE ON THE PROS AND CONS OF RESTRICTING SNAP PURCHASES 8 (2017), https://agriculture.house.gov/uploadedfiles/rachidi_testimony.pdf

⁷⁵ *Id.*

⁷⁶ U.S. DEP'T OF AGRIC., REGULATORY FLEXIBILITY ANALYSIS – FINAL RULE: ENHANCING RETAILER STANDARDS IN SNAP: CHANGES TO DEPTH OF STOCK AND STOCKING REQUIREMENTS USING NEW FARM BILL DEFINITION 1, 10 (2016), <https://fns-prod.azureedge.net/sites/default/files/snap/RFA-Enhancing-Retailer-Standards.pdf>.

⁷⁷ Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP), 81 Fed. Reg. 90,675, 90,675 (Dec. 15, 2016) (to be codified at 7 C.F.R. pts. 271 & 278).

⁷⁸ Press Release, U.S. Dep't of Agric., USDA Finalizes Changes to the WIC Program, Expanding Access to Healthy Fruits and Vegetables, Whole Grains, and Low-Fat Dairy for Women, Infants, and Children (Feb. 28, 2014), www.fns.usda.gov/pressrelease/2014/003114. In addition, the USDA has improved the National School Lunch and Breakfast Programs and the Child and Adult Care Food Program. *School Meals: Healthy, Hunger-Free Kids Act*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., www.fns.usda.gov/school-meals/healthy-hunger-free-kids-act (last updated Oct. 5, 2017).

for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk.⁷⁹ WIC participants receive checks, vouchers, or an electronic benefits transfer (EBT) card to purchase specific nutritious foods each month to supplement their diets.⁸⁰ Eligible foods include infant cereal, eggs, milk, cheese, peanut butter, dried and canned beans/peas, canned fish, soy-based beverages, tofu, fruits and vegetables, baby foods, whole-wheat bread.⁸¹ Unlike for SNAP, Congress directs the USDA to amend the WIC food package “to reflect nutrition science, public health concerns, and cultural eating patterns” at least every 10 years “to reflect the most recent scientific knowledge.”⁸² In 2005, the Institute of Medicine issued a report suggesting the USDA revise the WIC food package to encourage a healthier diet and match dietary guidance for infants and children.⁸³ Based almost entirely on these recommendations, the USDA issued proposed rules and interim requirements that were finalized in 2014,⁸⁴ strengthening WIC nutritional requirements to increase the allotment of whole grains, fruit, and vegetables; reduce juice; exclude white potatoes; and replace whole milk with low-fat or nonfat milk.⁸⁵ The successful adoption of nutrition standards for WIC demonstrates the feasibility of supporting a pilot to test whether the restriction

⁷⁹ *Women, Infants, and Children (WIC)*, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/wic/women-infants-and-children-wic> (last updated Feb. 14, 2018).

⁸⁰ *Women, Infants and Children (WIC): Frequently Asked Questions about WIC*, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/wic/frequently-asked-questions-about-wic#5> (last updated Apr. 20, 2018).

⁸¹ *Id.*

⁸² 42 U.S.C. § 1786 (2012) (section titled Special Supplemental Nutrition Program for Women, Infants, and Children).

⁸³ INST. OF MED., WIC FOOD PACKAGES: TIME FOR A CHANGE, NATIONAL ACADEMIES PRESS 71 (2005). It is noteworthy that neither the USDA nor the anti-hunger organization Food Research & Action Center (FRAC) objected to revising the WIC food package. FOOD RESEARCH & ACTION CENTER, NEW WIC FOOD PACKAGES PROPOSED: PRELIMINARY SUMMARY 2 (2006), www.dchunger.org/pdf/WIC%207Aug06.pdf.

⁸⁴ Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in the WIC Food Packages, 71 Fed Reg. 44,784, 44,784 (Aug. 7, 2006) (to be codified at 7 C.F.R. 246).

⁸⁵ 7 C.F.R. § 246 (2018).

of SSB could support SNAP's goal of improving nutrition of low-income Americans.

There is also precedent from previous farm bills to fund projects that could improve health and nutrition of SNAP recipients. The 2008 Farm Bill authorized \$20 million for pilot projects to evaluate health and nutrition promotion in SNAP to determine if incentives provided to SNAP recipients at the point-of-sale increase the purchase of fruits, vegetables or other healthful foods.⁸⁶ The Healthy Incentives Pilot (HIP), which operated from 2010 – 2013 demonstrated that providing incentives for fruits and vegetables increases consumption among SNAP participants.⁸⁷ A logical next step is for the 2018 Farm Bill to authorize a randomized controlled trial paralleling the Healthy Incentives Pilot trial, testing a ban on SSBs.⁸⁸

HIC can serve as a model to test the SSB restriction.⁸⁹ Just as the HIP reprogrammed retailers' EBT data systems to identify and calculate incentives, the same could be done with a SSB restriction.⁹⁰ Pilot participants assigned to the restriction group would receive special EBT cards and retailer EBT systems would be programmed to not allow SSB purchases among those SNAP households. Few retailers who participated in HIP identified problems with their EBT systems or store operations.⁹¹ Similarly, piloting a restriction on SNAP would not be overly burdensome on retailers. A pilot similar to HIP is thus both feasible and likely to provide a strong control study to demonstrate whether restrictions on the purchase of SSBs with SNAP reduce consumption and

⁸⁶ *Healthy Incentives Program (HIP)—Basic Facts*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., [HTTPS://WWW.FNS.USDA.GOV/HIP/HEALTHY-INCENTIVES-PILOT-HIP-BASIC-FACTS](https://www.fns.usda.gov/hip/healthy-incentives-pilot-hip-basic-facts) (last updated Apr. 20, 2014).

⁸⁷ SUSAN BARTLETT ET AL., U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., EVALUATION OF THE HEALTHY INCENTIVE PILOT (HIP): FINAL REPORT 202 (2014), [HTTPS://MAFOODSYSTEM.ORG/MEDIA/RESOURCES/PDFS/PILOTFINALREPORT.PDF](https://mafoodsystem.org/media/resources/pdfs/pilotfinalreport.pdf).

⁸⁸ Sanjay Basu et al., *Ending SNAP Subsidies For Sugar-Sweetened Beverages Could Reduce Obesity and Type 2 Diabetes*, 33 HEALTH AFFAIRS 1032, 1038 (2014).

⁸⁹ RACHIDI, *supra* note 74, at 8.

⁹⁰ *Id.*

⁹¹ *Id.*

improve health.⁹²

B. Likelihood of Effectiveness

Some argue that restricting SSBs from SNAP will have little to no effect on consumption of SSBs because the majority of SNAP recipients can substitute their own funds to buy the excluded product.⁹³ If total household expenditure on unhealthful foods was less than total household cash expenditure on food, the household can purchase healthful foods with SNAP and unhealthful foods with cash—with no change in total purchase or intake of unhealthful foods.⁹⁴ While SNAP benefits make up a substantial share of the food budget in most SNAP households, they are modest—approximately \$4.50 per person per day.⁹⁵ SNAP benefits do not necessarily provide the entire food budget, nor are they expected to do so.⁹⁶ Nearly all families supplement their SNAP purchases with groceries purchased from their cash income.⁹⁷ As reflected in its name, SNAP is intended to be a supplemental program and consistent with the program’s intention, the SNAP benefit formula is calculated with the assumption that households spend 30 percentage of income on food.⁹⁸ If SNAP recipients continue to purchase SSBs, then it is unlikely that a SSB restriction would actually change the nutrition profile of food purchases or induce any behavioral changes.⁹⁹

A related concern is that the exclusion of sweetened beverages will cause SNAP participants to switch to other

⁹² *Id.*

⁹³ Jessica E. Todd & Michele Ver Ploeg, *Restricting Sugar-Sweetened Beverages From SNAP Purchases Not Likely To Lower Consumption*, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV. (Mar. 2, 2015), <https://www.crs.usda.gov/amber-waves/2015/march/restricting-sugar-sweetened-beverages-from-snap-purchases-not-likely-to-lower-consumption/>.

⁹⁴ Klerman et al., *supra* note 72, at S173.

⁹⁵ *Policy Basics: The Supplemental Nutrition Assistance Program (SNAP)*, *supra* note 6.

⁹⁶ U.S. DEP’T OF AGRIC., *supra* note 36, at 5.

⁹⁷ *Id.*

⁹⁸ Klerman et al., *supra* note 72, at S172.

⁹⁹ *Id.*

beverages, such as diet soda, that have no nutritional value—a seemingly inefficient use of nutritional assistance funds.¹⁰⁰ SNAP recipients could use their benefits to purchase other unhealthy foods, such as candy, chips, and cakes. It is also argued that a SSB restriction without increased access to healthy foods could be ineffective because low-income households purchase energy-dense foods because they are cheap and readily available source of calories.¹⁰¹

Other opponents of a restriction note the lack of evidence base demonstrating that a SSB restriction could improve diets or reduce obesity.¹⁰² In addition, food choices are affected by a number of factors, including cost, taste, convenience, personal preference, and availability.¹⁰³ Restricting food choice would not substantially change most of these factors.¹⁰⁴

In response to these arguments, recent studies do show promising results about the potential for a SSB restriction to lead to reduced consumption of SSBs. A recent study examined the effects of financial incentives for the purchase of fruits and vegetables, restriction of the purchase of SSBs, candy, and sweet baked goods, or both, on food purchases among lower income adults.¹⁰⁵ Restricting the use of food program benefits for purchasing SSBs, sweet baked goods, and candy appeared to be effective in reducing the purchase of SSBs and sweet baked goods. The results suggest that interventions that limit SSB purchases may be effective in decreasing spending for these foods, and thus may contribute to improvements in dietary quality.¹⁰⁶ Even though some out of pocket funds were used in place of food

¹⁰⁰ Barnhill, *supra* note 56, at 2039.

¹⁰¹ HARTLINE-GRAFTON ET AL., *supra* note 66, at 8.

¹⁰² *Id.* at 15.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Simone A. French et al., *Financial Incentives And Purchase Restrictions In A Food Benefit Program Affect The Types Of Foods And Beverages Purchased: Results From A Randomized Trial*, 14 INT. J. BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 1, 2 (2017).

¹⁰⁶ *Id.* at 6.

benefit funds to purchase restricted foods, results suggest that out of pocket funds did not fully replace what otherwise may have been spent on these types of foods.¹⁰⁷ Certainly, further research is warranted to explore the potential effects of a restriction on both food purchases and dietary intake of all household members.¹⁰⁸ That is precisely the reason to allow pilot programs.

Another study which used a combination of economic and epidemiological modeling techniques, concluded that a SSB restriction in SNAP is likely to significantly reduce obesity prevalence and type 2 diabetes incidence.¹⁰⁹ The study combined data from a nationally representative dietary survey and a price database of nearly 20,000 children and adults in SNAP to simulate proposed SSB restriction.¹¹⁰ These data reveal that SNAP participants consume almost twice as many calories from SSBs as they do from vegetables and fruit, but they are sensitive to changes in SNAP benefits and food prices.¹¹¹ The result of this study suggest that the impact of a SSB restriction could be very significant—obesity prevalence could decline by over 281,000 adults and 141,000 children under a SSB restriction policy.¹¹² The researchers concluded that a policy to ban SSBs purchases made with SNAP dollars is more likely to significantly reduce obesity prevalence and type 2 diabetes incidence than a policy to subsidize vegetable and fruit purchases using SNAP dollars.¹¹³

In addition, a USDA study of the Summer Electronic Benefit Transfer for Children Program published in 2016 supports these conclusions about the likely impact of a restriction on SSBs. The USDA study found that only a WIC– based model of food

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.*

¹⁰⁹ Basu et al., *supra* note 88, at 1033, 1038. The largest effects in the model were observed among adults ages 18–65 and among nonblack, non-Mexican ethnic minorities such as other Latinos and Asians, although the effects remained significant for children and white populations as well. *Id.* at 1036.

¹¹⁰ *Id.* at 1037.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* It is interesting to note that a vegetable and fruit subsidy had a nonsignificant effect on obesity and type 2 diabetes. *Id.*

assistance, which restricted what could be purchased with benefits (including SSBs), led to a reduction in SSB consumption among families who participated.¹¹⁴ The SNAP-based model, which had no restrictions, did not reduce SSB consumption.¹¹⁵

The effectiveness of a restriction on SSB purchases and consumption is an empirical question that requires a pilot test of the policy to answer. As the USDA itself has stated, “There is no way to know – other than through carefully designed and evaluated pilot tests – to what extent the proposed restriction would have the desired effect of reducing purchases of foods with limited nutritional value.”¹¹⁶

IV. Should it be Done? The Ethics of Restricting SNAP Purchases

Those who oppose a restriction on SNAP purchases assert several arguments related to the ethics of governmental interference with a free market and personal purchasing decisions. The sections below explain and respond to the two primary assertions—that a SSB restriction unfairly and inequitably limits the choices of SNAP recipients and that the restriction is demeaning and stigmatizing.

A. Restricting Free Choice and Limiting Access

The SSB exclusion is considered inequitable because it restricts the beverage options of SNAP recipients so that they have less access to beverages of their choice than non-participants.¹¹⁷ The restriction is thus considered a strategy “aimed uniquely at keeping poor people from the normal streams of decision-making and commerce.”¹¹⁸ Put another way, a restriction on SSB is

¹¹⁴ ANN M. COLLINS ET AL., U.S. DEP’T OF AGRIC., SUMMER ELECTRONIC BENEFIT TRANSFER FOR CHILDREN (SEBTC) DEMONSTRATION: SUMMARY REPORT 55 (2016), <https://www.fns.usda.gov/sites/default/files/ops/sebtfinalreport.pdf>.

¹¹⁵ *Id.*

¹¹⁶ U.S. DEP’T OF AGRIC., *supra* note 36, at 5.

¹¹⁷ Anne Barnhill & Katherine F. King, *Evaluating Equity Critiques in Food Policy: The Case of Sugar-Sweetened Beverages*, 41 J. L. MED. & ETHICS 301, 302 (2013).

¹¹⁸ HARTLINE-GRAFTON ET AL., *supra* note 66, at 13.

considered by some to be a patronizing attempt to “micromanage” the lives of the poor.¹¹⁹ The message conveyed through the restriction on SSB purchases with SNAP is that that poor people make bad choices, therefore requiring government intervention to manage their food choices whereas higher income persons do not.¹²⁰

Relatedly, critics of the SSB restriction assert that SNAP participants and non-participants have similar intakes and purchases of unhealthy foods.¹²¹ There is limited evidence that SNAP participation increases SSB consumption beyond the risk associated with poverty.¹²² Therefore, if SNAP benefits are not to blame for additional purchases of SSBs, restricting only SNAP purchases in this way is not justified.¹²³

There is an ethical concern that the SSB ban unfairly targets SNAP participants, without imposing a similar restriction across other government programs, thereby singling out poor persons for a problem experienced by the majority of Americans.¹²⁴ Thus, some critics have argued that the restriction on SSBs can pass ethical muster only if it can be applied to all types of government funds used to purchase beverages, including cafeterias in all government buildings and all beverages purchased with federal grant funds.¹²⁵

To address the concerns about undermining the free choice and autonomy of SNAP recipients with a SSB restriction, it is necessary to note how our eating behavior and choices are more constrained than we may imagine.¹²⁶ Research studies demonstrate

¹¹⁹ Patrick McGeehan, *U.S. Rejects Mayor’s Plan to Ban Use of Food Stamps to Buy Soda*, N.Y. TIMES (Aug. 19, 2011), <http://www.nytimes.com/2011/08/20/nyregion/ban-on-using-food-stamps-to-buy-soda-rejected-by-usda.html>.

¹²⁰ Nancy Kass et al., *Ethics and Obesity Prevention: Ethical Considerations In 3 Approaches To Reducing Consumption Of Sugar-Sweetened Beverages*, 104 AM. J. PUB. HEALTH 787, 791 (2014); Barnhill & King, *supra* note 117, at 302.

¹²¹ HARTLINE-GRAFTON ET AL., *supra* note 66, at 13.

¹²² *Id.*

¹²³ Schwartz, *supra* note 22, at S201.

¹²⁴ Kass et al., *supra* note 120, at 791.

¹²⁵ *Id.*

¹²⁶ Barnhill & King, *supra* note 110, at 304.

how various features of the external food environment, such as large portion sizes, availability and location of snack foods and caloric beverages, function as psychological “cues” that encourage “mindless” overconsumption.¹²⁷ Furthermore, there is evidence that salty and sugary foods disrupt our appetite regulation, subverting the psychological and physiological systems that regulate food intake.¹²⁸ There is also evidence that low-income youth and adults are exposed to disproportionately more marketing and advertising for obesity-promoting products that encourage the consumption of unhealthy foods such as fast food and SSBs.¹²⁹

It is thus difficult to claim that obesity prevention policies, such as a restriction on the purchase of SSBs with SNAP, would impose for the first time, a constraint on choice of what to consume.¹³⁰ This reality helps us to understand that a SSB restriction is not based on an assumption that low-income people are uniquely bad at making food choices, or that low-income people are more easily manipulated by their environments.¹³¹ The influence of environmental cues on all people, regardless of income levels, should force policymakers and advocates to question whether “maximizing consumer food choice” is the pinnacle of good policy.¹³² This is admittedly a complex ethical issue; however, freedom of choice must be balanced with public health goals.¹³³ Of course, decisions about what or how much we eat deserve protection, but it must be acknowledged that when obesity prevention policies such as a SSB restriction in SNAP are implemented, they would replace one set of influential external stimuli with a different set, rather than exert influence on consumer

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ FOOD RESEARCH & ACTION CENTER, *supra* note 17, at 4.

¹³⁰ Kass et al., *supra* note 120, at 792.

¹³¹ Barnhill & King, *supra* note 117, at 304-05.

¹³² *Id.*

¹³³ *Id.* at 305.

choices where none had previously existed.¹³⁴

Furthermore, and perhaps most importantly, the disparity in consumer choice is not ethically decisive. The goal of SNAP is to address a specific problem: the diet and nutrition of low-income people.¹³⁵ The disparity of overriding importance, when evaluating the proposal to restrict SSBs, is the disparity in diet, nutrition, and health between low-income and higher-income Americans.¹³⁶ Thus, because low-income Americans have a disproportionately higher prevalence of diet-related disease than other Americans, SNAP policy changes may disproportionately benefit these populations most affected by the health consequences of poor nutrition.¹³⁷ National data show that people with lower incomes consume fewer fruits and vegetables and more SSBs compared with higher income people.¹³⁸ They also experience higher rates of obesity and type 2 diabetes than higher-income groups.¹³⁹

Such disparities were revealed in a recent review of 25 studies that examined the diets of SNAP participants, eligible non-participants, and higher income individuals.¹⁴⁰ Although overall caloric intake and consumption of macronutrients and micronutrients were similar between SNAP and income-eligible non-participants, adult SNAP participants consumed a less healthy diet than either comparison group.¹⁴¹ Children whose families participated in SNAP had similar nutrition quality to income-eligible non-participants, but lower quality than higher-income

¹³⁴ Kass et al., *supra* note 120, at 792.

¹³⁵ Barnhill, *supra* note 56, at 2040.

¹³⁶ *Id.*

¹³⁷ Basu et al., *supra* note 88, at 1032. It can also be said that the issue of whether SNAP participants have worse nutrition or health than non-participants is irrelevant; what is relevant is whether SNAP participants' nutrition and health *could* be improved with a SSB restriction. Barnhill & King, *supra* note 117, at 305.

¹³⁸ French et al., *supra* note 105, at 1.

¹³⁹ Basu et al., *supra* note 88, at 1032.

¹⁴⁰ Tatiana Andreyeva et al., *Dietary Quality of Americans by Supplemental Nutrition Assistance Program Participation Status A Systematic Review*, 49 AM. J. PREV. MED. 594, 594 (2015).

¹⁴¹ Schwartz, *supra* note 22, at S201.

children.¹⁴² While the findings comparing SSB consumption of SNAP participants with eligible nonparticipants were mixed, overall, the data suggest that SNAP participants consume more SSBs than higher-income individuals, but similar amounts as eligible non-participants.¹⁴³ Results showed that SSBs accounted for approximately 12 percent of total daily caloric intake of SNAP participants, higher than that of SNAP-eligible nonparticipants (9 percent total daily intake) and SNAP-ineligible nonparticipants (6 percent total daily intake).¹⁴⁴

Another reason to restrict SNAP purchases is economic. As a federally funded program, taxpayers pay for SSBs twice: once at the point of sale through the SNAP program and later as health care expenditures for treatment of diet-related diseases through Medicaid and Medicare, and indirect economic costs from future lost work productivity attributable to obesity, type 2 diabetes, and cardiovascular disease.¹⁴⁵ SNAP pays for an estimated \$4 billion in soft drinks per year, or about 20 million servings each day.¹⁴⁶ The costs of medical spending attributable to obesity is estimated at \$147 billion per year.¹⁴⁷ Of this amount, \$61.8 billion is financed by Medicare and Medicaid.¹⁴⁸ Put this way, SSBs have enormous costs to public health and spending.

In summary, where the goal of unfettered consumer choice is at odds with the goal of promoting health and good nutrition, it is ethically justifiable to modestly limit the consumer choice to improve the nutrition and health of SNAP participants, just as it is ethically justifiable to limit choice of unhealthy products in other settings such as schools, day care centers, hospitals, and places

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Binh T. Nguyen & Lisa M. Powell, *Supplemental nutrition assistance program participation and sugar-sweetened beverage consumption, overall and by source*, 82 *PREV. MED.* 81, 84 (2015).

¹⁴⁵ Basu et al., *supra* note 88, at 1032-33; Ludwig et al., *supra* note 27, at 2567-68.

¹⁴⁶ Ludwig et al, *supra* note 27, at 2567.

¹⁴⁷ Finkelstein et al., *supra* note 17, at w822.

¹⁴⁸ *Id.*

of employment.¹⁴⁹ Such limitations are already incorporated into SNAP—an assistance program to buy food, not to generally maximize consumer choice.¹⁵⁰

B. Stigmatization of SNAP Recipients

The USDA¹⁵¹ and opponents to a restriction on SNAP purchases have expressed concerns that such a policy would stigmatize low-income families.¹⁵² There is a related concern about the message such a policy conveys to society about the poor.¹⁵³ As stated by Joel Berg, former Executive Director of New York City Coalition against Hunger, such proposals to restrict SNAP purchases are “based on the false assumption that poor people were somehow ignorant or culturally deficient.”¹⁵⁴ There is concern that rejection of purchases at checkout could cause embarrassment and stigmatization of SNAP recipients by signaling them out as receiving assistance.¹⁵⁵ Increased stigma could become a threat to participation, and a decline in SNAP participation could in turn increase food insecurity.¹⁵⁶

To counter the concerns above, the issue of whether SNAP participants would feel stigmatized and deterred from using their benefits are empirical issues that can only be assessed through a pilot study.¹⁵⁷ Several surveys of SNAP recipients may actually demonstrate that concerns about potential negative impacts of a restriction are unwarranted. In recent surveys of SNAP recipients, the majority of respondents agreed that it would be

¹⁴⁹ Barnhill, *supra* note 56, at 2040.

¹⁵⁰ *Id.*

¹⁵¹ U.S. DEP’T OF AGRIC., *supra* note 36, at 1, 4.

¹⁵² *Food Purchase Restrictions: A Bad Idea for SNAP*, THE CENTER FOR LAW AND SOCIAL POLICY (CLASP) (Mar. 7, 2017), <https://www.clasp.org/blog/food-purchase-restrictions-bad-idea-snap>.

¹⁵³ Kass et al., *supra* note 120, at 793.

¹⁵⁴ McGeehan, *supra* note 119.

¹⁵⁵ U.S. DEP’T OF AGRIC., *supra* note 36, at 1, 4-5.

¹⁵⁶ Schwartz, *supra* note 22, at S202.

¹⁵⁷ Barnhill, *supra* note 56, at 2039.

appropriate to restrict SSBs from SNAP.¹⁵⁸ When New York City SNAP participants were surveyed on their consumption patterns and attitudes around restrictions in 2011, “almost 70 percent of surveyed SNAP participants supported restricting sweetened beverages from SNAP (49 percent)” or did not express an opinion on the issue (16 percent).¹⁵⁹ An extensive campaign to notify all SNAP recipients should accompany any change in the types of items that can be purchased. Embarrassment and stigma, if any, would have to be weighed against the potential benefits of SSB restriction, such as lower rates of obesity, diabetes, and other chronic disease, conditions that are themselves stigmatizing.¹⁶⁰

Rather than causing the stigmatization of SNAP recipients, there could actually be a reduction of stigma associated with a restriction of SSBs. Excluding SSBs from SNAP could bolster the public perception of SNAP, portraying the program as a carefully designed nutrition assistance program that helps families eat healthier, as opposed to an inefficient welfare program.¹⁶¹ Rather than sending negative messages about SNAP participants, a restriction on SNAP sends messages about nutrition—that SSBs are unhealthy, people drink fewer SSBs, and that SSBs do not contribute to good nutrition.¹⁶² These messages should be aimed not only at SNAP recipients, but at all Americans.¹⁶³ Put another way, a restriction on purchases of SSBs is a policy focused on singling out the drinks, not singling out SNAP participants. It is a policy solidly backed by nutrition science and public health goals articulated by the government and advocacy organizations.¹⁶⁴

¹⁵⁸ Michael Long et al., *Public Support For Policies To Improve The Nutritional Impact of The Supplemental Nutrition Assistance Program (SNAP)*, 17 PUB. HEALTH NUTRITION 219, 219 (2014); Cindy Leung et al., *Improving the nutritional impact of the Supplemental Nutrition Assistance Program: perspectives from the participants*, 52 AM. J. PREV. MED. 193, 196 (2016).

¹⁵⁹ RACHIDI, *supra* note 74, at 7.

¹⁶⁰ Barnhill, *supra* note 56, at 2038-39.

¹⁶¹ *Id.* at 2039.

¹⁶² Barnhill & King, *supra* note 117, at 306.

¹⁶³ *Id.*

¹⁶⁴ See CENTERS FOR DISEASE CONTROL & PREVENTION, THE CDC GUIDE TO STRATEGIES FOR REDUCING THE CONSUMPTION OF SUGAR-SWEETENED BEVERAGES 4 (2010),

There are other examples of anti-SSB policies that only reach a subset of the population, such as restricting these products in schools, hospitals, and government buildings. Like the SSB SNAP restriction, “these policies are not aimed uniquely” at poor people; they are aimed uniquely at sugary drinks.¹⁶⁵

In summary, a pilot program to test the efficacy of a restriction on SSB purchases with SNAP can and should be included in the 2018 Farm Bill. The administrative obstacles for the USDA, states, and retailers are not insurmountable, as evidenced by other such as WIC nutrition assistance programs and HIC pilot program. There are several recent studies suggesting that a SSB restriction would reduce consumption of SSBs, which could lead to improved health outcomes. The ethical objections to a SSB restriction as patronizing and demeaning, though valid, are not decisive. At stake is the public health of 42 million Americans who depend on the SNAP program to purchase food. Given the “general consensus that SSBs contain no beneficial nutrients”¹⁶⁶ and compelling evidence linking SSBs to obesity, diabetes, and other chronic diseases for which low-income Americans are particularly at risk, it is the government’s moral imperative to implement policies that address health disparities.¹⁶⁷

V. Recommendation for a SSB Restriction Pilot Project

The 2018 Farm Bill presents an opportunity for Congress to authorize the funding of a pilot that restricts the purchase of SSBs¹⁶⁸ with the use of SNAP. Such a restriction brings the

http://dhhs.ne.gov/publichealth/Documents/Guidance_Doc_Sugar_Sweetened_Bev.pdf; *AMA Adopts Policy to Reduce Consumption of Sugar-Sweetened Beverages*, AMERICAN MED. ASS’N, (June 14, 2017), <https://www.ama-assn.org/ama-adopts-policy-reduce-consumption-sugar-sweetened-beverages>.

¹⁶⁵ Schwartz, *supra* note 22, at S201.

¹⁶⁶ Blondin, *supra* note 57, at 5.

¹⁶⁷ See Cynthia M. Jones, *The Moral Problem of Health Disparities*, 100 AM. J. PUB. HEALTH S47, S47 (2010).

¹⁶⁸ Although pilot proposals can suggest definitions of SSBs, one suggestion is from the CDC: caloric, sweetened beverages including: soft drinks (soda or pop), fruit drinks, sports drinks, tea and coffee drinks, energy drinks, sweetened milk or milk alternatives, and any other beverages to which sugar, typically high fructose corn syrup or sucrose, has been added. CENTERS FOR DISEASE CONTROL & PREVENTION,

program in alignment with its longstanding goal—to “safeguard the health and wellbeing of the Nation’s population and to raise levels of nutrition among low-income households.”¹⁶⁹

An evidence base is needed to evaluate the most effective ways to curb the obesity epidemic, particularly among the nation’s most vulnerable populations who are at higher risk of diet-related diseases. As the USDA has recognized, “carefully designed and evaluated pilot tests” are the only way to evaluate the effect of a SSB restriction on reducing consumption.¹⁷⁰ To date, no randomized trial has been conducted to examine the effects of restrictions on the purchase of certain food and beverage items.¹⁷¹ The objections regarding feasibility and efficacy discussed in the preceding sections rely on empirical issues that could be resolved with a pilot project. In addition, many of the ethical debates and assumptions about stigma to SNAP recipients could similarly be resolved with more data, and more importantly, more inclusion of SNAP recipients in the conversation about how to improve nutrition of low-income populations. Thus, Congress should direct the USDA to invite applications from states to pilot a well-designed, thoroughly evaluated, and carefully messaged SSB restriction.

A well-designed pilot will include a rigorous evaluation plan to compare similar locations that would experience the restriction while others would not, and to assess whether retailers could appropriately implement the restriction and whether participants could follow the changes.¹⁷² Like the NYC proposal, a pilot authorized in the farm bill should use survey data and retailer data to assess changes in consumption patterns over time, as well as qualitative assessments of the experiences of retailers

supra note 164, at 4.

¹⁶⁹ The Food Stamp Act of 1964, Pub. L. 88-525, §2, 78 Stat. 703 (1964) (demonstrating the goal of the original food stamp program).

¹⁷⁰ U.S. DEP’T OF AGRIC., *supra* note 36, at 5.

¹⁷¹ French et al., *supra* note 105, at 2.

¹⁷² RACHIDI, *supra* note 74, at 8.

and participants during the pilot.¹⁷³ Messaging and education will also be critical to address concerns regarding stigma and administrative burdens for retailers. A public information campaign should inform all SNAP recipients of changes, and retailers should be notified well in advance of implementation to allow time to upgrade systems and procedures. The public information campaign should explain the public health justifications for the restriction to make clear that the policy is aimed at SSBs, not SNAP recipients.

A restriction on the purchase of SSB should not be read to support a reduction of SNAP benefits. It is beyond dispute, from this author's perspective, that SNAP benefits should be increased to alleviate food insecurity, increase food expenditures, and improve diet quality among low-income Americans, while also injecting money into local economies.¹⁷⁴ Nor should this proposal be interpreted as a rejection of other measures to improve the health and nutrition of SNAP recipients, such as educational campaigns about the harms of SSBs¹⁷⁵ and incentives to purchase fruits and vegetables.¹⁷⁶ Rather, a restriction on the purchase of SSBs means that the federal government will cease subsidizing the purchase of products that are demonstrably and indisputably harmful to public health.

There should be no winners or losers in the debate about restricting SNAP among anti-hunger and public health advocates. Anti-hunger, social justice, and public health groups should

¹⁷³ *Id.* at 7.

¹⁷⁴ See Michael Leachman et. al, *President Trump's Budget Would Shift SNAP Costs to States, Increasing Risk of Hunger and Weakening Response to Recessions*, CTR. ON BUDGET & POL'Y PRIORITIES (July 19, 2017), <https://www.cbpp.org/research/state-budget-and-tax/president-trumps-budget-would-shift-snap-costs-to-states-increasing>.

¹⁷⁵ See Jess Lynch, *HIA on SNAP and Sugar Sweetened Beverages*, ILL. PUBLIC HEALTH INSTITUTE (2013), <http://www.pewtrusts.org/~media/assets/2013/09/25/3lynch.pdf?la=en> (recommending education about the health effects of drinking SSBs).

¹⁷⁶ See, e.g., BARTLETT ET AL., *supra* note 87, at 11; *Food Insecurity Nutrition Incentive (FINI) Grant Program*, NAT. INST. OF FOOD & AGRIC., U.S. DEP'T OF AGRIC., <http://nifa.usda.gov/program/food-insecurity-nutrition-incentive-fini-grant-program> (last visited May 14, 2018); *Senior Farmers' Market Nutrition Program (SFMNP)*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., <http://www.fns.usda.gov/sfmnp/senior-farmers-market-nutrition-program-sfmnp> (last updated Apr. 15, 2015).

coalesce around the issue of improving the health and nutrition of our country's most vulnerable populations. Rather than framing the issue as a restriction of choice, with low-income individuals as targets, the issue is about targeting SSBs as void of nutrition, detrimental to public health, and undeserving of subsidization by the government. Allowing the purchase of SSBs with SNAP makes the government complicit in lining the soda industry's pockets at the expense of the public health.

Conclusion

SNAP is essential for hunger prevention in the United States, but its exclusive focus on food quantity contributes to malnutrition and obesity and is misaligned with the goal of helping beneficiaries lead healthier lives.¹⁷⁷ SNAP is not merely a transfer of wealth, but a program intended to alleviate hunger and improve nutrition and health of low-income Americans. Authorizing a pilot program in the 2018 Farm Bill to test the efficacy of a SSB restriction could be a significant opportunity to reduce the burden of diet-related disease among low-income children and families.

¹⁷⁷ Ludwig et al., *supra* note 27, at 2568.