McGeorge Law Review

Volume 46
Issue 4 *Symposium—The Long Overdue Reform of California's Sentencing Practice and Policy*

Article 7

1-1-2014

# Alcohol- and Drug-Free Housing: A Key Strategy in Breaking the Cycle of Addiction and Recidivism

Susan F. Mandiberg
*Lewis & Clark College*

Richard L. Harris

# Alcohol- and Drug-Free Housing: A Key Strategy in Breaking the Cycle of Addiction and Recidivism

Susan F. Mandiberg and Richard L. Harris*

TABLE OF CONTENTS



---

* Susan F. Mandiberg is the Associate Dean of Faculty, Jeffrey Bain Faculty Scholar, and Professor of Law at Lewis & Clark College, Portland, Oregon. Richard L. Harris, M.S.W., is the former Executive Director of Central City Concern (CCC) and former Director of the Division of Addictions and Mental Health of the State of Oregon. The authors want to thank Nicholas Lauren for his outstanding research assistance and helpful insights. We are also grateful to the input from CCC staff, including Ed Blackburn, E.V. Armitage, Dr. Rachel Solotaroff, Mentors Lynda Williams and Doug Bishop, and Parole Transition Project Manager Norm Brown.

## I. INTRODUCTION

Most persons who are incarcerated for criminal activity become recidivists after being released from jail or prison.[1] For example, according to the United States Department of Justice:

> Overall, 67.8% of the 404,638 state prisoners released in 2005 in 30 states were arrested within 3 years of release, and 76.6% were arrested within 5 years of release. Among prisoners released in 2005 in 23 states with available data on inmates returned to prison, 49.7% had either a parole or probation violation or an arrest for a new offense within 3 years that led to imprisonment, and 55.1% had a parole or probation violation or an arrest that led to imprisonment within 5 years.[2]

1. "Recidivism is the act of reengaging in criminal offending despite having been punished." PEW CTR. ON THE ST., STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 7 (Apr. 2011), *available at* http://www.pewtrusts.org/en/research-and-analysis/reports/2011/04/12/ state-of-recidivism-the-revolving-door-of-americas-prisons (on file with the *McGeorge Law Review*). "The prison recidivism rate . . . is the proportion of persons released from prison who are rearrested, reconvicted or returned to custody within a specific time period." *Id.*

2. *See* MATTHEW R. DUROSE ET AL., BUREAU OF JUST. STAT., U.S. DEP'T JUST., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 1 (Apr. 2014), *available at* http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf (on file with the *McGeorge Law Review*) (noting that there are many possible measures of recidivism including arrest, adjudication, conviction, incarceration, and imprisonment).

Another study estimated California's recidivism rate for 2004–2007 as being the second highest in the country at 57.8%, a slight improvement from the 61.1% rate in 1999–2002.[3] It is logical to conclude that repeat offender populations are a major driver of jail and prison overcrowding and the huge public expenditures to build prison beds and manage parolees in the community.

The causes of recidivism are complex.[4] High-risk offenders, however, generally suffer from a lack of secure housing, re-association with peers engaged in crime, use of drugs and alcohol, a lack of money, a lack of living-wage employment opportunities, and insufficient means of navigating post-release administrative obstacles.[5] Indeed, over half of the people who are in jail or prison have serious problems with drugs, including alcohol, and do not receive effective treatment while incarcerated.[6]

It is, however, possible to reduce the rate of recidivism through provision of the right kinds of services. The effectiveness of any given rehabilitation or treatment program may be disputed.[7] In general, however, programs providing services that target the contributing factors and give offenders the means and capacity to successfully reenter society indeed reduce recidivism.[8] Scholars advocate for a pragmatic and result-driven approach, and they embrace evidence-based rehabilitation and treatment programs.[9] Although strategies vary widely,[10]

---

3. PEW CTR. ON THE ST., *supra* note 1, at 10.

4. Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 799–800 (2014) ("[R]ecidivism is a vexingly complicated criminological and social concept, . . . [however] a conceptual resolution of the meaning of recidivism at this level of generality is unnecessary to the operation of a criminal justice system.").

5. Mark Halsey*, Assembling Recidivism: The Promise and Contingencies of Post-Release Life*, 97 J. CRIM. L. & CRIMINOLOGY 1209, 1232 (2007) (defining a hypothetical high-risk recidivist as "young, unemployed, uneducated, homeless, (perhaps) previously abused, and (often) drug-dependent").

6. *E.g.*, *Online only: Report Finds Most U.S. Inmates Suffer from Substance Abuse or Addiction*, NATION'S HEALTH, (Apr. 2010), http://thenationshealth.aphapublications. org/content/40/3/E11.full (on file with the *McGeorge Law Review*) (showing sixty-five percent of studied inmates had substance abuse issues)**.**

7. Weisberg, *supra* note 4, at 800 ("[E]ven if we establish a sensible model of recidivism in terms of formal stages of criminality adjudication and correctional control, measuring the recidivism-reducing effect of any program is challenged by the complexity of interdependent variables that affect the measure.").

8. Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 586 (2009) ("More important, a large body of rigorous research conducted over the last twenty years has proven that well-implemented rehabilitation and treatment programs carefully targeted with the assistance of validated risk assessment tools at the right offenders can reduce recidivism by 10%–20%."); Taylor Chase-Wagniere, Note, *The Perfect Storm:* Brown v. Plata *and California's Financial Crisis*, 22 S. CAL. REV. L. & SOC. JUST. 345, 361 (2013) ("Many studies prove that rehabilitation programs lower recidivism rates."); *see also,* Edward J. Latessa & Christopher Lowenkamp, *Exploring Alternatives to the Incarceration Crisis*, 3 U. ST. THOMAS L.J. 521 (2006) ("While evidence from a large body of research demonstrates that treatment is more effective in reducing recidivism than punishment alone, not all treatment programs are equally effective.").

9. Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 345–46 (2013) ("Explicit calls also have been made to make criminal justice policy and practice, including corrections, evidence-based. This development has supported rehabilitation because it gained force in the correctional

successful programs share common threads of "outcome-based performance, rigorous evaluation, and a positive return on taxpayer investment."[11] Housing,[12] drug treatment,[13] education,[14] and employment[15] rehabilitation services have been found to be especially effective.

This article sets out an approach—focused on alcohol and drug-free housing—that combines these effective intervention techniques and significantly increases the rate at which participating ex-felons return to a productive, non-criminal life. In fact, a recent Portland State University study of the program shows that successful participation in treatment, alcohol- and drug-free community housing, and recovery reduces participants' criminal activity by 93%.[16] Nevertheless, establishing such a program requires careful planning and execution, not only to ensure that the various elements are effectively maintained, but also to navigate the often tricky legal dimensions that affect this type of housing.

The article starts in Part II with a description of the Alcohol- and Drug-Free Community (ADFC) model developed and maintained by Central City Concern (CCC), a private non-profit social service agency in Portland, Oregon.[17] This Part describes the model and related programs and reports on studies that indicate its success. The remainder of the article addresses the legal context.[18] It is meant to provide a general description of the issues that can be encountered by those wishing to operate recovery housing on the CCC model, not to provide a detailed legal analysis of any particular issue. Part III addresses matters that arise in the

---

community precisely when published studies were beginning to show the effectiveness of treatment and the ineffectiveness of deterrence programs and harsh criminal sanctions.").

10. *See* Warren, *supra* note 8, at 597–98 (outlining seven principles of evidence-based practice); Latessa & Lowenkamp, *supra* note 8, at 522–25 (laying out methods of effective intervention).

11. STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT 1 (2006), *available at* http://wsipp.wa.gov/Reports/06-01-1201 (on file with the *McGeorge Law Review*).

12. Halsey, *supra* note 5, at 1220 ("The importance of a stable and secure place to live has been mentioned countless times both within and beyond the context of post-release support.").

13. Chase-Wagniere, *supra* note 8, at 363 ("Substance abuse programs are also effective at reducing recidivism because many recidivists' crimes often stem from drug addiction.").

14. *Id.* at 362 ("Education may be the most important factor in reducing recidivism. A study from the Bard Prison Initiative found that '[p]rison-based education is the single most effective tool for lowering recidivism.'").

15. Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 532 (2005) ("Because of the compound effects of joblessness, employment is a significant factor in recidivism.").

16. HEIDI HERINCKX, REG'L RES. INST. FOR HUM. SERV., PORTLAND ST. UNIV., CRIMINAL ACTIVITY AND SUBSTANCE ABUSE STUDY: CENTRAL CITY CONCERN: MENTOR AND ADFC HOUSING PROGRAMS 17 (2008), *available at* http://www.centralcityconcern.org/LiteratureRetrieve.aspx?ID=53398 (on file with the *McGeorge Law Review*).

17. *See infra* Part II.

18. *See infra* Part III–IV.

course of establishing recovery housing, including those raised by zoning and land-use laws and the requirement to provide the "most integrated setting appropriate."[19] Part IV addresses issues involved in operating such housing, including both those raised by federal housing law and those raised by state and local eviction law.[20] We will use the term "ADFC housing" when referring specifically to CCC's model of the Alcohol- and Drug-Free Community; we will use the term "recovery housing" when referring to alcohol- and drug-free housing generally.

## II. THE ALCOHOL- AND DRUG-FREE COMMUNITY MODEL[21]

The model that is the focus of this article has been developed and used by Central City Concern (CCC), a nonprofit agency founded in Portland, Oregon, in 1979. The agency provides an array of services to low-income people in the Portland metropolitan area.[22] The core services include housing, health care, employment assistance, and actual employment. The population served includes both single men and women and families. Most of the adults utilizing CCC's services have significant problems with drugs, including alcohol. Many are disaffiliated from families, jobs, and friends and have a history of criminal activities. Many are homeless, almost all are unemployed, and most have significant chronic health problems. In 2013, nearly 3,000 people engaged with CCC's recovery programs.[23] The annual operating budget for the agency is $47 million;[24] CCC employs over 600 individuals, and approximately half are in recovery from addictions.[25] CCC's programs include the Hooper Detoxification Center; over 1,587 units of housing in twenty-one separate buildings, most of

19 *See infra* Part III.

20. *See infra* Part IV.

21. Except where noted, the information about Central City Concern and the operation of the Alcohol- and Drug-Free Community model is provided by Richard Harris, former Executive Director of CCC, who helped develop and administer the model.

22. CORP. FOR SUPPORTIVE HOUS., HEALTHCARE AND HOUSING PROFILE: CENTRAL CITY CONCERN, PORTLAND OREGON 1 (2010), *available at* http://www.csh.org/wp-content/uploads/2011/12/Casestudt_CCCL.pdf (on file with the *McGeorge Law Review*).

23. ED BLACKBURN, CENT. CITY CONCERN, 2013 ANNUAL REPORT 2 (2013), *available at* www.centralcityconcern.org/LiteratureRetrieve.aspx?ID=207854 [hereinafter BLACKBURN, ANNUAL REPORT] (on file with the *McGeorge Law Review*).

24. *About Central City Concern*, CENT. CITY CONCERN, http://www.centralcityconcern.org/Default.aspx?PageID=15601850&A=SearchResult&SearchID=12655708&ObjectID=15601850&ObjectType=1(last visited Feb. 22, 2015) (on file with the *McGeorge Law Review*).

25. CAROLE ROMM ET AL., DESIGNING URBAN SPACES TO FOSTER RECOVERY, HOUSING, AND COMMUNITY 8 (2012), *available at* http://www.centralcityconcern.org/LiteratureRetrieve.aspx?ID=134678, (on file with the *McGeorge Law Review*).

which are designed to serve the needs of people with different problems;[26] outpatient addictions treatment featuring acupuncture to treat early to late stages of opiate withdrawal; outpatient mental health treatment; outpatient primary health care services, including an on-site pharmacy; the Mentor Program;[27] and the Parole Transition Project.[28]

### *A. ADFC Housing: A Recovery Model*

As previously noted, housing, drug treatment, education, and employment rehabilitation are essential to address recidivism for most persons transitioning from jail or prison back into the community.[29] CCC had been providing both housing and alcohol and drug addiction services since its start in 1979.[30] In 1984, CCC combined fifty-four units of recovery housing with services for late-stage chronic alcoholics; it was a groundbreaking experience. What CCC learned is that unless housing is readily available at the time that the other services are provided, neither will be as successful as combining them together in a coordinated manner.[31] Today, the use of ADFC housing has expanded to include twelve buildings with 975 housing units.[32]

ADFC housing is located in apartment buildings that contain from 60 to about 200 units in either single-occupancy or studio format. Some of these units provide transitional housing,[33] while other units provide permanent housing.[34] As

---

26. For example, families and single people live in buildings that are appropriate to their needs. Some of the housing is dedicated to people with primary mental health issues. The Mentor Program utilizes ADFC housing in one building, while the Parole Transition Project utilizes housing in two other buildings. Other special needs housing that does not require abstinence from drugs and alcohol includes housing dedicated to recuperative care for persons discharged from local hospitals. Rapid Response Housing, a harm-reduction program, moves active drug users directly from the streets into housing. CCC also operates approximately 400 units of low-income housing that do not involve special supportive programs.

27. *See infra* Part II.B.1.

28. *See infra* Part II.B.2. For a comprehensive listing of programs and contact information, *see* http://www.centralcityconcern.org/ (on file with the *McGeorge Law Review*).

29. *See supra* notes 8–10.

30. *About Central City Concern*, *supra* note 24.

31. ROMM ET AL., *supra* note 25, at 6.

32. Workshop Slides, Ed Blackburn, Exec. Dir., Cent. City Concern, Supportive Housing at the National Alliance to End Homelessness (July 17, 2012), available at http://www.centralcityconcern.org/Literature Retrieve.aspx?ID=143826 (on file with the McGeorge Law Review). CCC operates nine buildings and almost 625 housing units in addition to the ADFC housing.

33. Transitional housing may be time-limited to fulfill a specific purpose. Similar to students in a dormitory who leave at the end of the school year, people in transitional ADFC housing can use the housing until they have completed their programs and are judged to have gained the intended benefit.

34. There are no time limits to residency in permanent housing. If the resident's rent is being paid for by a third party, such as Section 8, there are qualifying limits, such as income of the resident. On a periodic basis, a person would need to re-qualify for the subsidy, and a person who no longer qualified would have to leave the housing.

in any apartment building, residents are free to come and go as they please twenty-four hours a day. Other than the special rules regarding alcohol, drugs, and treatment described below, the rules for tenants and landlords are those that exist in any apartment building. Residents apply to be in ADFC housing and can move out of the housing if they choose to do so.

Although the populations and services may vary, the basic management and operation of the ADFC housing does not change. ADFC housing is based on a common principle that the housing not only provides shelter, but also forms the base from which to build the positive peer support essential for recovery from addictions.

### *1. The Philosophy Behind ADFC Housing*

Providing alcohol- and drug-free housing to individuals with serious addiction issues while they are in outpatient treatment is a recent development in the alcohol and drug treatment field, where residential treatment has been the traditional methodology used to address serious addiction.[35] CCC started the program of combining ADFC housing with outpatient treatment in the mid-1980s, based on the revolving door experienced at the Hooper Detoxification Center. During the late 1970s and early 1980s, the Hooper medical detox program would graduate 2,500 people per year and return them to the community, where residential treatment could accommodate fewer than 200 people.[36] Prior to alcohol- and drug-free housing, the recidivism rate at Hooper Detox Center was over 80%.[37] Providing safe housing that was alcohol and drug free seemed like a better option than the revolving door of returning individuals to shelters or the streets where drugs and alcohol were prevalent, only to have them return to detox for a new round. Tellingly, since the advent of ADFC housing, the recidivism rate at Hooper has significantly decreased.[38]

ADFC housing is firmly based in the medical model of alcoholism as a disease, which recognizes that regardless of the person or the etiology, there is a course of treatment and education that leads to recovery and changed behavior.[39] Like those learning how to manage diabetes, individuals can learn to manage their addictions and lead successful lives without using drugs or alcohol. Relapse

35. Stephanie A. Farquhar et al., *Listening to Consumer Perspectives to Inform Addictions and Housing-Related Practice and Research*, 5 GLOBAL J. OF CMTY. PSYCHOL. PRAC. 11 (2014).

36. *See* ROMM ET AL., *supra* note 25, at 4 (noting there was "not enough treatment capacity . . . even though referrals were being made to every open bed in Oregon and even in Washington State").

37. Email from E.V. Armitage, Exec. Coordinator, Cent. City Concern, to authors (Jan. 27, 2015) (on file with the authors).

38. *Id.*

39. *See generally, e.g.*, GEORGE E. VAILLANT, THE NATURAL HISTORY OF ALCOHOLISM 15–21 (1983) (viewing alcoholism as a disease and advocating medical-based treatment).

is part of the disease of addiction, and an effective recovery program needs to account for this phenomenon.[40]

The management of ADFC housing follows the principle of "intervention before eviction." Sometimes residents who start to use again just leave their housing, usually without notice. Others, however, want to retain their housing. Most residents understand their agreed-upon responsibilities and are motivated to follow their "relapse plans." In such a case, the ADFC staff will work with the resident and his or her sponsor or reference to get the person back into detox, outpatient treatment, increased twelve-step meetings, and other mechanisms to help him or her deal with the relapse. When this occurs, the ADFC staff hold the person's room until he or she has stabilized and is free of drugs and alcohol. After an intervention process involving a plan of recovery, a resident who is unwilling to deal with the relapse is in violation of the rental or program agreement and must leave the housing.

ADFC housing provides an environment that supports recovery and helps to build a peer support-based community. Managing recovery housing and keeping drugs out of the building are important operational functions. Just as important is establishing an environment of mutual peer support for recovery.[41] This is so because learning to manage the many facets of addiction recovery presented in everyday experience is often a painful and very difficult challenge. In early recovery, people are easily influenced by peers—for good or for bad. If an addict returning from prison goes back to the neighborhood and peer group that supported the addiction in the first place, alcohol and drug use—and resulting crime—are likely to recur.[42] On the other hand, living with others who are also struggling with recovery provides the emotional support and guidance essential to learning to cope with the many issues that undermine the effort. Residents learn from each other—and from staff members who model successful recovery. The members of this community often develop longstanding recovery relationships that begin to replace the old, drug-using relationships and provide a more solid basis for managing addiction

### *2. How ADFC Housing Works*

Over the past two decades of developing, building, and operating ADFC housing, CCC has formalized standards of practice for successfully managing the

40. *E.g.*, *id.* at 173–80 (comparing addiction and its treatment to heart disease).

41. *See, e.g.*, *id* at 173 (noting the importance, among other factors, of "facilitating identification with culturally accepted role models who have recovered from alcoholism").

42. *Drug Addiction Treatment in the Criminal Justice System,* NAT'L INST. OF DRUG ABUSE (rev. Apr. 2014), http://www.drugabuse.gov/related-topics/criminal-justice/drug-addiction-treatment-in-criminal-justice-system (on file with the *McGeorge Law Review*).

program.[43] Residents normally enter ADFC housing after successfully completing detox, as CCC must be sure the resident is clean and sober and involved in a recovery program, normally through outpatient treatment. In addition to this bottom line, there are four essential aspects to successful ADFC housing: residence rules, appropriate staff, supportive building structure, and easy access to treatment and other support services.[44]

*a. Residence Rules*

A successful ADFC is developed and sustained based on housing management policies and procedures that are different in many ways from the usual landlord-tenant housing management process. Residents are, of course, expected to pay rent and observe the normal laws and rules pertaining to their rental responsibilities. There are, however, several unique principles that distinguish ADFC housing and will be outlined in this section. Clarity of the terms of engagement is foremost.

Special ADFC management principles are enshrined in the rental agreement for permanent housing, in a program agreement for transitional housing, and in the policy and procedure manuals. Oral and written agreements by the tenant are essential prerequisites to entering the supportive community, as everyone involved in this type of environment must have a clear understanding of rights, responsibilities, and consequences. Thus, residents agree in writing to the following conditions and also discuss them with staff upon entry into ADFC housing:

- On the premises, no alcohol or drugs may be consumed, used, bought, or sold by either the resident or the resident's guests.

- The resident agrees to be in a program of recovery from drugs or alcohol and to remain free from using drugs or alcohol either on or off the premises.

- The resident agrees to submit voluntarily to urinalysis upon request as a method of determining alcohol or drug use.

If these rules are broken, a resident would be in violation of the rental or program agreement and subject to losing the housing. The agency's

43. *See* WHAT IS ADFC HOUSING?, CENT. CITY CONCERN 1 (2011), *available at* www.centralcityconcern.org/LiteratureRetrieve.aspx?ID=136738 (on file with the *McGeorge Law Review*) (listing tenant requirements for ADFC housing).

44. *See generally* ROMM ET AL., *supra* note 25, at 5, 7, 10 (laying out important features of ADFC housing).

experience is that often a tenant will leave voluntarily after receiving a termination notice after a second relapse in a six-month period.[45]

Other ADFC requirements are also observed as part of the rental or program agreement.[46] In particular, as this housing is for people in recovery, all residents are asked to identify a person who serves as a recovery reference. This person must know the resident and be in a position to identify and know the details of the resident's "program of recovery," that is, the recovery plan and activities. In addition, as relapse is a normal part of the recovery process,[47] when relapse occurs the person identified as the reference will be called with permission of the resident.

*b. Appropriate Staff*

CCC currently employs over 600 individuals, approximately 50% of whom are in recovery.[48] This figure includes staff at all levels in the organization. Staff and residents share common values about recovery and living clean and sober, reflected by the requirement that all employees of CCC be alcohol and drug free while on duty or during working hours.[49]

Additional rules apply to staff members who have experienced alcoholism or drug addiction in the past.[50] It is essential that these employees be in recovery themselves. This factor is especially important for Mentors and ADFC housing staff, as a strong qualification for these positions is having lived through the addiction-recovery experience.[51] As with residents, these staff members must be clean and sober both on and off the premises.[52] This matters because residents see the staff as role models, and so staff must be consistent in modeling recovery. However, as noted above, relapse is a normal part of recovery, so even for staff, being in stable recovery is no guarantee that relapse may not occur. When relapse happens the agency follows a policy of intervention before separation. The

45. *See* WHAT IS ADFC HOUSING?, *supra* note 43 (noting points to which a resident must agree when he or she moves in to ADFC housing). *See also infra* Part IV.B. (discussing eviction processes).

46. *See id.* (discussing additional resident requirements).

47. *See* VAILLANT, *supra* note 39, at 173–74, 177–180 (explaining innate factors that contribute to relapses).

48. Armitage, *supra* note 37; ROMM ET AL., *supra* note 25, at 8.

49. *Director of Development Job Announcement*, CENT. CITY CONCERN, http://www.Centralcity concern.org/jobs/new-jobs/8187850_209996_Director%20of%20Development%20JA%2014-240%209-30-2014.pdf (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

50. *Id.*

51. *See e.g.*, *Sobering Technician Job Announcement*, CENT. CITY CONCERN, http://www. centralcityconcern.org/jobs/new-jobs/3962655_209996_Sobering%20Tech%20II%20On%20Call%20JA%20% 2811-114%29%206-8-11.pdf (last visited Mar. 15, 2015) (providing an example of a CCC job that requires employees to interact directly with ADFC residents) (on file with the *McGeorge Law Review*).

52. ROMM ET AL., *supra* note 25, at 5.

employee is referred to an employee assistance program to remedy the relapse. In the meantime, the employee is offered a position in the organization without a "clean and sober" requirement in the job description.

In addition to the requirements for sobriety, other staff guidelines are important for the success of the ADFC housing. Once again, clarity of the terms of engagement is foremost. ADFC housing staff must closely coordinate with the people who staff the treatment and other programs each resident is engaged in, so that all the messages about recovery, living in the community, following treatment plans, and so forth are in agreement.

*c. Supportive Building Structure*

Working with architects on rehabilitating old buildings and constructing new ones, CCC designed the physical environment of the housing to reinforce the residents' sense of belonging to a community. The buildings that house people newly in recovery have community kitchens because preparing food and sharing food in a common kitchen places the individual in a social and nurturing environment. The buildings have community TV and recreation rooms because the social interactions in these areas allow people to discuss and support each other's sobriety. The buildings have lobbies with 24-hour desk staff and accommodations such as comfortable furniture, mailboxes, bulletin boards, and other amenities designed to encourage interactions among residents and staff. Staff are trained not only to monitor the comings and goings and meet guests, but also—and more importantly—to greet people and interact with them as they leave or return home.

The interiors of the buildings are designed to be comfortable and to reinforce the dignity of the residents. The individual rooms and common spaces are all equipped with new, comfortable, and high-quality furnishings. Original works by local artists are placed in common areas. A good example of this is in the Harris Building, a 180-unit ADFC with 120 single-room-occupancy (SRO) housing units and 60 permanent studio apartments.[53] Juried original art adorns all the common areas, including the elevator lobbies on each of the twelve floors. The walls facing the elevators have mirrored art pieces so that residents getting off the elevator see their own images amidst the rest of the art. The objective is to create a nurturing and welcoming environment.[54] Residents want to live in the ADFC buildings, and the environment enhances their efforts to be successful in recovery.[55]

53. ROMM ET AL., *supra* note 25, at 6.

54. *Housing*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/housing/(last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

55. *Id.*

#### *d. Easy Access to Treatment and Other Services*

No drug or alcohol treatment or counseling takes place in ADFC housing. Because these services are essential to recovery, however, it is important that the ADFC housing be located such that residents have easy access to treatment and other programs. Thus, CCC makes commercial space available for Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings or makes sure that the meetings are located close by in the neighborhood.[56] All the ADFC housing for single people is located in the central city of Portland within a six-block radius. Essential services—including health care, employment assistance, alcohol and drug treatment, and a mental health center—are within this radius. All the amenities of the city are located within a ten-minute walk, including grocery and other stores, entertainment, a library, parks, and numerous AA and NA meetings. Public transportation is plentiful for those whose employment is outside the immediate neighborhood.

### *B. Direct Services Programs for ADFC Housing*

Of the 975 units of ADFC housing operated by CCC, 110 units (15%) are occupied by participants in two special programs described in this part: the Mentor Program and the Parole Transition Project.[57] (The remaining residents of ADFC housing are served by other programs.) A large percentage of the participants in the two programs highlighted here have recently been released from prison or have a criminal history.

#### *1. The CCC Mentor Program*

CCC created the Mentor Program in 1999 to focus on hardcore heroin addicts who reflected the surge in heroin addictions in the late 1980s and early 1990s in Portland.[58] Most had criminal records and numerous attempts at recovery. The problem was that heroin addicts completing detoxification at Hooper Center failed to engage with treatment and recovery housing.[59] Fewer than 20% referred from Hooper lasted longer than a month in treatment and

56. ROMM ET AL., *supra* note 25, at 7.

57. *See Recovery Mentor Program*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/health-recovery/recovery-mentor-program/index.html (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*); *see also Eastside Concern*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/health-recovery/eastside-concern/ (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*) (describing outpatient programs at one CCC location).

58. ROMM ET AL., supra note 25, at 7.

59. *Id.*

housing. People with alcoholism problems were more successful, where the completion rate for treatment plus housing was over 50%.

A group of former addicts who were successful CCC clients in recovery suggested the solution. They proposed that they work directly with newly detoxed, hard-core addicts to help them engage with the CCC treatment program and housing.[60] The first three mentors—two male and one female, all with at least three years of clean time—were all active in NA and had been acting as NA sponsors for a long time.[61] To this day, mentors follow the same practice guidelines established by the founders. All mentors are in recovery and work an active program of their own.[62] This is important because it gives the mentors credibility and affords them the insight to know when mentees are running into difficulties. In addition, the Mentor Program has the added advantage of providing a way to support the mentors in their own recovery.[63]

The goal of the Mentor Program is to provide hands-on assistance to newly sober addicts to engage in treatment, housing, and twelve-step recovery programs in the community.[64] It was and remains a peer-based support program targeted to men and women in early recovery.[65] The Mentor Program is now housed in one ADFC building and occupies 50 of the 200 units of transitional and permanent housing in that building.[66] The building also houses separate space for daily NA and AA meetings.

The Mentor Program begins even before the client is ready to enter ADFC housing.[67] Mentors meet potential clients at Hooper or prison and assess their motivation and depth of desire to be in the Mentor Program. Once a client is accepted into the program and is ready to begin, a mentor hand escorts the individual through the various intake and admission processes for treatment and housing. On the first day in the program, the mentor personally introduces the client at an NA meeting; in subsequent days and weeks, the mentor takes the client to as many meetings as need be. Also during the first day, the mentor introduces the client to other mentors and mentees in the Program.

---

60. *Peer Support*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/peer-support/ (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

61. ROMM ET AL., *supra* note 25, at 7.

62. KEN KRAYBILL & SUZANNE ZERGER, PROVIDING TREATMENT FOR HOMELESS PEOPLE WITH SUBSTANCE USE DISORDERS: CASE STUDIES OF SIX PROGRAMS, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL 22 (2003), *available at* http://www.nhchc.org/wp-content/uploads/2011/09/CA05RCaseStudies-FINAL5.pdf (on file with the *McGeorge Law Review*).

63. *Id.*

64. *Id.*

65. *Id.*

66. ROMM ET AL., *supra* note 25, at 7.

67. KRAYBILL & ZERGER, *supra* note 62, at 22.

Participating in the mentor program is an intensive experience. Each mentor has a caseload of twelve to fifteen mentees.[68] Mentors meet as necessary with mentees, both individually and in groups. Frequent check-in is a must. All mentors have cell phones, and mentees can call any time they feel the need.

But mentors *do not* act as treatment counselors. All mentees are engaged in treatment, either through CCC's outpatient program or another similar program. The program treatment staff communicates with mentors and vice versa. Mentor activities are coordinated with treatment and with the Community Volunteer Corps (CVC).[69] All mentees are expected to participate fully in twelve-step programs, treatment, and employment, as well as in the support activities of the Mentor Program.

The Mentor Program has been very successful.[70] As of July 1, 2014, approximately 2,060 recovering addicts have participated in the Mentor Program.[71] Forty percent of these participants had been in prison, and 95% had criminal records. 1,267 (61.5%) of the participants completed the mentor program successfully.[72] As a study by Portland State on recovery and criminal activities points out, after being in recovery in this program, 93% of the participants did not commit further crimes.[73]

The peer-based Mentor Program has proven over the past sixteen years that it is a major intervention that has created real opportunities for change among this heroin-using, criminal-behavior population in Portland.

### *2. Parole Transition Project*

The Parole Transition Project (PTP) is a separate CCC program that serves individuals returning to the community from prison.[74] This program combines ADFC housing and other services in collaboration with Multnomah County Community Justice (Probation and Parole). The program began in the late 1980s as CCC began to expand the number of housing units in its ADFC housing portfolio and as it became obvious that this type of housing would be more successful than continuing to house returning felons in places that were laced

68. *Id.*

69. *See infra* Part II.C.2.

70. Armitage, *supra* note 37.

71. *Id.*

72. *See Recovery Mentor Program*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/health-recovery/recovery-mentor-program/index.html (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*) (describing the nature and success of the Mentor Program).

73. *See infra* Part II.D.2.

74. Memorandum from Ed Blackburn, Exec. Dir., Cent. City Concern, to Central City Concern, Resolution on its Designation as a Hybrid Entity under HIPAA (Sept. 23, 2013), *available at* http://www.centralcityconcern.org/LiteratureRetrieve.aspx?ID=188744 (on file with the *McGeorge Law Review*).

with drug- and alcohol-using residents.[75] At the present time, residents stay in the ADFC housing around sixty days. The County pays a *per diem* amount for housing and case management services.[76]

All PTP participants live in CCC's ADFC housing. The PTP staff operates the ADFC building and provides basic case management services and support for residents.[77] PTP staff make referrals to alcohol and drug treatment, post-program housing, and employment, which services may or not be within CCC. PTP staff and parole and probation staff are in close contact and communicate frequently.

PTP participants have obligations that are both similar to and different from those undertaken by participants in the Mentor Program and ADFC housing itself. CCC requires participants to remain alcohol and drug free while being housed. Nevertheless, the efforts to build community are different since residency is short term[78] and individuals are not engaged in an ongoing recovery program. Individuals do benefit from being in safe recovery housing and from the support they derive from staff and other residents.

The Multnomah County Community Justice staff provides parole and probation services and has ultimate responsibility for success of the clients in meeting their parole requirements. All program performance data are managed by Multnomah County, and the information is returned to CCC on a monthly, quarterly, and yearly basis. The measured goals include: (1) program completion, (2) income or employment at exit, and (3) housing status at exit. In the fiscal year 2014, of 575 individuals entering the program, 85% (or 487 individuals) completed the program, had an income, and were housed in follow-up housing.[79] In other words, 85% were considered successful at the time of exit. Whether or not these individuals were in recovery is not known. As a comparison, a similar program operated by another agency in collaboration with Community Corrections—but not in alcohol- and drug-free housing—had a lower rate of successful completions. Using the same measurements, in the fiscal year 2014, of 230 entering the program, 119 (or 51%) completed it. Those completed had housing and income at exit. Using a model of ADFC housing and case

75. Prior to this time, the Parole and Probation department had purchased housing from CCC with thirty-day housing vouchers in regular SRO housing.

76. THOMAS L. MOORE, HERBERT & LOUIS LLC, ESTIMATED COST SAVINGS FOLLOWING ENROLLMENT IN THE COMMUNITY ENGAGEMENT PROGRAM: FINDINGS FROM A PILOT STUDY OF HOMELESS DUALLY DIAGNOSED ADULTS 7–8 (2006), *available at* http://www.centralcityconcern.org/LiteratureRetrieve.aspx?ID=53400 [hereinafter MOORE, COST SAVINGS] (on file with the *McGeorge Law Review*).

77. *Housing*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/housing/ (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

78. The length of stay is much shorter than similar CCC programs, averaging a little over sixty days.

79. Ed Blackburn, Exec. Dir., Cent. City Concern, Keynote Address at the Affordable Housing Investors Council's 2014 Fall Industry Meeting (Oct. 20, 2014), *available at* www.ahic.org/download/tools-resources/?id=162 (on file with the *McGeorge Law Review*).

management "lite" appears to make a significant difference in the effort to provide a stable base for successfully staying out of a return to prison.

### C. Additional Service Programs

#### 1. Health Care

In the CCC housing and supportive service model, ADFC housing, treatment, and recovery services are crucial to successful outcomes with disaffiliated addicts and alcoholics. However, this is not the whole story. Drug addiction also has other associated problems that interfere with recovery and sobriety. These frequently include health problems such as diabetes, liver disease, HIV, dental problems, cardiovascular disease, and similar conditions.[80] Addressing health problems early contributes to better outcomes in recovery.

To address the health needs of its clients, CCC has developed extensive health services, including alcohol and drug treatment, primary care, a dental clinic operated by Multnomah County, a pharmacy, and a mental health clinic.[81] All these services are provided to clients according to their need. These services are located in downtown Portland within a six-block radius of most of the ADFC housing units and easily accessed by public transportation for residents of other housing.

#### 2. Employment

Most drug- and alcohol-affected clients are unemployed when they enter CCC programs, including both treatment and housing.[82] Self-sufficiency is a large part of CCC's mission and crucial for successful recovery. Thus, CCC has operated an employment program since 1992.[83] The goal of this program is to assist individuals to prepare for work, find a job, and retain employment.

CCC's employment program operates on the premise that work is important both in and of itself and for recovery and self-sufficiency.[84] Understanding the importance of work prompted CCC to form special employment services that

80. *Health Effects*, NAT'L INST. ON DRUG ABUSE, http://www.drugabuse.gov/drugs-abuse/commonly-abused-drugs/health-effects (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

81. *See e.g.*, *Old Town Clinic*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/health-recovery/old-town-clinic/index.html (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*) (describing some of the health services provided by CCC).

82. HERINCKX, *supra* note 16, at 3.

83. THOMAS L. MOORE, HERBERT & LOUIS LLC, PORTLAND ADDICTIONS ACUPUNCTURE CENTER PROGRAM EVALUATION 2 (2000).

84. *Services: Employment: Employment Access Center*, CENT. CITY CONCERN, http://www.centralcity concern.org/services/employment/employment-access-center (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

could better meet the needs of recovering addicts. CCC has successfully adapted the Supported Employment model, a fidelity-based best practice for employment for people with mental illness, to help people who are homeless and in recovery find employment. This model includes a small caseload, working with the employee and employer for up to two years if needed, and access to education and training.

First, CCC developed business enterprises that employ clients in recovery.[85] CCC has operated a painting company and a building maintenance and repair company; it currently operates a wholesale-based coffee enterprise and a public street maintenance program. The latter—the Clean and Safe program—operates in partnership with the Business Improvement District.[86] CCC provides the sidewalk cleaning and graffiti removal in downtown Portland.[87] This program has provided first job opportunities to hundreds of recovering people over the last fifteen years.[88]

Nevertheless, over the years CCC also began to realize that although work is important, many individuals with serious drug problems had been out of the workplace for quite a long time. In some cases they may never have been successful in the workplace or held a job at all. These clients need to learn or relearn workplace skills prior to getting a job, even a job in the CCC business enterprises.

Thus, in 2009 CCC started the Community Volunteer Corps (CVC).[89] The mission of this program is to provide basic training that will enable people in recovery to be able to succeed in normal workplace situations.[90] A second goal is to give opportunities to recovering drug addicts to "give back to the community" as a way to redeem themselves from the carnage that their addictions have caused.[91] To further both goals, the CVC provides work activities that help to better communities. For example, volunteer corps members remove graffiti, clean up schoolyards, remove invasive ivy from parks, and glean vegetables for the food bank. All successful participants receive a small stipend. They are expected to show up on time and learn how to follow instructions under supervision. Participants spend about ninety days working in the CVC until their graduation, when they will have earned a written reference reflecting the jobs they have

85. ROMM ET AL., *supra* note 25, at 12. Clients with more recent work skills and experience find jobs through the CCC employment program in a more traditional manner. *Id.* at 11.

86. *Services: Employment: Clean & Safe*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/employment/clean-and-safe (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

87. *Id.*

88. *Id.*

89. *Services: Employment: Community Volunteer Corps*, CENT. CITY CONCERN, http://www.centralcityconcern.org/services/employment/community-volunteer-corps/ (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

90. *Id.*

91. *Id.*

performed.[92] A graduate can then use this reference to gain employment in the conventional workplace. Participants in the program have come to value the CVC reference highly. One indication that this is so is the high number of people who have completed the program since it began in 2009: 690 total graduates, with over 65,000 volunteer hours given to community service.[93] In fact, the CVC program has been adopted by the Mentor Program staff for most, if not all, the mentees as a regular part of helping their clients be successful in the struggle to manage addictions

### *D. ADFC Housing: An Effective Tool to Promote and Stabilize Recovery*

Two studies that focus specifically on CCC's programs, including ADFC housing, confirm the effectiveness of the ADFC approach.

#### *1. The Thomas L. Moore Study*

In 2000, Dr. Thomas Moore conducted a study of the CCC outpatient treatment program.[94] Dr. Moore's study was designed to determine the post-treatment success of graduates from CCC's outpatient treatment program.[95] The study focused on the recovery status of 244 people who completed the program and concluded that 41.9% met the criteria for success after twelve months.[96] Success in this study meant that the person was abstinent, employed, and housed.[97] This was primarily a group of opiate addicts and alcoholics who had been criminally involved, homeless, or both.[98] The 41.9% success rate is a very positive outcome given the very serious nature of the subjects' addiction problems.[99]

What was even more significant, however, was the breakdown by the type of housing each person had while in early recovery. Some members of the study group were living in CCC ADFC housing.[100] Others were living with family or living in non-ADFC housing.[101] The study found that of those living in CCC ADFC housing, 87.8% met the criteria for success (sober, housed, and

92. *Id.*
93. Armitage, *supra* note 37.
94. MOORE, COST SAVINGS, *supra* note 76, at ii.
95. *Id.* at 4.
96. *Id.* at 15–16.
97. *Id.* at 15.
98. *Id.* a 14.
99. *Id.* at 1.
100. *Id.* at 13.
101. *Id.*

employed).[102] Of those living in non-ADFC housing, only 25% were successful.[103] More recent data from CCC's ADFC housing has shown that 68% of residents completed treatment, and at twelve-month follow up, 89% of those who exited the housing clean and sober remained housed and sober.[104]

The Moore outcome study has confirmed that the chances of staying clean and sober are vastly improved when recovering addicts live in alcohol- and drug-free communities and that the model of housing management for ADFC housing is extremely important.[105]

*2. The Heidi Herinckx Study*

In 2008, Heidi Herinckx, a researcher associated with the Regional Research Institute for Human Services at Portland State University (PSU), completed the Criminal Activity and Substance Abuse Study.[106] The purpose of the study was to better understand the relationship between the participants in CCC's ADFC housing and the Mentor Program, on one hand, and criminal activity and drug use, on the other.[107] The questions to be answered were: (1) what level of criminal activity was associated with participants in the ADFC and Mentor programs both before and after participation;[108] and (2) whether drug use and criminal activity is reduced by engagement in these programs.[109] The study aimed to reveal if any difference in drug use and criminal activity could be attributed to participation in these two programs.[110]

The PSU Criminal Activity and Substance Abuse Study involved eighty-seven past (48%) and present (52%) participants in the Mentor Program who were living in ADFC housing.[111] The participants submitted to interviews, up to two hours long, about their drug use and criminal activity both prior to participation in these programs and at the time of the interview.[112] To control against the possibility of a client misleading a naïve interviewer, interviews were conducted by recovering drug addicts who were also drug-treatment counselors trained in the interview methodology.[113] These interviewers were supervised by

102. *Id.* at 16.

103. *Id.*

104. Armitage, *supra* note 37; ROMM ET AL., *supra* note 25, at 7.

105. *See* MOORE, COST SAVINGS, *supra* note 76, at 16 (finding almost 88% of those in ADFC housing were successful in treatment).

106. HERINCKX, *supra* note 16.

107. *Id.* at 3.

108. *Id.* at 8.

109. *Id.*.

110. *Id.*

111. *Id.* at 8, 10.

112. *Id.* at 8–9.

113. *Id.* at 9.

the principal investigator.[114] Nevertheless, the interviews are based on self-reporting, and therefore the responses are subject to the limitations inherent in such studies.[115]

The study revealed a number of telling results. First, 97% of participants reported that prior to entering CCC's programs they engaged in poly-drug use, including alcohol, heroin, cocaine, and methamphetamines.[116] This statistic makes the next result even more dramatic. Subjects still in the CCC programs had an average of 325 clean days at the time of the interview; those who were graduates averaged 589 clean days at the time of the interview.[117]

The study also collected information about crime. Eighty-one of the subjects (93%) had committed crimes prior to participation in CCC programs, and fifty-two (62%) had committed crimes on a daily basis.[118] The researchers estimated the cost of the non-drug crimes committed by these interviewees to have been over $2 million in the year prior to participation in the CCC programs.[119] In addition, the annual cost of illegal drugs used by the cohort was estimated at $6 million.[120] The change after participation in the programs was dramatic. Based on participant reports, after participation there was a 95% reduction in the use of illegal drugs and a 93% reduction in crimes committed.[121] Many of the participants reconnected with family (87%) and increased financial support to their children.[122]

This study indicates that people with serious drug addiction problems commit a large number of crimes to support their drug addiction and that there is a high financial cost to others in the community.[123] It also shows that effective intervention can significantly reduce criminal activity and this has a direct impact on recidivism of people with drug addictions.[124]

114. *Id.*
115. *Id.* at 22.
116. *Id.* at 12.
117. *Id.* at 16.
118. *Id.* at 6, 13.
119. *Id.* at 6.
120. *Id.* at 22.
121. *Id.* at 21.
122. *Id.* at 19.
123. *See id.* at 6, 13 (explaining a 93% crime reduction due to drug treatment programs).
124. *Id.* at 21.

### *E. ADFC Housing: A Successful Model to Address Recidivism*

As noted in the Introduction, a significant number of people incarcerated in jail and prison are addicted to alcohol, drugs, or both, and their addictions contributed to both their original crimes and to their rates of recidivism.[125]

CCC's experience with ADFC housing, however, shows that effective treatment for addiction can be a powerful intervention that helps individuals into personal recovery and reduces crime and recidivism.[126]

In its thirty-five years of experience, CCC has made significant discoveries of what does not work, what does work, and what works best when it comes to effective recovery among late-stage addicts and alcoholics.

The list of what does not work is long and includes: failure to provide treatment while incarcerated, assuming that incarceration itself will resolve the addiction;[127] or providing a bus ticket and an appointment to meet a parole officer, a motel voucher, and a referral to an underfunded outpatient treatment program or to a four-month waiting list for a residential program. Scenarios such as these are all-too common and will not have the positive effect desired by the person or the community.

Recovery works best when addicts and alcoholics learn to manage their addiction, stay clean and sober, become self-sufficient, reconnect with family, and participate in community life.[128] If this standard is met, individuals who have returned to the community from jail and prison will not be going back.[129] Importantly, this standard is much more likely to be met by sober addicts living in safe housing in a peer-supportive community with others who can model successful recovery. Good health and employment are the other elements that help people in recovery become self-sufficient.[130] The best approach to recovery is to wrap this all together in a program like ADFC housing.

---

125. *See* HALSEY, *supra* note 5, at 1233–34, 1236.

126. *See* HERINCKX, *supra* note 16, at 17, 19 (demonstrating a program with a 95% drug treatment success rate with only five of eighty-seven participants who committed crimes post-treatment).

127. *See* MOORE, COST SAVINGS, *supra* note 76, at 1 (recounting the history of CCC); STEVE AOS ET. AL., *supra* note 11, at 4 (examining relapse and recidivism after prison and jail drug treatment programs).

128. *See* HERINCKX *supra* note 16, at 10, 19 (highlighting success rates in a treatment program "focus[ed] on becoming self-sufficient and obtaining permanent housing placements")..

129. *See id*. at 17 (illustrating a "ninety-three percent reduction in the number of individuals who committed crimes").

130. *See* BLACKBURN, ANNUAL REPORT *supra* note 23 (proclaiming the organization's successes with securing jobs, housing, and healthcare for recovering addicts).

## III. ESTABLISHING RECOVERY HOUSING

### *A. Obeying the Requirements of Federal Anti-Discrimination Laws*

#### *1. The Statutes: Basic Coverage*

Alcoholics and drug addicts often come under the protection of one or more federal anti-discrimination statutes: the Rehabilitation Act (RA),[131] the Americans with Disabilities Act (ADA),[132] and the Fair Housing Amendments Act (FHAA).[133] These laws overlap significantly in what they prohibit or require, and courts tend to use cases interpreting them interchangeably.[134] Among other similarities, all three consider the failure to make reasonable accommodations to be a form of discrimination.[135] The three statutory schemes at issue here prohibit discrimination against persons with handicaps or disabilities and can affect the operation of recovery housing.

The oldest of the three schemes is the Rehabilitation Act. Section 504 provides:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[136]

A central purpose of this provision is to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and place such individuals in employment."[137] But the section applies more broadly,

---

131. Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355, codified as 29 U.S.C. §§ 701–7961.

132. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327, codified as 42 U.S.C. §§ 12101–213.

133. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619, codified as 42 U.S.C. §§ 3601–3631.

134. *E.g.,* Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 591 (1999) (noting that Congress directed that the Attorney General's regulations implementing the provisions under portions of the ADA and RA should be consistent with one another); Giebler v. M & B Assocs., 343 F.3d 1143, 1148–49 (9th Cir. 2009) (stating that the court had "applied [Rehabilitation Act] regulations and case law when interpreting the FHAA's reasonable accommodations provisions").

135. *See* School Bd. of Nassau Co., Rla. v. Airline, 480 U.S. 273, 289 n.19 (1987) (regarding the RA); 42 U.S.C. § 12112(b)(5) (requiring employers to make reasonable accommodations under the ADA); *id.* § 12182(b)(2) (requiring public accommodations under the ADA); Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737 (7th Cir. 2006) (regarding public services under the ADA); 42 U.S.C. § 3604(f)(3)(B) (considering a failure to make reasonable accommodations a form of discrimination under the FHAA).

136. 29 U.S.C. § 794 (2012).

137. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 626 (1984); *see* 29 U.S.C. § 701(b)(1) (2012) ("The purpose[] of this chapter [is] to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society").

covering activities undertaken by state or local governments,[138] such as zoning,[139] as well as activities of private entities providing "health care, housing, [or] social services."[140] Notably, the act applies to the entire entity "any part of which is extended Federal Financial assistance."[141] Federal financial assistance is defined broadly,[142] although determining whether it exists in a particular situation can be challenging.[143] Federal financial assistance does not, however, include acceptance of Section 8 housing vouchers.[144] When an entity does receive federal financial assistance, section 504 does not apply unless there is some "nexus" between the federal financial assistance and the program at issue.[145]

The mandates of the ADA are similar to those of the RA, prohibiting discrimination on the basis of disability. Title I of the ADA prohibits covered entities from engaging in employment discrimination based on disability.[146] Covered entities include private, state, and local government employers, employment agencies, labor organizations, and joint labor-management committees.[147] Title II prohibits discrimination against "qualified individual[s] with a disability" in "services, programs, or activities of a public entity."[148] "Public entities" include state and local governments and their agencies,[149] and "public services" include housing,[150] so Title II prohibits discrimination in public housing. Title III prohibits discrimination in public accommodations and services

---

138. 29 U.S.C. § 794(b)(1).

139. *E.g.*, Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44–46 (2d Cir. 1997).

140. 29 U.S.C. § 794(b)(3)(A)(ii). *See generally, e.g.*, Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 396 (2003).

141. 29 U.S.C. § 794(b)(3)(B).

142. 24 C.F.R. § 8.3. *See also, e.g.*, Arlene S. Kanter, *A Home Of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 939–41 (1994).

143. *E.g.*, Heidi A. Reimer, Note, *Defining Recipients of Federal Financial Assistance Under the Nondiscrimination Statutes,* 57 WASH. & LEE L. REV. 1355, 1362 (2000).

144. Reyes v. Fairfield Properties, 661 F. Supp. 2d 249, 263–64 (E.D.N.Y. 2009) (holding acceptance of Section 8 housing vouchers alone does not constitute federal financial assistance). Regarding the Section 8 programs, *see infra,* note 309.

145. *E.g.*, Paradis, *supra* note 140 at 396.

146. Americans with Disabilities Act § 102, 42 U.S.C. § 12112(a) (2012); *see, e.g.*, Paradis, *supra* note 140 at 390 & n.6 (noting that Title I has been extensively interpreted and limited by the Supreme Court and citing cases).

147. Americans with Disabilities Act § 101, 42 U.S.C. § 12111(2), (5) (defining "covered entity" and "employer").

*148.* Americans with Disabilities Act § 202, 42 U.S.C. § 12132. *See also id.* § 12133 (providing that the "remedies, procedures, and rights set forth in [§ 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights" under the public services subchapter).

149. Americans with Disabilities Act § 201, 42 U.S.C. § 12131(1)(A)–(B).

150. *See, e.g.*, Tsombandis v. West Haven Fire Dept., 352 F.3d 565, 578 (2d Cir. 2003).

operated by private entities.[151] Places of lodging qualify as "public accommodations,"[152] but only if they provide transient, as opposed to permanent, housing.[153]

The FHAA prohibits discrimination based on handicap in the sale or rental of housing.[154] The prohibitions cover all dwellings unless certain exemptions apply; the exemptions are not applicable to recovery housing on the CCC model.[155]

As noted above, the CCC model of ADFC housing involves recovering alcoholics and addicts living in single rooms or studio apartments located in relatively large apartment-type buildings. The occupants are free to come and go as they please and are subject to few rules other than those regarding the use of alcohol and illegal drugs. If this model is used with residents in public housing, Title II of the ADA will apply as will, in some instances, section 504 of the RA.[156] When privately owned housing is involved, short-term housing that is considered "transient" will be covered by Title III of the ADA.[157] When the housing is considered to be non-transient it will be covered by the FHAA.[158]

### *2. Drug Addicts and Alcoholics May Be "Disabled" or "Handicapped" Under Federal Anti-Discrimination Laws*

The RA prohibits discrimination against a "qualified individual with a disability."[159] This same phrase is used in Title II of the ADA.[160] Title I of the ADA prohibits discrimination against a "qualified individual on the basis of

---

151. Americans with Disabilities Act § 302, 42 U.S.C. § 12182. *See also id.* § 12181(6) (defining "private entity" as "any entity other than a public entity").

152. Americans with Disabilities Act § 301, 42 U.S.C. § 12181(7)(A).

153. *E.g.* Regents of Mercersburg College v. Republic Franklin Ins. Co., 458 F.3d 159, 165 n.8 (3d Cir. 2006); Hibbert v. Bellmawr Park Mut. Housing Corp., 937 F. Supp. 2d 565, 572–73 (D. N.J. 2013); Lancaster v. Phillips Investments, LLC, 482 F. Supp. 2d 1362, 1366–67 (M.D. Ala. 2006); Indep. Housing Servs. of S.F. v. Fillmore Center Assoc., 840 F. Supp. 1328, 1344 (N.D. Cal. 1993).

154. Fair Housing Act Amendments of 1998, 42 U.S.C. § 3604(c)–(f) (2012). For an overview of the main provisions of the FHAA, *see,* JOINT STATEMENT OF DOJ AND HUD, GROUP HOMES, LOCAL LAND USE, AND THE FAIR HOUSING ACT, *available at* http://www.justice.gov/crt/about/hce/final8_1.php (last visited Sept. 13, 2014) [hereinafter JOINT STATEMENT] (on file with the *McGeorge Law Review*).

155. 42 U.S.C. § 3603(a)(2), (b). For an examination of the constitutionality of applying the FHAA to private landlords, *see* David A. Thomas, *Fixing Up Fair Housing Laws: Are We Ready for Reform*, 53 S. CAR. L. REV. 7, 11–47 (2001).

156. *See* Americans with Disabilities Act, 42 U.S.C. § 12132 (2012) (prohibiting discrimination on the basis of a disability in public services and programs); 29 U.S.C. § 794 (2012) (codifying section 504 of the Rehabilitation Act, which outlaws disability discrimination in federally funded programs).

157. *See* 42 U.S.C. §§ 12181–82 (defining places of public accommodation and barring discrimination due to a disability in such places).

158. *See, e.g.*, Conn. Hosp. v. City of New London, 129 F. Supp. 2d 123, 132–34 (D. Conn. 2001).

159. 29 U.S.C. § 794; *cf. id*. § 705(20) (defining "qualified individual with a disability").

160. 42 U.S.C. § 12132; *cf. id.* § 12102(1)–(2) (defining "disability" and "qualified individual with a disability").

disability,"[161] and Title III prohibits discrimination against an individual "on the basis of disability."[162] The FHAA prohibits discrimination against persons on the basis of "handicap."[163] Despite the differences in language, the coverage is similar for alcoholics and drug addicts. For ease, we will use the term "handicapped" when discussing these laws generally.

To be protected under the RA, ADA, and FHAA, a person first must have a "physical or mental impairment.[164] In general, alcoholism and drug addiction qualify as such.[165] However, protection requires more than the impairment itself.[166] The fact that alcoholics, for example, are all impaired in some basic way is not enough to establish that alcoholism is a "disability" or "handicap" for any individual alcoholic.[167]

First, the impairment must "substantially limit[] one or more major life activities"[168]; individuals will also be protected if they have "a record of such an impairment" or are "regarded as having such an impairment."[169] The ADA defines "major life activities" as those that are essential to daily life[170] and are not "transitory and minor."[171] The FHA does not define "major life activities," and courts adopt the approach used under the ADA.[172] Courts use an individual, case-

161. *Id.* § 12112; *cf. id*. § 12102(1), (8) (defining "disability" and "qualified individual").

162. *Id.* § 12182; *cf. id*. § 12102 (defining "disability").

163. Fair Housing Act Amendments, 42 U.S.C. § 3604(c)–(f) (2012); *cf. id*. § 3602(h) (defining "handicap").

164. 29 U.S.C. § 705(20)(A)(i); 42 U.S.C. § 3602(h)(1); *id.* § 12102.

165. *E.g.*, Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 46–47 (2d Cir. 2002); Mary's House, Inc. v. North Carolina, 976 F. Supp. 2d 691, 702 (M.D.N.C. 2013); Oxford House, Inc. v. City of Baton Rouge, 932 F. Supp. 2d 683, 689 (M.D. La. 2013); Skinner v. City of Amsterdam, 824 F. Supp. 2d 317, 330 (N.D.N.Y. 2010).

166. *See* RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723, 756 (W.D. Pa. 2010) ("Many courts have found that alcoholism is not a disability per se.").

167. *E.g.*, RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723, 756 n.34.

168. 42 U.S.C. § 12102(1)(A) (2012).

169. 29 U.S.C. § 705(20)(B) (defining "disability" for RA, in part, by reference to the ADA); 42 U.S.C. § 12102(1). *See id.* § 3602(h) (setting out the same for the FHAA with slightly different language).

170. 42 U.S.C. § 12102(2)(A) (defining "major life activities" as including, but not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working"); *id.* § 12102(2)(B) (adding to the definition "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions"). Under the RA, a "disability" also exists when an individual's physical or mental impairment "constitutes or results in a substantial impediment to employment." 29 U.S.C. § 705(9)(A), (20)(A).

171. 42 U.S.C. § 12102(3)(B) (providing that an impairment is transitory if it has "an actual or expected duration of 6 months or less). *See, e.g.*, CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS § 6:2.50 (explaining how the Americans with Disabilities Act Amendments of 2008 broadened the definition of disability and expressly overturned two Supreme Court cases that narrowly interpreted the term).

172. *E.g.*, Oxford House, Inc. v. City of Baton Rouge, 932 F. Supp. 2d 683, 688 (M.D. La. 2013); Matarese v. Archstone Pentagon City, 761 F. Supp. 2d 346, 358 (E.D. Va. 2011) (citing ADA cases).

by-case approach to assess whether an impairment has the necessary effect.[173] (A possible exception to this rule is discussed in the zoning context, below.[174])

Secondly, under all three schemes, handicapped status is assessed as of the time discriminatory actions occur,[175] and an alcoholic or drug addict in recovery may not be handicapped at that moment. This problem seems to be resolved by congressional findings leading to the Americans with Disability Act Amendments of 2008 that "clarify that an impairment that is episodic or in remission is nonetheless a disability if it would tend to substantially limit a major life activity when the impairment is active."[176] Alcoholism and addiction are, indeed, episodic: the fact that addicts and alcoholics in recovery often relapse means that an individual might be actively using the addictive substance and thus substantially limited in major life activities at any specific time.

This cycle of active use and abstinence creates a third complication for drug addicts, however, because these anti-discrimination statutes do not protect individuals who are currently using illegal drugs at the time the discrimination occurs.[177] The statutes do protect an addict who has been "rehabilitated" or is participating in a supervised rehabilitation program, and is no longer using illegal drugs," as well someone who "is erroneously regarded as engaging in such use, but is not engaging in such use."[178] (To qualify as disabled or handicapped, however, an addict must have been free from illegal drug use for a significant period of time.[179]) This distinction between drug *addiction* and drug *use*[180] comports with the model followed by CCC and other addiction experts; the distinction recognizes that an addict is always an addict but may, at any particular time, be "in recovery" and not actively using the substance.

---

173. Toyota Motor Mfc., Ky., Inc. v. Williams, 534 U.S. 184, 197–99 (2002), *overturned by legislative action on other grounds* (noting that the inquiry under the ADA must be case-by-case, especially when symptoms vary from person to person); Sutton v United Airlines, 527 U.S. 471, 483 (1991), *overturned by legislative action on other grounds* (noting that "disability" under the ADA must be evaluated "with respect to an individual" and citing 42 U.S.C. § 12102(2)); United States v. Southern Mgmt. Corp., 955 F.2d 914, 918 (4th Cir.1992) (noting in a FHAA case that "whether or not a particular person in handicapped is usually an individualized inquiry" and citing authority under the RA); RICHEY, *supra* note 171, at § 6:2.85.

174. *See infra* text accompanying notes 207–212.

175. *E.g.*, Gilmore v. Univ. of Rochester Strong Mem'l Hosp. Div., 384 F. Supp. 2d 602, 611 (W.D.N.Y. 2005); Fowler v. Borough of Westville, 97 F. Supp. 2d 603, 608 (collecting cases).

176. RICHEY, *supra* note 171.

177. 29 U.S.C. § 705(20)(C)(i) (2012); 42 U.S.C. § 12214(a) (2012); 42 U.S.C. § 3602(h) (2012).

178. 29 U.S.C. § 705(c)(ii); 42 U.S.C. § 12214(b). The FHAA does not contain this provision, but addicts in recovery are considered to be "handicapped" under the FHAA. *E.g.*, Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1339, 1346 (S.D. Fla. 2007); Tsombanidis v. City of West Haven, 180 F. Supp. 2d 262, 283 (D. Conn. 2001), *rev'd in part on other grounds*, 352 F.3d 564 (2d Cir. 2003); Fowler v. Borough of Westville, 97 F. Supp. 2d 602, 608–09 (D.N.J. 2000).

179. *Fowler*, 97 F. Supp. 2d at 608–09 (collecting cases).

180. *See, e.g.*, *Gilmore*, 384 F. Supp. 2d at 611 (concluding that the RA did not protect a terminated employee who was an active drug user at the time of his termination and citing additional authority).

All of these provisions matter to providers of recovery housing. The employees who work in such housing are themselves required to refrain from using alcohol or illegal drugs.[181] If they are "disabled" or "handicapped," the provider must take care not to discriminate when engaging in disciplinary actions.[182] Similarly, the provider must take care not to violate the anti-discrimination laws when terminating the tenancy of or evicting a recovery housing resident who violates the prohibitions against using alcohol or illegal drugs.[183] In addition to these relatively obvious cautions, some provisions in the RA and ADA may seem to present further complications for dealing with tenants of recovery housing who are using alcohol or illegal drugs. On deeper reflection, however, these complications do not exist.

First, under the RA and ADA, an active drug user may not be excluded from "health services . . . if [the individual] is otherwise entitled to such services."[184] The ADA and RA do not define "health services," but statutes in related fields suggest that it is unlikely that recovery housing on the CCC model would be considered to qualify. Some statutes and regulations define "health services" in purely medical terms, which would include CCC's medical clinic and the medical detoxification facility, but not housing.[185] A provision regarding hospital, nursing home, domiciliary, and medical care for veterans defines "preventive health services" to include, in addition to clearly medical items, "patient health education; maintenance of drug use profiles, patient drug monitoring, and drug utilization education; [and] substance abuse prevention measures . . . ."[186] No staff member in CCC ADFC housing—and no mentor in the mentor program—provides these services.[187]

Second, under the ADA, an active drug user may not be excluded from "services provided in connection with drug rehabilitation."[188] Is recovery housing such a service? No other statute in the U.S. Code uses that phrase, and the DOJ regulations applying the ADA repeat the phrase without defining it.[189] Programs such as methadone centers certainly provide services "in connection with drug

181. *See supra* text accompanying note 50.

182. *See infra*, Part IV.C.

183. *See infra*, Part IV.A.2.

184. 29 U.S.C. § 705(20)(C)(iii) (2012); 42 U.S.C. § 12210(c) (2012).

185. *See, e.g.*, 42 U.S.C. § 300e-1(1) (defining "basic health services" in treatment and diagnostic terms for purposes of health maintenance organizations); *id.* § 1395x (s) (2006) (in the context of health insurance for aged and disabled persons, defining "medical and other health services" in treatment and diagnostic terms); 42 C.F.R. § 51c.102(h), (j) (1996) (defining "primary" and "supplemental" health services in the context of grants for community health services).

186. 38 U.S.C. § 1701(9)(B), (C), (E) (2012). There are no cases applying this provision.

187. *See supra* Part II.A.2.

188. 42 U.S.C. § 12210(c).

189. 28 C.F.R. § 36.209(b)(1) (2014); 28 C.F.R. § 35.131(b)(1) (2014).

rehabilitation,"[190] but ADFC housing does not involve providing drugs like methadone to residents. A statute that applies to homeless housing assistance mentions "outpatient substance abuse services as a sub-category of "outpatient health services."[191] ADFC housing, however, does not qualify as an outpatient substance abuse service.[192]

In the unlikely event that ADFC housing were to be considered as providing services in connection with drug rehabilitation, there are several reasons why operators of the housing could exclude an active drug addict notwithstanding the language in the ADA. First, Appendix B to the DOJ regulations, addressing public services, notes that a "health care facility, such as a hospital or clinic" does not have to make "services that it does not ordinarily provide" available to individuals illegally using drugs.[193] ADFC housing does not "ordinarily provide" services for tenants actively using alcohol or illegal drugs.[194] More to the point, the DOJ guidance also notes:

> Congress clearly intended to prohibit exclusion from drug treatment programs of the very individuals who need such programs because of their use of drugs, but, *once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may prohibit illegal use of drugs by individuals while they are participating in the program*.[195]

---

190. *See, e.g.*, RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723 (W.D. Pa. 2010) (citing the ADA provision in the context of issues regarding setting of a methadone center).

191. *See* 42 U.S.C. § 11360(14) (in the context of homeless housing assistance, defining "outpatient health services" as "outpatient health care services, mental health services, and outpatient substance abuse services"). There are no cases applying this definition.

192. For example, an addiction recovery website defines "outpatient treatment" as a process in which "the patient visits the facility for treatment at regular intervals" for such things as individual or group sessions involving "cognitive behavioral therapy, motivational incentives, motivational interviewing, and multidimensional family therapy." *Choosing Inpatient Rehab vs. Outpatient Rehabilitation*, RECOVERY.ORG., http://www.recovery.org/topics/choosing-inpatient-rehab-vs-outpatient-rehabilitation/ (last visited Dec. 7, 2014) (on file with the *McGeorge Law Review*). The National Center for Biotechnology Information, a branch of the National Institutes of Health, describes the outpatient process in more detail. *Substance Abuse: Clinical Issues in Intensive Outpatient Treatment*, NCBI, http://www.ncbi.nlm.nih.gov/ books/NBK64094/ (last visited Dec. 7, 2014) (on file with the *McGeorge Law Review*).

193. 18 C.F.R. § 35.131 (2014) (giving the example of a health care facility that specializes in treating burn victims; such a facility would not have to provide drug treatment, but would have to treat a user of illegal drugs for burns).

194. *See, e.g.*, WHAT IS ADFC HOUSING?, *supra* note 43 (explaining ADFC housing requires that tenants do not use or have alcohol or drugs "either on or off the premises").

195. 28 C.F.R. § 35.131 (emphasis added); *see also* 28 C.F.R. § 36.209 (2014) (using the same language as quoted).

Similarly, Appendix C, addressing public accommodations, clarifies:

> [A] health care provider or other public accommodation . . . may exclude an individual whose current illegal use of drugs poses a direct threat to the health or safety of others, and . . . a public accommodation may impose or apply eligibility criteria that are necessary for the provision of the services being offered, and may impose legitimate safety requirements that are necessary for safe operation. These same limitations also apply to individuals with disabilities who use alcohol or prescription drugs.[196]

Finally, a provider does not have to allow access to services for which the applicant is not "otherwise entitled."[197] As noted above,[198] addicts who return to active use of drugs or alcohol while living in ADFC housing are given the opportunity to remain if they return to treatment and stop using drugs. If they refuse or fail to do so, they are asked to leave voluntarily or are evicted.[199] At that point, the addict is not "otherwise entitled" to the housing, which requires abstinence from drugs and alcohol. In a similar situation, an employer did not violate the ADA by firing an active drug user and thus making him ineligible for the employer's Employee Assistance Program (EAP). Prior to being discharged, the employee had not contacted the EAP to ask for help; he might have had a claim if he had done so properly and been turned away.[200]

### *3. Finding a Site: the NIMBY Problem*[201]

Operators of housing and programs for people with handicaps or disabilities are sometimes faced with local agencies, neighborhood groups, and other opponents who use zoning laws and similar barriers to prevent them from locating their facilities as desired.[202] Using zoning laws and similar governmental

196. 28 C.F.R. § 36.209.

197. 29 U.S.C. § 705(20)(C)(iii) (2012); 42 U.S.C. § 12210(c) (2012); *see also, e.g.*, Baustian v. Louisiana, 929 F. Supp. 980, 982–83 (E.D. La. 1996) (finding drug addict not "entitled" to participate in employer's Employee Assistance Program, as he did not apply and meet the admissions criteria).

198. *See supra* Part II.A.2.

199. *Id.*; *see also infra*, Parts IV.A.2, B. (regarding tenants who relapse).

200. *Baustian*, 929 F. Supp. at 983.

201. NIMBY is the acronym for "not in my backyard." It is "a pejorative characterization of opposition by residents to a proposal for a new development because it is close to them, often with the connotation that such residents believe that the developments are needed in society but should be further away." WIKIPEDIA, http://en.wikipedia.org/wiki/NIMBY (last visited Dec. 9, 2014).

202. *See, e.g.*, THW Grp., LLC v. Zoning Bd. of Adjustment, 86 A.3d 330, 333 (Pa. Commw. Ct. 2014) (overruling a local zoning board determination to allow operation of a methadone clinic although, as the neighbors opposing the clinic argued, the commercial zone did not explicitly allow clinics).

barriers to forcibly relocate existing programs for handicapped or disabled people may violate the ADA,[203] RA,[204] and FHAA.[205]

Complications exist, however, for an entity wanting to locate *new* recovery housing (or any other program for addicts and alcoholics), as it may be difficult to establish standing to challenge the obstructing law.[206] The entity is not, of course, itself handicapped or disabled, so it must act for its potential clients. While the RA and ADA allow third-party standing based on the entity's "association" with disabled persons,[207] a program that does not yet exist cannot name particular disabled persons with whom it has the required association. This means that the agency cannot identify anyone for whom a court can assess disability on an individual basis.

As the court in *RHJ Medical Center, Inc. v. City of DuBois* observed, however, failing to allow standing in this situation would mean that "an entire class of recovering drug addicts would be excluded from the protections of the ADA and RA."[208] To resolve this problem, the court held that an "association" exists if the relationship with handicapped individuals is "imminent"[209] and the "imminent" client is impaired in the ways the statutes require.[210] The Medical Center survived the City's motion for judgment on the pleadings because, at that stage, the court was willing to consider that people might have a disability *per se* if their condition meets a multi-factor "'baseline prerequisite'" that establishes an "impairment by virtue of its necessary impact on [their] existence."[211] The court concluded that "[a] person with an opioid addiction who meets the criteria for admission to a federally regulated methadone clinic is a strong candidate for suffering from a disability *per se*" because those criteria track the baseline prerequisites: the person must have been addicted to an opioid for at least one year (the impairment);[212] "[t]he addicts who are eligible for admission to a

---

203. *E.g.*, New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 297–98 (3d Cir. 2007); Start, Inc. v. Baltimore Cnty, 295 F. Supp. 2d 569, 573–75 (D. Md. 2003).

204. *E.g.*, *New Directions*, 490 F.3d at 297–98, 300.

205. *E.g.*, Tsombanidis v. City of West Haven, 180 F. Supp. 2d 262, 271 (D. Conn. 2001), *rev'd in part on other grounds*, 352 F.3d 564 (2d Cir. 2003); *see also* JOINT STATEMENT, *supra* note 154.

206. *But see* Suffolk Hous. Services v. Town of Brookhaven, 397 N.Y.S.2d 302, 311 (N.Y. App. Div. 1977) (conferring standing in a suit to invalidate zoning restrictions on multifamily housing to a community group representing the interests of potential future residents against whom the zoning discriminated); Huntington Branch, NAACP v. Huntington, 689 F.2d 391 (2d Cir. 1982) (allowing Plaintiffs, who included a civil rights organization and current non-residents who would benefit from future low-cost housing, to bring an action regarding the area's zoning).

207. *E.g.*, RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723, 735, 737 (W.D. Pa. 2010).

208. *Id.* at 737, 740.

209. *Id.* at 740–43

210. *Id.* at 752–53.

211. *Id.* at 759. The court based these elements on the Supreme Court's analysis from Sutton v. United Airlines, 527 U.S. 471, 482 (1999).

212. *See e.g.*, RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723, 759 (W.D. Pa. 2010).

methadone clinic, as proscribed by the federal regulatory regime, must suffer from a state of inability wherein they are no longer able to help themselves" (the effect on a major life activity)[213]; and "the baseline prerequisite for opioid addicts gaining admission to a methadone clinic demands satisfaction of these requirements" (that the effect be "substantial").[214]

Notwithstanding the court's flexibility at the pre-trial phase, the next phase of the case underlines a program's need to be careful and detailed in mounting the evidence that supports standing at trial.[215] After a six-day bench trial, the court held that standing did not exist after all.[216] The Medical Center had failed to provide sufficient evidence for the court to assess *on an individual basis* whether the disability substantially limited a major life activity, nor had the Center provided the testimony of any patients or experts on the effects of opioid addiction.[217] Similarly, there was insufficient evidence for the court to determine whether any potential patient had a "record of impairment."[218] Finally, although the record showed that some city officials "may have been prejudiced against [the Medical Center], given its association with recovering drug addicts," the record lacked evidence that anyone at the City regarded the Medical Center's patients as being affected in their ability to conduct major life activities.[219] As the Third Circuit observed in upholding the District Court's findings, "animus is simply not enough to satisfy the 'regarded as' test."[220] As a result of this failure of proof, the Medical Center lost on its ADA and RA claims.

An entity that establishes standing will face a second barrier if the court determines that the change in zoning or land-use law is not a required accommodation.[221] In the housing context, the anti-discrimination laws require an accommodation "if [it] is (1) reasonable and (2) necessary (3) to afford

213. *Id.* at 760.

214. *Id.* at 761.

215. Standing is determined based on facts that existed when the case was filed. *E.g.*, Cleveland Branch, N.A.A.C.P. v. City of Parma, 263 F.3d 513, 524–25 (2001) (collecting cases).

216. RHJ Med. Ctr., Inc. v. City of DuBois, No. 3:09-cv-00131-KRG, slip op. at 38–39 (W.D. Pa. August 17, 2012) (on file with the *McGeorge Law Review*). The trial court noted that its disability *per se* approach "was solely for the purpose of determining the merits of [the Motion for Judgment on the Pleadings], and *not* whether a standing argument could survive at trial." *Id.* at 31 n.18.

217. *See also id.* at 33–34 (noting that "without more specific information about the circumstances faced by RHJ's individual patients, no comparisons with an average person can be made, nor was any evidence provided about an average person's baseline functions to make such a comparison" and that evidence showed that individual patients faced "different circumstances in coping with their addictions").

218. *Id.* at 35.

219. *Id.* at 36–37.

220. RHJ Med. Ctr., Inc. v. City of DuBois, 54 F. App'x. 660, 666 (3d Cir. 2014).

221. *See, e.g.*, Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 604–05 (4th Cir. 2013) (finding a zoning variance to expand a residential community for handicapped residents unnecessary).

handicapped persons equal opportunity to use and enjoy housing."[222] These criteria require courts to engage in fact-specific analyses.[223] This barrier can present a challenge to entities attempting to expand or relocate existing facilities as well as to those trying to establish new facilities.[224]

*4. The "Most Integrated Setting Appropriate"*

Title III of the ADA—the "public accommodations" portion—includes in its prohibition of discrimination the mandate that "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability *in the most integrated setting appropriate to the needs of the individual*."[225] Title II of the ADA—the "public services" portion—does not use this phrase.[226] Nevertheless, the Department of Justice's[227] regulations addressing both Titles II and Title III[228] contain a mandate to use the "most integrated setting appropriate" to the individuals being served.[229] The preamble to the "public services" regulations defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables

222. *Id.* at 603 (referencing the FHA, 42 U.S.C. § 3604(f)(3)); *see also*, *e.g.*, Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 751–53 (7th Cir. 2006) (adopting essentially the same approach under the RA); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 782–84 (7th Cir. 2002) (noting that the requirements are the same under the FHAA and the ADA).

223. *See, e.g.*, *Wis. Cmty. Servs.*, 465 F.3d at 752; *Oconomowoc Residential Programs*, 300 F.3d at 782; *Bryant Woods Inn*, 124 F.3d at 604.

224. *See, e.g.*, *Wis. Cmty. Servs.*, 465 F.3d at 737 (regarding move to new location); *Oconomowoc Residential Programs*, 300 F.3d at 777 (regarding new facility); *Bryant Woods Inn*, 124 F.3d at 599 (regarding expansion of existing facility).

225. 42 U.S.C. § 12182(b)(1)(C) (2012) (emphasis supplied).

226. Title II provides: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."Americans with Disabilities Act § 201, 42 U.S.C. § 12132.

227. Congress authorized the Department of Justice to administer the non-transportation provisions of the ADA. 42 U.S.C. §§ 12134, 12186(b).

228. 28 C.F.R. § 35.101–190 (2014) (dealing with "Nondiscrimination on the Basis of Disability in State and Local Government Services"); 28 C.F.R. § 36.101–607 (2014) (dealing with "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities"); *cf.* 28 C.F.R. § 41.1–32 (2014) (dealing with the implementation of Executive Order 12250, which addresses nondiscrimination on the basis of handicap in federally assisted programs).

229. 28 C.F.R. § 35.130(d) (requiring public entities, *i.e.* state and local governments, to "provide services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities"); 28 C.F.R. § 36.203(a) (requiring public accommodations to "afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual"); 28 C.F.R. § 41.51(d) (requiring recipients of federal assistance to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons").

individuals with disabilities to interact with non-disabled persons to the fullest extent possible."[230]

The Attorney General's regulations also require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[231]

*a. The Olmstead Case*

In *Olmstead v. L.C. ex rel. Zimring,*[232] the Supreme Court considered whether the "most integrated setting" language in the ADA's "public services" regulations "may require placement of persons with mental disabilities in community settings rather than in institutions."[233] The holding—a "qualified yes"—was narrow:

> Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[234]

The plaintiff mental-health patients in *Olmstead* were kept in a restricted institutional setting against their will and against medical judgment.[235] The Court concluded that in these specific circumstances institutionalization is a form of discrimination.[236] This is so because, first, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[237] In addition, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations,

---

230. 56 Fed. Reg. 35694-701, 35705 (July 26, 1991); *see also* Olmstead v. L.C. ex. rel. Zimring, 572 U.S. 581, 592 (1999), (citing 28 C.F.R. pt. 35, App. A; 56 Fed. Reg. 8538-01, 8544).

231. 28 CFR § 35.130(b)(7).

232. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587, 589 (1999). The *Olmstead* Court meant its approach to apply to other portions of the ADA, as it stated, "[t]he [ADA] as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Id.* at 589 (quoting 42 U.S.C. § 12101(b)(1)).

233. *Id.* at 587.

234. *Id.*

235. *Id.* at 593.

236. *Id.* at 597.

237. *Id.* at 600.

social contacts, work options, economic independence, educational advancement, and cultural enrichment."[238] The Court found that the *quid pro quo*—giving up freedom in return for treatment—constituted dissimilar treatment as compared to "persons without mental disabilities [who] can receive the medical services they need without similar sacrifice."[239]

### *b. First Glance: Olmstead Does Not Apply to ADFC Housing*

At first glance, it seems clear that *Olmstead* does not apply to ADFC housing, which presents facts that are quite different from those at issue in the case. [240] The mental-health patients in *Olmstead* were confined against their will in an institution, as opposed to being housed in the community-based setting they preferred,[241] despite medical judgment that their needs could be met in community-based treatment programs.[242] In contrast, residents of ADFC housing live in the community and are not confined: they can come and go as they please, have non-resident guests in their rooms, and engage in employment and other activities in the same manner as any person living in an apartment.[243] Residents agree to live in ADFC housing being fully aware of the rules and can move to a different home whenever they wish to do so. Residents are not asked to give up freedom in return for treatment; in fact, they are encouraged to leave the building for outpatient treatment, employment, and other activities, and they are supported in engaging with the community so that recovery can be more effective. The studies noted above, as well as professional medical opinion analogous to that of the doctors in *Olmstead,* support the conclusion that this approach is effective for motivated addicts in recovery.[244]

---

238. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 601 (1999).

239. *Id.* at 601. The Court "emphasize[d] that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601–02. "Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting." *Id.* at 602.

240. To date, there are no reported cases applying *Olmstead* to the recovery housing situation.

241. Although plaintiffs were voluntarily admitted to the state hospital, they objected to their continued institutionalization. *Olmstead*, 527 U.S. at 593.

*242. Id.* at 593.

243. Thus, ADFC housing does not limit "everyday life activities" of the tenants—"family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 600. In fact, the model tends to encourage and support such activities.

244. *See supra* Part II.D (regarding studies). Dr. Rachel Solotaroff, MD, MCR, Chief Medical Officer for Central City Concern, reports, "Social networks and social integration are well-known mediators of improved health, particularly in the maintenance of sobriety among people with substance use disorders. Living within a therapeutic community, such as that offered by Recovery Housing, takes the influence of social networks to the next level. In addition to building mutually supportive and healing relationships, people in Recovery Housing learn adaptive life skills, such as self-care, maintaining a home, and building community that many of us take

These factual differences between the situation of the *Olmstead* plaintiffs and residents of AFDC housing mean that the discriminatory aspects the Court found in *Olmstead* simply do not exist in ADFC housing.[245] Unlike a state mental hospital, there is nothing about ADFC housing that communicates its function to anyone in the outside world. The buildings look like—and are—normal single-room occupancy and studio apartments with a concierge-like desk in the lobby. Because tenants are not institutionalized and isolated from others in the community, the housing does not communicate or give rise to "unwarranted assumptions" that residents are "incapable or unworthy of participating in community life."[246] Tenants are, of course, treated differently from residents of other apartment housing in the requirement that they not use alcohol or allow alcohol to be brought onto the premises. [247] However, this assumption is discriminatory only in the sense that people with mental illness in the community-based housing mandated by *Olmstead* are still treated for their mental illness.[248] The restriction is a way to support addicts in living outside an institution, not a way to discriminate against them.[249]

At first glance, then, *Olmstead* should not present a barrier to ADFC housing.[250]

### *c. Second Glance: DOJ Enforcement and Mission Creep*

After the Supreme Court announced its decision in *Olmstead*, the Justice Department embarked on a campaign to enforce the standards set by the Court,[251]

---

for granted. Where traditional outpatient addictions treatment stops, Recovery Housing steps in, as people build relationships and skills that support sobriety through a lifetime." Dr. Solotaroff is Board Certified in Internal Medicine.

245. *See, e.g.*, WHAT IS ADFC HOUSING?, *supra* note 43, (listing the restrictions placed on an ADFC resident and mentioning the ongoing monitoring, which could be analogized to being institutionalized against one's will, as in *Olmstead*).

246. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 600 (1999).

247. The requirement that tenants should not use illegal drugs is one that applies to everyone in the United States; a ban on use of illegal drugs in or near a residence is, in fact, required for publicly supported housing. *See infra* notes 325–329.

248. *See Olmstead*, 527 U.S. at 594 (indicating that plaintiffs would be "treated" in their community-based residences); *see also id.* at 610 (Kennedy, J., concurring) (assuming that suitability for community placement includes the ability to follow a medication regime without extreme supervision).

249. SEE WHAT IS ADFC HOUSING?, *supra* note 43 (inferring from the statement that ADFC housing is "for 'individuals who are committed to a clean and sober lifestyle'" that barring alcohol from such housing helps to encourage this commitment).

250. *See Olmstead*, 527 U.S. at 597 (declaring "unjustified isolation" discrimination; ADFC housing does have a justification for its restrictions).

251. *El Departmento De Justia Obtiene Acuerdo Con El Estado De New Jersey Con Relacion a Conidciones En El Woodbridge Developmental Center*, EL DEPARTMENTO DE JUSTICIA, http://www.justice.gov/archive/doj-espanol/pr/2005/November/05_crt_603_spanish.htm (on file with the *McGeorge Law*

and the Obama Justice Department claims to be taking an especially assertive approach to enforcing the mandates of *Olmstead*.[252] As part of this effort, the focus has moved from the type of large, public, mental-health institution at issue in *Olmstead* to an examination of how well "community-based" facilities achieve the "least restrictive setting" mandate.[253] The potential effect of this effort on ADFC and similar sober housing is illustrated by CCC's own experience.

In 2012, the State of Oregon signed a settlement agreement with the DOJ.[254] This agreement, and the DOJ's enforcement effort generally, focused on persons with "Serious and Persistent Mental Illness" (SPMI),[255] which an attachment to the agreement defined to exclude individuals whose handicap is alcoholism or drug addiction alone.[256] The State of Oregon agreed to collect, share, and discuss data with the DOJ over four years and to make agreed-upon modifications to the system to ensure that persons with SPMI "live in the most integrated setting appropriate to their needs," that is, "live successfully in the community and prevent their unnecessary institutionalization."[257] The agreement noted the possibility that the data collection could expand to include information about persons with "serious mental illness," although neither the agreement nor the attachments define that term.[258] Nevertheless, neither alcoholism nor drug addiction *per se* constitute "serious mental illness."[259] The process included data

---

*Review*) (indicating enforcement is a priority for DOJ with 56 investigations completed since 2001 and others ongoing).

252. *See, e.g.,* Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., Dep't of Justice, Statement before the United States Senate Committee on Health, Education, Labor & Pensions*: Olmstead* Enforcement Update: Using the ADA to Promote Community Integration 1 (June 21, 2012) [hereinafter *Olmstead* Enforcement Update] (identifying enforcement of the *Olmstead* decision as one of the Division's top priorities). Mr. Perez noted that "[i]n the last three years, the Division has been involved in more than 40 matters in 25 states. We have also significantly expanded our collaborations with other federal agencies, including the Departments of Health and Human Services (HHS), Housing and Urban Development and Labor . . . ." *Id.*

253. *E.g.*, *id.* at 8.

254. Consent decrees and agreements with similar provisions exist in other states as well. *E.g.*, Class Action Settlement Agreement at 10, Amanda D. et. Al. v. Hassan (No. 1:12-cv-53-SM) (on file with the *McGeorge Law Review*) (New Hampshire Settlement Agreement imposing a 10% limit for persons with Serious Mental Illness (SMI) in supported housing); Amended Stipulation and Order of Settlement at 2, United States v. New York (Civ. No. 13-CV-4165) (on file with the *McGeorge Law Review*) (Settlement Agreement in the Eastern District of New York imposing a 25% limit for persons with Serious Mental Illness in adult homes).

255. Letter from Amanda Marshall, U.S. Att'y, U.S. Dep't of Just., Dist. of Or., to John Dunbar, Att'y in Charge, Special Litig. Unit, Or. Dep't of Just., (Nov. 9, 2012) [hereinafter Oregon Settlement] (on file with *McGeorge Law Review*).

256. *Id.* (attachment defining SPMI as schizophrenia and other psychotic disorders; major depression and bi-polar disorder; anxiety disorders; personality disorders; and having "one or more mental illnesses recognized by the current edition of the Diagnostic and Statistical Manual, excluding substance abuse and addiction disorders, and a GAF score of 40 or less that result from such illnesses").

257. *Id.*

258. *Id.*

259. The National Alliance on Mental Illness (NAMI) defines "serious mental illnesses" to include "major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder (OCD), panic disorder, post

collection concerning, among other things, "supported housing" and "supportive housing," both of which were defined in attachments to the agreement.[260] Both definitions pertain to "permanent housing." The DOJ attachment defines supported housing, among other criteria, as "scattered site supported housing, with no more than 20% of the units in any building to be occupied by individuals with a disability known to the State."[261]

As noted, the settlement agreement applies only to services for persons with SPMI (and potentially those with "serious mental illness"), and then only to permanent housing. Nevertheless, perhaps in an abundance of caution, Oregon's subsequent requests for proposals (RFPs) to state-funded housing providers required that no more than 20% of the units could be occupied by persons with a "disability"—whether or not the housing was for persons with SPMI or was transitional as opposed to permanent.[262]

Imposing such a limit on ADFC housing would destroy the model, as it is based on creating a supportive community consisting of a critical mass (more than 20%) of people in recovery (and thus "disabled" under the ADA).[263] Other aspects of the DOJ and SAMHSA definitions, if applied to ADFC housing, would have similar disastrous effects.[264]

In October 2014, after input from a variety of providers regarding conflicts "with Fair Housing laws and the ability to serve individuals with disabilities," the State consulted with the DOJ and subsequently modified its position:

---

traumatic stress disorder (PTSD) and borderline personality disorder." *Mental Illnesses—What is Mental Illness: Mental Illness Facts*, NAMI, http://www.nami. org/template.cfm?section=About_Mental_Illness (last visited Dec. 12, 2012) (on file with the *McGeorge Law Review*). BlueCross BlueShield of Illinois' definition, which is similar to NAMI's, also does not include addictions of any type. *Serious vs. Non-Serious Mental Illness*, BLUECROSS BLUESHIELD OF ILLINOIS, http://www.bcbsil.com/provider/standards/serious_vs_non _serious.html (last visited Dec. 12, 2012) (on file with the *McGeorge Law Review*).

260. The agreement adopted the DOJ's definition of "supported housing" and SAMHSA's definition of "supportive housing." Oregon Settlement, *supra* note 255. SAMHSA (Substance Abuse and Mental Health Services Administration) is an agency within the U.S. Department of Health and Human Services. *About Us*, SAMHSA, http://www.samhsa.gov/about-us (last visited Dec. 12, 2014) (on file with the *McGeorge Law Review*).

261. Oregon Settlement, *supra* note 255.

262. *See, e.g.*, MARISHA JOHNSON, OR. HEALTH AUTH., PROJECTS FOR ASSISTANCE IN TRANSITION FROM HOMELESSNESS 103 app. c (2013), *available at* http://www.oregon.gov/oha/amh/docs/FINAL%20-%20FFY %202013%20PATH%20Application%20-%20Posted%20Version.pdf (on file with the *McGeorge Law Review*) (listing requirements for housing within an RFP, including that 85% of participants cannot be enrolled in mental health services).

263. *See supra* Part II.A.

264. Both definitions set out that support services must be available, but not mandated; if applied to recovery housing, residents arguably cannot be required to be in treatment or involved in a twelve-step program. SAMHSA's "supportive housing" definition contains other elements inconsistent with ADFC housing, requiring lease provisions and house rules to be similar to those imposed on persons without a "psychiatric disability." A requirement that housing be "integrated" is also inimical to ADFC housing if it means that persons without alcoholism or drug addiction must live in the same building, as opposed to the same neighborhood.

> No more than 20% of units in a building or complex of buildings may be reserved for tenants with *Severe Mental Illness* (SMI), referred by the state or its contractors who shall make good faith, best efforts to facilitate the use of those units by persons with SMI. The remaining housing is available to all individuals in conformance with Fair Housing and other laws.[265]

As neither "severe mental illness" nor "serious mental illness" include alcoholism or drug addiction,[266] recovery housing seems safe from *Olmstead*, for the time being at least.

Nevertheless, a form of "mission creep" may be at hand. The original consent agreement dealt only with individuals with SPMI (severe permanent mental illness).[267] Oregon applied the "20%" requirement much more broadly.[268] Although there was pull-back from this, the second agreement—applying to individuals with SMI (serious mental illness)—still represents an expansion. In the future, could the focus expand once again?

In light of the threat of mission creep, it is worth questioning the validity of the 20% requirement contained in the definitions of "supported" and "supportive" housing. The 20% rule appears nowhere in the ADA or the RA.[269] It appears nowhere in the regulations adopted by the DOJ or in the guidance

---

265. E-mail from Rena Jimenez-Blount, Att'y, Cent. City Concern, to Susan Mandiberg (citing Memorandum from Pamela A. Martin, ABPP Director, to All Interested Parties, (Oct. 9, 2014)) (on file with author).

266. *See supra*, notes 255, 259. *See also, e.g.*, *Severe Mental Illness Ties to Higher Rates of Substance Abuse*, NAT'L INST. OF HEALTH (Jan. 3, 2014), http://www.nih.gov/news/health/jan2014/nida-03.htm (on file with the *McGeorge Law Review*) (giving schizophrenia and bipolar disorder as examples of "severe mental illness"); Marian JT Oud et al., *Care for Patients with Severe Mental Illness: The General Practitioner's Role Perspective*, BMC FAMILY PRACTICE (May 6, 2009), http://www.ncbi.nlm.nih.gov/pmc/articles/ PMC2685366/ (on file with the *McGeorge Law Review*) (giving "the schizophrenia spectrum and affective psychotic disorders" as examples of "severe mental illness"); ACUMENTRA HEALTH, OREGON STATEWIDE PERFORMANCE IMPROVEMENT PROJECT: DIABETES MONITORING FOR PEOPLE WITH DIABETES AND SCHIZOPHRENIA OR BIPOLAR DISORDER (Nov. 14, 2013), *available at* http://www.oregon.gov/oha/healthplan/Contractor WorkgroupsMeetingMaterials/Statewide_PIP%2011-15-13%20for%20QHOC%2011-18-13.pdf (on file with the *McGeorge Law Review*) (giving schizophrenia and bipolar disorder as examples of "severe mental illness"). *See also, Physical Health of People with Severe Mental Illness*, NCBI (July 28, 2001), http://www. ncbi.nlm.nih.gov/ pmc/articles/PMC1120844/ (on file with the *McGeorge Law Review*) (indicating inconsistency in defining severe mental illness).

267. Oregon Settlement, *supra* note 255.

268. OR. HEALTH AUTH. & U.S. DEP'T OF JUST., DATA DICTIONARY AND INSTRUCTION FOR MATRIX COMPANION TO 07/30/14 MATRIX 5, 10–11 (2014), *available at* http://www.oregon.gov/oha/amh/docs/ 07.30.14%20Data%20Dictionary.pdf (on file with the *McGeorge Law Review*) (explaining measurement metrics).

269. *See* Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2012) (showing the Act does not include a requirement that no more than twenty percent of a housing complex may be set aside for residents with SPMI); Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (2012) (defining independent living and housing services, but not limiting the number of units for tenants with SPMI).

documents available on the DOJ's *Olmstead* website.[270] The rule seems to have appeared without explanation in earlier consent agreements, which evidently provided a model for agreements that came later.[271] The idea of limiting the number of disabled people in a residence, however, may have come from a 2010 publication from SAMHSA.[272] The SAMHSA advice about integrated housing does not indicate a percentage of units, but says: "Integration is best achieved when tenants live in scattered-site units located throughout the community or in buildings in which a majority of units are not reserved for people with psychiatric disabilities."[273] Although the pamphlet claims to be "evidence based," it gives no support for this conclusion.[274] Notably, however, although SAMHSA also deals with substance abuse, the recommendation is aimed only at people with "psychiatric disabilities."[275] It is also worth mentioning that the SAMHSA definition of "supportive housing" attached to the Oregon settlement agreement provides that housing can be either "single-site housing, in which tenants . . . live together in a single building . . . or scattered-site housing in which tenants . . . live throughout the community. . . ."[276]

The attempted application of the 20% rule to CCC ADFC housing is a classic example of mission creep.[277] SAMHSA's relatively vague directive regarding people with "psychiatric disabilities" crept into the DOJ's consent agreements, the use of which is a relatively hidden, opaque way to regulate.[278] The mission

---

270. *See Olmstead: Community Integration for Everyone*, ADA.GOV, http://www.ada.gov/olmstead/index.htm (last visited Dec. 12, 2012) (on file with the *McGeorge Law Review*).

271. Settlement Agreement Fact Sheet, United States v. Georgia (Civ. No. 1:10-CV-249-CAP) (on file with the *McGeorge Law Review*) (mentioning that "no more than 20%" of a resident's units may be provided for supported housing for those suffering from serious and persistent mental illness).

272. BUILDING YOUR PROGRAM: PERMANENT SUPPORTIVE HOUSING, U.S. DEPT. OF HEALTH & MENTAL SERVS 4 (2010), *available at* http://store.samhsa.gov/shin/content//SMA10-4510/SMA10-4510-06-BuildingYourProgram-PSH.pdf (on file with the *McGeorge Law Review*).

273. *Id.*

274. *But see id.* at 2 (asserting that "growing agreement in the field supports a number of critical elements described below" with regard psychiatric disabilities). It is possible that SAMHSA's evidence is summarized in SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, BLUEPRINT FOR CHANGE: ENDING CHRONIC HOMELESSNESS FOR PERSONS WITH SERIOUS MENTAL ILLNESSES AND CO-OCCURRING SUBSTANCE ABUSE DISORDERS 61 (2003), *available at* http://store.samhsa.gov/product/Ending-Chronic-Homelessness-for-Persons-with-Serious-Mental-Illnesses-and-Co-Occurring-Substance-Use-Disorders-Blueprint-for-Change/SMA04-3870 (on file with the *McGeorge Law Review*). The noted studies supporting "integrated, regular housing," however, apply only to people with "serious mental illness," not to people with addictions or even those with dual diagnoses. *See id.*

275. *See* BUILDING YOUR PROGRAM: PERMANENT SUPPORTIVE HOUSING, *supra* note 272, at 2.

276. Oregon Settlement, *supra* note 255.

277. *See* BUILDING Your PROGRAM: PERMANENT SUPPORTIVE HOUSING, *supra* note 272, at 75 (explaining how a state or local agency could provide permanent supportive housing, but not applying the 20% rule).

278. SAMHSA is not tasked with administering the ADA—it is the DOJ's job to administer the provisions relevant here. American with Disabilities Act, 42 U.S.C. §§ 12134, 12186(b). The DOJ had not adopted the 20% rule in a regulation through notice-and-comment rulemaking. Note that a percentage limit on

creep then moved to the state level, where material relevant to a consent agreement for people with SPMI crept into requirements for housing all types of individuals with disabilities.[279]

### *d. ADFC Housing Provides the Least Restrictive Setting for the Population Served*

There are a number of reasons why the 20% rule and similar restrictions[280] should not apply to ADFC housing, and they all center around the recognition that ADFC housing *does* comply with *Olmstead*'s "least restrictive setting" mandate.[281] First, people who live in ADFC housing choose to live there. The housing is attractive.[282] What is more, however, residents feel that the conditions in ADFC housing effectively allow them to manage their addictions more successfully than they would in other types of housing.[283] Because of these conditions, residents choose to stay in ADFC housing.[284] Many choose to move to permanent ADFC housing after their time in transitional ADFC housing is over.[285] And, whether they are in transitional or permanent ADFC housing, they can leave at will if the situation no longer meets their perceived needs.

A second reason not to apply the 20% rule to ADFC housing is that this type of supportive community is successful—and thus professionally indicated—for motivated alcoholics and addicts.[286] Some might argue that a less restrictive

---

the number of units in a dwelling that can be occupied by persons with disabilities was integrated by law into the Frank Melville Supportive Housing Act of 2010, Pub. L. 111-374 (Jan. 4, 2001). 42 U.S.C. § 8013(b)(3)(B)(ii) (imposing a 25% cap). *See also, e.g.*, SHAUN DONOVAN, U.S. DEPT. OF HOUSING & URBAN DEV., BRINGING PERMANENT SUPPORTIVE HOUSING TO SCALE: STATUS REPORT TO CONGRESS 6, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=Sec811_Congressional_Rpt.pdf (last visited Dec. 13, 2014) (on file with the *McGeorge Law Review*). This limit makes it impossible for operators of recovery housing to take advantage of the Section 811 funding program.

279. *See Olmstead* Enforcement Update, *supra* note 252, at 6 (discussing states' implementation of *Olmstead* protocols in housing for developmentally disabled people).

280. *See supra* note 264. Note that the provisions about lease terms and voluntary participation in services also evidently come from SAMHSA. *See* BUILDING YOUR PROGRAM, *supra* note 272, at 2–3 (regarding lease terms and voluntary services).

281. *See* WHAT IS ADFC HOUSING?, *supra* note 43 (mentioning tenants "choose" to live in ADFC housing and must apply to live there).

282. *See supra,* Part II.A.2.

283. *See, e.g.*, BLACKBURN, ANNUAL REPORT, *supra* note 23, at 1 (recounting the story of a CCC client who has "never felt better" after receiving assistance with social security and permanent housing).

284. *See* CORP. FOR SUPPORTIVE HOUS., HEALTHCARE & HOUSING PROFILE: CENTRAL CITY CONCERN, PORTLAND, OREGON (2010), *available at* http://www.csh.org/wp-content/uploads/2011/12/Casestudt_CCCL.pdf (on file with the *McGeorge Law Review*) (showing 58% of ADFC residents moved into permanent housing).

285. *See id.* (transitioning 58% of clients into permanent housing); HERINCKX, *supra* note 16, at 10 ("[C]lients can access permanent housing through CCC or other community resources.").

286. *See supra*, Part II.D.

alternative would be to require people in recovery to be in treatment, but to house them in a building with non-alcoholics who were allowed to drink on the premises.[287] (Allowing people to use illegal drugs on the premises would violate housing laws, as noted below.[288]) But experience shows that alcoholics and addicts who are trying to remain clean and sober have a greater chance of success in the early stages when surrounded by others who have the same goals and practices and thus can support one another's sobriety.[289] Because the ADFC model requires abstinence, treatment, and a safe, secure, guaranteed alcohol- and drug-free living situation, it *is* the "least restrictive alternative" that can do the job.

Finally, regardless of the number of units in a particular building, ADFC housing is not "institutional" and exists in a "community setting."[290] ADFC housing resembles normal urban apartment dwellings. Non-ADFC housing exists in the same neighborhood. Residents of ADFC housing can—and do—interact with neighbors in the community at will.[291] They can come and go—work outside, eat outside—no one restricts them to interactions with other "handicapped" individuals.

These characteristics indicate that ADFC housing provides the least restrictive alternative for motivated people learning to manage their alcoholism and drug addictions. Still, two additional points should be made against imposing the 20% rule and similar restrictions. First, regulations allow providers to resist modifications that entail a "fundamenta[l] alter[ation]" of the services and programs.[292] Second, regulations also provide that "[n]othing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit available under this part that such individual chooses not to accept."[293] The recovering alcoholics and addicts who choose to

287. *See* William Kuhn, *Civil Commitment of Alcoholics in Texas*, 1 AM. J. CRIM. L. 335, 342 (1972) (allowing an outpatient commitment where an individual can live at home while attending rehabilitation programs).

288. *See infra* notes 325–329.

289. *See also supra* Part II.D.

290. Dennis McCarty et al., *Development of Alcohol- and Drug-Free Housing*, 20 CONTEMP. DRUG PROBS. 521, 524 (1993).

291. *See Housing*, CENT. CITY CONCERN, *supra* note 54 (noting the need to feel like a community to be successful).

292. 28 C.F.R. § 35.130(b)(7) (relating to State services). In *Olmstead,* accommodating the plaintiff's desire for different housing might have had an impact on state resources, and a plurality of the Court interprets this provision as allowing "the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 604 (1999).

293. 28 C.F.R. § 36.203(c)(1).

live in ADFC housing do not want to accept the "benefit" of living in a building with people who are actively drinking or using illegal drugs.[294]

The bottom line is that requiring recovering addicts and alcoholics to live with people who are not in recovery amounts to imprisoning them in a dysfunctional environment—the exact opposite of the goals embodied by *Olmstead* and the ADA.[295]

## IV. OPERATING RECOVERY HOUSING

Landlords discriminate against handicapped or disabled persons when they know or reasonably should have known about the disability and refuse to make an accommodation that "may be necessary" to afford the person an equal opportunity to the dwelling or job at issue.[296] This situation presents an issue in that alcoholism and drug addiction are conditions characterized by occasional relapse.[297] Residents in relapse are likely to be in violation of recovery housing's restriction on use of alcohol and drugs and may thus be asked to leave—or be evicted from—the housing.[298] In addition, recovery housing staff are subject to the same sobriety rules[299] and thus subject to being dismissed.

This Part of the Article addresses the laws relevant to removal of non-sober tenants and staff. Part A addresses dealing with tenants who relapse, and Part B addresses non-sober staff.

### A. *Federal Housing Law*[300]

Operating recovery housing requires an understanding of federal housing law in addition to federal anti-discrimination law. It can be a bit of a challenge to sort out the statues and regulations that apply to a particular type of housing built, rehabilitated, or operated with the assistance of federal funds, including funds

294. McCarty et al., *supra* note 290, at 529.

295. *See Olmstead*, 527 U.S. at 607 (concluding that placement in State treatment is appropriate when "the affected persons do not oppose such treatment").

296. Giebler v. M&B Assocs., 343 F.3d 1143, 1147 (9th Cir. 2003) (regarding housing discrimination and citing United States v. California Mobile Home Park Mgmt. Co. (*Mobile Home II*), 107 F.3d 1374, 1380 (9th Cir. 1997).

297. VAILLANT, *supra* note 39, at 173–80.

298. *See supra* Part II.A.2.

299. *See id.*

300. For a history of federal housing legislation, *see, e.g.,* John M. Kerekes, Note, *The Housing and Community Development Act of 1992: Affordable Housing Initiatives May Have Found a Home*, 18 SETON HALL LEGIS. J. 683 (1994); Dan Nnamdi Mbulu, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 387 (2000); Silesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation,* 24 LAW & INEQ. 353 (2006).

passed through state or local entities. Some requirements are found in statues, and some in HUD regulations.

On the statutory level, Title 28 of the United States Code contains two groups of relevant provisions. The first group is found in Chapter 8, Subchapter I, and the second group is in Chapter 135, Subchapters IV[301] and V.[302] On the regulatory level, much recovery housing is also subject to sometimes-overlapping provisions of Title 24 of the Code of Federal Regulations.[303]

How these statutes apply depends upon how the housing is financed. For example, recovery housing might exist in "public housing," that is, housing for low-income people owned by state or local Public Housing Agencies and subsidized by the federal government.[304] Such housing is subject to the requirements of both chapter 8[305] and chapter 135.[306] More commonly, however, recovery housing exists as "low-income housing," that is, "housing that is privately owned but government-subsidized."[307] This type of housing is subject to federal housing law when tenants enjoy rent subsidies through the Section 8 program,[308] which is governed by chapter 8 whether project-based[309] or tenant-

301. 42 U.S.C. §§ 13641–13643.

302. 42 U.S.C. §§ 13661–13664.

303. *See* 24 C.F.R. §§ 5.851-5.861 (regarding screening and evicting tenants in federally assisted housing); *id*. at pt. 8 (regarding programs or activities funded with Federal financial assistance); *id*. at pt. 100 (regarding discrimination under the Fair Housing Act); *id.* at pt. 247 (regarding some subsidized housing); *id.* at pt. 891 (regarding supportive housing for elderly and persons with disabilities); *id.* at pt. 960 (regarding public housing); *id*. at pt. 966 (regarding same); *id*. at pt. 982 (regarding Section 8 program).

304. *See* 42 U.S.C. § 1437a; *see also, e.g.*, HARVEY J. CHOPP, ET. AL., RESIDENTIAL AND COMMERCIAL LANDLORD-TENANT PRACTICE IN MASSACHUSETTS § 14.1.1(a) (2014) (discussing the federal models in the context of Massachusetts housing law); BARRY G. JACOBS, HDR HANDBOOK OF HOUSING AND DEVELOPMENT LAW § 2:3; Mbulu, *supra* note 300, at 393.

305. 42 U.S.C. §§ 1437–1437z-8.

306. *See* 42 U.S.C. § 13641(2)(A) (including "a public housing project"); *id.* § (2)(G) (including, by reference to 42 U.S.C. § 1437f(b)(2), public housing "constructed or substantially rehabilitated" with specified federal funds); s*ee also id.* § 1437a(b) (defining "public housing" as "low-income housing ["decent, safe, and sanitary dwellings assisted under [Chapter 8]], and all necessary appurtenances thereto, assisted under [Chapter 8] other than under section 1437f of this title [and] includes dwelling units in a mixed finance project that are assisted by a public housing agency with capital or assistance").

307. JACOBS, *supra* note 304, at § 2:3.

308. 42 U.S.C. § 1437f. The Section 8 rental assistance program was created by the Housing and Community Development Act of 1974 (Section 8 of the U.S. Housing Act of 1937, as amended). *E.g.,* JACOBS, *supra* note 304, at § 3:1 (setting out the history); 42 U.S.C. § 1437f(c) (setting out the provisions that must be included in assistance contracts entered into by HUD); *id.* § 1437f(d)(1) (setting out provisions that must be included in "[c]ontracts to make assistance payments entered into by a public housing agency with an owner of existing housing units"); *id.* § 1437f(o)(1)-(12), (14) (describing the "voucher program"); *id.* § 1437f(o)(13) (addressing "PHA project-based assistance"). *See generally, e.g.*, *Mbulu, supra* note 300, at 397.

309. In project-based Section 8 housing, a private owner of housing has a subsidy contract with HUD or with a state agency that channels federal funds to provide housing for qualified tenants. 42 U.S.C. § 1437f(f)(6). *See also, e.g.*, CHOPP ET. AL.*, supra* note 304, at § 14.1.1(b); JACOBS, *supra* note 304, at § 3:30 et. seq.

based.[310] Even housing financed through a mechanism such as Low-income Tax Credits,[311] HOPE VI,[312] or the HOME Investment Partnership program[313] will come under the housing law requirements if tenant rent is subsidized through section eight.[314] Finally, Chapter 135 applies to housing financed through programs of supportive housing for the elderly,[315] "housing financed by a loan or mortgage insured under" a program for providers of low- and moderate-income housing,[316] "housing insured, assisted, or held by the Secretary or a State or State agency under" a program for rental and cooperative housing for lower income families,[317] and supportive housing for persons with disabilities.[318]

As the discussion below reveals, these overlapping statutes and regulations set out the way operators of recovery housing admit drug addicts and alcoholics as tenants, and also the way they administer and possibly terminate these tenancies. As such, they affect the ability to maintain an alcohol- and drug-free environment.

---

310. Chapter 135 will also apply if the housing is developed or operated using project-based Section 8 housing. 42 U.S.C. § 13641(2)(B) (referencing 42 U.S.C. § 1437f). In tenant-based Section 8 housing, the tenant finds a private owner who is willing to accept a subsidy or "voucher" issued to the tenant by a housing agency. 42 U.S.C. § 1437f(f)(7); *see also, e.g.*, CHOPP ET. AL., *supra* note 304, at § 14.1.1(c); JACOBS, *supra* note 304, at § 3:86 et. seq.

311. Such housing is subject to federal housing law when tenant rent is subsidized through Section 8 or if one of the other funding methods subject to the housing laws comes into play. *See* 26 U.S.C. § 42; 26 C.F.R. § 1.42. *See generally, e.g.*, CHOPP ET. AL , *supra* note, 304, at § 14.1.1(d). Note that a "development with tax credit units has an affirmative duty to accept Section 8 tenant-based vouchers for openings in the development." *Id.* at §14.1.1 (referencing HUD Notice PIH No. 2001-2). Such housing is subject to federal housing law when tenant rent is subsidized through Section 8. *See, e.g.*, Carter v. Md. Mgmt. Co., 835 A.2d 158 (Md. 2003); Fennelly v. Kimball Court Apts. Ltd. P'ship, 14 Mass. L. Rptr. 37, 42 (Mass. Super. Ct. 2001). The housing laws are not otherwise applicable, but the Low-Income Tax Credit Program (LIHTC) statute bars eviction without "good cause." 26 U.S.C. § 42(h)(6). *See, e.g.*, *Carter,* 835 A.2d at 165.

312. HOPE VI Program Reauthorization and Small Community Mainstreet Rejuvenation and Housing Act of 2003, Pub.L. 108–186, 117 Stat. 2693 (2003).

313. *See generally* CHOPP ET. AL., *supra* note 304, at § 14.1.1(d) ("The HOME Investment Partnerships Program provides federal funds to state and local governments for affordable housing through acquisition, rehabilitation, and new construction of housing, as well as tenant-based rental assistance."). As with LIHTCs, tenants in housing funded through this program may have rent subsidized by Section 8. *Id*.

314. *See* CHOPP ET. AL., *supra* note 304, at § 14.1.1(d). [S]ince tax credits are often used in tandem with, or to supplement, other forms of financing or subsidy, it is very important to know what other subsidies and regulatory rules may apply to the property as a whole, as well as for each particular tenancy. For example, a tax credit development may involve redeveloped federal public housing under the HOPE VI program, and therefore most of the units still follow public housing rules. *Id.* LIHTCs may also be involved in public housing programs. Mbulu, *supra* note 300, at 393 n.33.

315. 42 U.S.C. § 13641(2)(C)–(D) (referencing 12 U.S.C. § 1701q) (2012).

316. *Id.* § 13641(2)(E) (referencing 12 U.S.C. § 1715*l*(d)(3) and (d)(5)).

317. *Id.* § 13641(2)(F) (referencing 12 U.S.C. § 1715z-1).

318. *Id.* § 13641(2)(H) (referencing 42 U.S.C. § 8013).

*1. Tenants with Criminal Histories*

When recovery housing is developed or operated with federal assistance, the housing laws may erect barriers to including some drug addicts who would benefit from the program, but have past criminal involvement.[319] Persons with convictions for manufacture or production of methamphetamine must be excluded from public housing and from Section 8 tenant-based housing assistance.[320] Persons who are parole or probation violators, or who are fleeing to avoid prosecution, custody, or confinement, may not be tenants.[321] Finally, persons who, in the prior three years, were evicted from federally assisted housing for drug-related criminal activity must be excluded from federally assisted and public housing if they have not already successfully completed an approved rehabilitation program.[322]

*2. Tenants Who Relapse*

Two types of laws affect how recovery housing operators may deal with tenants who relapse and are using alcohol or illegal drugs. Federal housing laws normally provide the parameters for addressing the problem, as a significant portion of recovery housing is constructed or operated with the assistance of federal funds.[323] If the problem leads to the need to evict the tenant, however, state and local eviction laws ultimately govern.[324] These different laws are addressed in turn.

Federal law presents no barrier to excluding active drug users from recovery housing.[325] First, as noted above, drug addicts who are actively using are not protected by the anti-discrimination statutes.[326] Moreover, persons who are illegally using a controlled substance *must* be excluded from housing that comes under chapters 8 and 135.[327] In addition, even if there is only "reasonable cause to believe" that a person is illegally using drugs, that person must be excluded from such housing if the "illegal use or pattern of illegal use of a drug may interfere

319. *Id.* § 13661.

320. *See* 24 C.F.R. § 960.204(3) (2014) (screening out of public housing); *id.* § 966.4(*l*)(5)(i)(A) (terminating from public housing); *id.* § 982.553(a)(ii)(C) (prohibiting admission to the section 8 program); *id.* § 982.553(b)(1)(ii) (terminating from section 8 assistance).

321. 42 U.S.C. § 1437d(*l*)(9) (2012); 24 C.F.R. §§ 5.859(b), 882.518(c)(2)(ii), 982.310(c)(2)(ii), 966.4(*l*)(5)(ii)(B).

322. *See* 42 U.S.C. § 13661(a) (regarding federally assisted housing generally); 24 C.F.R. § 5.854(a) (regarding public housing); 24 C.F.R. § 982.553(a) (regarding § 8 tenant-based housing).

323. *See* 42 U.S.C. § 8013 (providing "supportive housing for persons with disabilities").

324. *See id.* § 1437d(k) (describing eviction procedures).

325. State and local laws may present barriers, however. *See infra* Part IV.B.

326. *See supra* text accompanying note180.

327. 42 U.S.C. §§ 1437d(*l*)(6), 13661(b)(1) (2012); 24 C.F.R. §§ 5.854(b)(1), 983.257(a) (2014).

with the health, safety, or right to peaceful enjoyment of the premises by other residents."[328] Under this last provision, however, the landlord may take treatment and rehabilitation into consideration.[329] As to residents who are selling drugs but not actually using them, the law requires exclusion of persons engaging in criminal activity that "threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants" or "persons residing in the immediate vicinity of the premises."[330] Importantly, the criminal activity at issue can be the mere possession of controlled substances.[331]

A more complex set of issues involves individual alcoholics or non-active drug addicts who relapse[332] and violate the tenancy agreement by drinking alcohol. Such persons are likely to be considered as "handicapped" or "disabled"[333] at the time operator seeks to remove the person from ADFC housing.[334] This raises the question whether the landlord's actions in terminating the tenancy or effecting an eviction could be considered discrimination under the ADA public services[335] and public accommodations[336] provisions, the RA,[337] and the FHAA.[338] .

Key to answering this question is the realization, noted above, that the sobriety of other tenants in recovery is threatened if they must live in the same building as tenants who are drinking.[339] This being so, both the ADA and the FHAA suggest that terminating the tenancy of or evicting an ADFC tenant who is drinking would not, in fact, amount to discrimination. The ADA provides:

> Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges,

---

328. 42 U.S.C. § 13661(b)(1)(B); 24 C.F.R. §§ 5.854(b)(2), 960.204(2)(ii), 982.553(a)(ii)(B).

329. 42 U.S.C. § 13661(b)(2).

330. 42 U.S.C. §§ 1437d(*l*)(6), 1437f(d)(1)(B)(iii), 1437f(o)(7)(D).

331. *E.g.*, Clark v. Alexander, 894 F. Supp. 261 (E.D. Va. 1995) (upholding termination of section 8 housing assistance for presence of illegal drugs and drug-related paraphernalia brought by family member), *aff'd on other grounds*, 85 F.3d 146 (4th Cir. 1996).

332. *See* VAILLANT, *supra* note 39, at 173–80.

333. *See supra* Part III.B.

334. As noted above, handicapped status is assessed as of the time discriminatory actions occur. *See supra* at note 175 and accompanying text.

335. *See* 42 U.S.C. § 12132 (prohibiting the exclusion of a "qualified individual with a disability . . . by reason of such disability").

336. *See id.* § 12182 (prohibiting public services from discriminating on the basis of disability).

337. *See* 29 U.S.C. § 794 (2012) (prohibiting exclusion of a "qualified individual with a disability . . . by reason of her or his disability").

338. 42 U.S.C § 3604 (2012). This provision prohibits various types of housing discrimination against handicapped persons including: actions related to advertising; representations about availability; making units unavailable; imposing terms and conditions of rental; access to facilities and services; standards and methods of administration; and similar policies.

339. *See supra* at note 42 and accompanying text.

> advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.[340]

The FHAA has similar language.[341] Sobriety is an aspect of health and safety for the residents of recovery housing. Thus, under these provisions, it is arguably lawful to exclude a tenant whose drinking threatens the cotenants' sobriety.

There are several prerequisites to using the "threat exception," however. First, the existence of the threat must be based on evidence specific to the person being excluded, not on vague fears or stereotypes.[342] Second, the risk to others must be "significant" as "determined from the standpoint of the [handicapped or disabled person], and the risk assessment must be based on medical or other objective evidence."[343] Third, the direct threat must be the reason for taking the action of exclusion.[344] Fourth, the exception kicks in only after reasonable accommodations do not work to eliminate the threat.[345]

> As to this last factor, as noted above, under the ADFC model the person in relapse is offered the opportunity to correct the problem by ceasing to use the addictive substance.[346] Normally this would involve outpatient treatment, increased twelve-step meetings, and, possibly, returning to detox. Does the offer of this opportunity qualify as a "reasonable accommodation" that satisfies the requirements of the anti-discrimination statutes and allows the operator to remove the relapsed tenant if the drinking continues? "To make out a claim of discrimination based on failure to reasonably accommodate, a plaintiff must demonstrate that: (1) he suffers from a handicap as defined by the FHAA; (2) defendants knew

340. Americans with Disabilities Act**,** 42 U.S.C. § 12182(b)(3) (2012).

341. *See* Fair Housing Administration Amendments, 42 U.S.C. § 3604(f)(9) ("Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others").

342. *E.g.*, Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Walker, 719 F.3d 322, 328 (4th Cir. 2013); United States v. Mass. Indus. Fin. Agcy., 910 F. Supp. 21, 27 (D. Mass. 1996); Support Ministries for Pers. with AIDS, Inc. v. Vill. of Waterford, N.Y., 808 F. Supp. 120, 137 (N.D. N.Y. 1992).

343. *See* Bragdon v. Abbott, 524 U.S. 624, 629 (1988) (reviewing the history of the "direct threat" provision).

344. *E.g.*, Robbins v. Conn. Inst. for the Blind, No. 3:10cv1712 (JBA), 2012 WL 3940133 at *5 (D. Conn. Sept. 10, 2012) (noting question of fact whether denial of accommodation was for threatening behavior or a *post hoc* rationalization for failure to pay rent).

345. *E.g.*,*id.* at *4–5; Roe v. Hous. Auth. of City of Boulder, 909 F. Supp. 814, 822–23 (D. Colo. 1995); Roe v. Sugar River Mills Assocs., 820 F. Supp. 636, 639 (D. N.H. 1993).

346. *See supra* Part II.A.2.

> or reasonably should have known of the plaintiff's handicap; (3) accommodation of the handicap "may be necessary" to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation."[347] A tenant who wanted to remain in recovery housing while actively using alcohol could certainly establish the first two factors in this test. To prevail on a discrimination claim, however, the tenant would need to show that there was an alternative accommodation, not involving sobriety, that would allow continued residency and that the operator of the housing refused to make that accommodation.[348]

### *B. Eviction Procedures: State and Federal Law*

To operate successfully, recovery housing requires that the operator be able to remove tenants who violate the pledge to be clean and sober and to keep non-tenants from bringing drugs and alcohol onto the premises.[349] The ability to remove tenants—and the process that must be followed to do so—are governed by state and local law, even when the housing is subject to federal housing law.[350]

#### *1. Normal Procedures*

State and local laws vary, of course, but it is possible to set out some generalities. First, it is important to distinguish between terminating the tenancy and evicting the tenant from the premises.[351] A landlord terminates the tenancy by

---

347. Bently v. Peace & Quiet Realty 2 LLC, 367 F. Supp.2d 341, 345 (E.D.N.Y. 2005).

348. *See id.* (describing the factors for a successful discrimination claim).

349. *See supra* Part II.A.2.

350. 42 U.S.C. § 1437f(o)(7)(E) (2012) (providing that in termination of tenancy "any relief shall be consistent with applicable State and local law"); 24 C.F.R. § 966.4(*l*)(3)(i)(C) (2014) (providing that "if a State or local law allows a shorter notice period [than that set out in the regulation], such shorter period shall apply"); *id.* § 966.4(l)(3)(iii) (providing that "[a] notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (*l*)(3)(i) of this section"); *id.* § 966.4(l)(4)(ii) (providing that a PHA may evict by bringing an administrative action if the law of the jurisdiction allows that); *id.* § 982.310(e)(2)(i) (defining "eviction notice" as "a notice to vacate, or a complaint or other initial pleading used under State or local law to commence an eviction action"); *but see id.* § 966.4(l)(3)(iv) (providing that when a PHA is required to give a tenant a hearing, the tenancy does not terminate until the hearing held, "even if the notice to vacate under State or local law has expired").

351. *See*, *e.g.,* Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 U.C.L.A. L. REV. 759, 786 (1993) (distinguishing termination of tenancy and eviction); *compare, e.g.,* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.201 (1974) (regarding termination of tenancy), *with* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.206 (1974) (regarding claim for possession); *see also, e.g.*, Tova Indritz, *Tenant's Rights Movement*, 1 N.M. L. REV 1, 44–46 (1971) (explaining legal shift from landlord self-help to eviction process); Shannon Dunn McCarthy, *Squatting: Lifting the Heavy Burden to Evict Unwanted Company*, 9 U. MASS. L. REV. 156, 178 (2014) (same).

ending the rental agreement and asking the tenant to vacate the premises; the tenant can leave the premises voluntarily and avoid eviction proceedings. Eviction involves the landlord suing the tenant and, if the suit is successful and the tenant does not leave, bringing about forcible removal of the tenant. Under most laws, it can take several weeks—or even months—and a good deal of expense to evict an uncooperative tenant.[352] In Oregon,[353] for example, the tenancy is not terminated until the tenant receives proper notice and has not cured the violation within the relevant statutory period (which can be up to thirty days).[354] At that point, if the tenant refuses to leave, the landlord must sue for eviction.[355] The tenant has time to answer, a hearing ensues, and, if the dispute is not settled, there is a trial.[356] If the landlord wins, the sheriff serves an eviction notice, and the tenant has four days to vacate before the sheriff undertakes a forcible removal.[357] The eviction process itself takes time: In California eviction can theoretically be completed in seventeen days, but normally takes quite a bit longer, and if the leasehold has not yet expired will certainly take longer.[358]

### *2. Special Provisions for Alcohol- and Drug-Free Housing*

When termination of tenancy takes a substantial amount of time before eviction proceedings can begin, the process is detrimental to the operation of recovery housing. During the time it takes for the termination process to run its course, the tenant at issue is likely to be using alcohol or drugs in the building and engaging in addictive behavior, threatening the sobriety of the other tenants. The Oregon legislature has responded to this problem in a variety of ways.

First, Oregon law authorizes a landlord to terminate a rental agreement and begin eviction proceedings with twenty-four hours written notice if the tenant of someone in the tenant's control manufactures, delivers, or possesses a controlled substance.[359]

---

352. *See, e.g.*, Gerchick, *supra* note 351, at 785 ("Under the summary eviction process, however, a landlord may have to wait several months before regaining possession and may spend hundreds or thousands of dollars on legal fees . . .").

353. Oregon is one of over 20 states that have adopted the Uniform Residential Landlord Tenant Act ("RLTA") with some variations. UNIF. RESIDENTIAL LANDLORD & TENANT ACT, 7B U.L.A. 531 (2000). The RLTA was the result of a legal aid project funded by Congress in an attempt to balance the bargaining power between landlords and tenants. *Residential Landlord and Tenant Act Summary*, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, http://uniformlaws.org/ActSummary.aspx?title=Residential+Landlord+and+Tenant+Act (last visited Mar. 15, 2015) (on file with the *McGeorge Law Review*).

354. OR. REV. STAT. § 90.392 (West, Westlaw current through 2015 Reg. Sess.).

355. *See generally id.* § 105.105.

356. *See id.* § 105.130 (detailing procedure for bringing an action).

357. *Id.* § 105.151.

358. *See* Gerchick, *supra* note 351, at 808.

359. OR. REV. STAT. § 90.396(1)(f)(B).

More to the point, the Oregon legislature amended its version of the Uniform Residential Landlord Tenant Act (RLTA) to expedite the process when residents of recovery housing are using either illegal drugs or alcohol.[360] As the Oregon Supreme Court noted in *Burke v. Oxford House,* "[a]lthough not exempt from the requirements of the RLTA, drug- and-alcohol-free housing facilities enjoy expedited eviction procedures under certain circumstances." [361] This focused approach is multi-faceted.

First, if a tenant living in "drug and alcohol free housing" for less than two years "uses, possesses or shares alcohol, illegal drugs, controlled substances or prescription drugs without a medical prescription, the landlord may deliver a written notice to the tenant terminating the tenancy for cause and take possession as provided" in the normal FED provisions of the code.[362] The written notice must specify both "the acts constituting the drug or alcohol violation" and the date and time that the rental agreement will terminate, which cannot be less than forty-eight hours after delivery of the notice.[363] However, as the notice also states, if the tenant cures "the drug or alcohol violation by a change in conduct or otherwise within 24 hours after delivery of the notice," termination of the tenancy is cancelled.[364] This procedure essentially provides the tenant a wake-up call and a chance to cure the problem as well as shortening the normal period of time necessary to terminate the tenancy if the problem is not cured.

The law also protects the landlord against a cycle of repeated substance abuse problems.[365] This provision applies if the landlord gave notice as above and, within six months, the tenant repeats substantially the same act that constituted the prior violation.[366] In this situation the landlord may terminate the rental agreement upon at least twenty-four hours' written notice specifying the violation and the date and time of termination; the tenant does not have a right to cure this subsequent violation.[367]

Washington has adopted a statute essentially the same as Oregon's, except that tenants have seventy-two instead of forty-eight hours to cure the first drug or alcohol violation, and seventy-two instead of twenty-four hours to vacate after

---

360. Co-author Richard Harris was active in the joint effort of CCC and representatives of landlord and tenant organizations that lobbied for this amendment.

361. Burke v. Oxford House of Or. Chapter V, 137 P.3d 1278, 1281 (Or. 2006).

362. OR. REV. STAT. § 90.398(1); *see also* Burke v. Oxford House of Or. Chapter V, 137 P.3d 1278, 1281 (Or. 2006) (citing the provision as "providing for termination of tenancy on 48 hours' notice if tenant uses drugs or alcohol while living in drug-and-alcohol-free housing").

363. OR. REV. STAT. § 90.398(1).

364. *Id.* § 90.398(1)–(2).

365. *Id.* § 90.398(3).

366. OR. REV. STAT. § 90.398(3) (West, Westlaw current through 2015 Reg. Sess.).

367. *Id.*

repeating the same violation within six months.[368] No cases have been litigated under Washington's statute, which went into effect in 2003.[369]

It is important to distinguish the expedited procedures available to alcohol- and drug-free housing from provisions exempting some housing from the requirements of the RLTA altogether.[370] The exceptions include "[r]esidence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious or similar service, but not including residence in off-campus nondormitory housing."[371] However, a landlord does not qualify for these exceptions if the lease arrangements were "created to avoid the application of this chapter."[372]

### *C. Dealing with Staff Who Use Drugs or Alcohol*

Employers must make "reasonable accommodations" for employees who come under the protection of the anti-discrimination statutes.[373] The ADFC model requires staff who work in the housing to be clean and sober.[374] As with most people in recovery from addictions, staff members may also experience relapse, and their drug or alcohol use may be evident to other staff and residents.[375] However, a staff member who relapses by using alcohol is protected under the anti-discrimination statutes and is entitled to a reasonable accommodation.[376] CCC's approach to ADFC housing is to move staff who relapse to a different

368. WASH. REV. CODE § 59.18.550 (West, Westlaw current through 2015 Reg. Sess.).

369. *Id.*

370. OR. REV. STAT. § 90.110 (West, Westlaw current through 2015 Reg. Sess.).

371. *Id.*

372. *Id.*; *see also Burke*, 137 P.3d at 1281.

373. *See supra* text accompanying notes 146–147.

374. *See supra* Part II.A.2.

375. The Anti-discrimination statutes do not prevent a medical determination of whether an employee is drinking or using illegal drugs. The provisions, which are in the ADA only, permit an employer to "make pre-employment inquiries into the ability of an applicant to perform job-related functions" and require medical examinations or make inquiries that are "shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(2)(B), (4)(A) (2012). Again, there is more leeway to deal with addiction, as "a test to determine the illegal use of drugs shall not be considered a medical examination." *Id.* § 12114(d)(1). Furthermore, "[n]othing in this subchapter shall be construed to . . . prohibit . . . the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results." *Id.* § 12114(d)(2). And although the prohibitions against discrimination apply to individuals who have been successfully rehabilitated, or who are erroneously regarded as using illegal drugs, as long as they are not, in fact, engaged in such use; employers may "adopt or administer reasonable policies or procedures, included but not limited to drug testing" to ensure that no illegal use is ongoing. *Id.* § 12114(b); *but see* 42 U.S.C. § 12114(a) (prohibiting employers from requiring medical examinations or making inquiries about medical issues in most situations).

376. *See supra* text accompanying notes 146–147; RICHEY, *supra* note171, at § 6:2.50 ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

position in the agency while they deal with their relapse.[377] The question is whether this approach qualifies as a reasonable accommodation.

In *U.S. Airways v. Barnett,* the Supreme Court has outlined a two-step "practical approach" to assessing whether an employer has met this obligation.[378] The first question is whether "an 'accommodation' seems reasonable on its face, *i.e.,* ordinarily or in the run of cases."[379] If so, the employer prevails.[380] If the accommodation fails the first test, however, the employer can still prevail by showing "special (typically case-specific) circumstances that demonstrate undue hardship [on the operation of the business] in the particular circumstances."[381] In applying its test, the Court took account of the effect the desired accommodation would have on other employees.[382] The proposed accommodation would violate the company's seniority system.[383] This fact meant that the accommodation was not "reasonable" under the first prong of the test.[384]

*U.S. Airways* provides persuasive support for the conclusion that CCC's approach does constitute a reasonable accommodation.[385] ADFC staff in recovery from alcohol and drug addiction model recovery for the tenants as well as for one another.[386] A staff member who uses alcohol or drugs sends the wrong message. It was reasonable for U.S. Airways to protect its other employees' benefits under the seniority system. Similarly, it is reasonable for the operator of recovery housing to protect the benefits, promised to the other staff and tenants, of living and working in a community that is alcohol and drug free.[387]

The situation is especially persuasive when, unlike the situation in *U.S. Airways*, the employee at issue is provided an alternate job in the agency that he or she is capable of performing.[388] In this sense, the CCC approach may be even more generous than the law requires.[389] The *Barnett* case did not address accommodations for an employee whose disability was alcoholism.[390] Under the

377. *See supra* Part II.A.2.

378. 535 U.S. 391 (2002) (addressing the ADA's "reasonable accommodation" provision).

*379. Id.* at 410.

380. *Id.*

381. *Id.* at 402.

382. *Id.* at 402–03 (discussing the "seniority system" versus reasonable accommodation).

383. *Id.* at 405.

384. *Id.* at 403 ("The statute does not require proof on a case-by-case basis that a seniority system should prevail. That is because it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail").

385. *Id.* at 406 (holding that usually an individual's need for an accommodation will not outweigh the seniority rankings of the general group, absent a special showing).

386. *See supra* Part II.A.2.

387. *See* McCarty, et al., *supra* note 290 (noting that lack of sobriety in one threatens the sobriety of all).

388. *See Barnett*, 535 U.S. at 394 (detailing Barnett's lost job).

389. *Compare* ROMM, *supra* note 25, at 5 (emphasizing intervention principles), *with* 42 U.S.C. § 12114(a) (2012) (excluding individuals engaging in illegal use of drugs from disability).

390. 535 U.S. at 394 (indicating that the disability in question was a back injury).

RA, however, for purposes of employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.[391] The ADA contains a similar understanding of the problems an active alcoholic employee can present. It allows employers to prohibit "the illegal use of drugs and the use of alcohol at the workplace by all employees" and to "require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace."[392] Furthermore, an employer may hold an employee who engages in the illegal use of drugs or is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.[393]

The approach is even more generous when an employee relapses by using illegal drugs. In addition to the general exclusion of active drug addicts from the definition of "disability" or "handicap,"[394] the ADA subchapter dealing with employment makes it clear that "a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use."[395]

## V. CONCLUSION

Helping alcoholics and drug addicts learn to maintain recovery will lead to a reduction in criminality, including recidivism. CCC's Alcohol- and Drug-Free Community model is a very effective way to achieve this success for a large number of people struggling with addiction. To work, however, the model must be carefully structured and operated, both from a recovery perspective and from a legal perspective. This article has outlined the major standards and issues—as well as some of the nuances—involved in achieving that success.

391. 29 U.S.C. § 705(20)(C)(v) (2012).

392. 42 U.S.C. § 12114(c)(1)–(2).

393. 42 U.S.C. § 12114(c)(4); *see, e.g.*, Bailey v. Georgia-Pacific Corp., 176 F. Supp. 2d 3, 9 (D. Me. 2001) (holding, in the context of an operator of heavy machinery, that "an employer's decision to terminate an employee based on his alcohol-related misconduct is not termination because of his disability and does not violate the ADA" and citing authority).

394. *See supra* at note 177–179 and accompanying text.

395. 42 U.S.C. § 12114(a).

* * *