A PUBLIC HEALTH APPROACH TO ADDICTION STARTS AT HOME

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In December 2021, New York’s Metropolitan Museum of Art unceremoniously removed the “Sackler” name from galleries funded by the billionaire family.1 At the time the donations began, in the 1970s, such a public disavowal was unthinkable. Arthur Sackler’s wealth was largely built through his advertising and peddling of valium, which used falsified claims to downplay the risk of addiction.2 By the late 1970s, valium was the most widely abused prescription drug in the world.3 But public understanding of addiction at that time did not lay the blame of addiction on the developers or advertisers of addictive substances.4 Rather, there was a widely held belief that drug abuse was a result of personal weakness, and that those addicted to valium were solely responsible for their dependencies. This was reflective of the broader understanding of addiction at the time, which informed our government’s punitive approaches towards substance use.5

As evidenced by the Met’s recent changes, attitudes towards addiction have evolved since the 1970s.6 Most Americans now favor a public

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2 Patrick Radden Keefe, Empire of Pain: The Secret History of the Sackler Dynasty 58, 62–65 (2021) (“[T]he original House of Sackler was built on Valium . . . .” Id. at 64.)

3 Id. at 63–64.

4 Id. at 65 (reporting that drug producers spread a narrative that “it wasn’t the pills that were getting people addicted; it was the addictive personalities of the patients who were abusing them . . . . [who] ‘mixed it with alcohol or cocaine’”).


6 This is in no small part because of the sheer pervasiveness of the opioid epidemic — and the demographics of communities most afflicted. That politicians express sympathy for individuals addicted to opioids cannot be understood without acknowledging that the opioid epidemic initially hit white communities the hardest. Keefe, supra note 2, at 320 (“African Americans had been spared the full brunt of opioid epidemic: doctors were less likely to prescribe opioid painkillers to Black patients, either because they did not trust them to take the drugs responsibly or because they were less likely to feel empathy for these patients . . . .”). Law enforcement and prosecution of opiate-related crime has nonetheless fallen disproportionately on people of color. Id.
health approach to illicit drug use, not continued criminalization. Despite these positive developments in public opinion, however, our earlier understanding of illicit drug use remains codified in federal policies. Beyond the overcriminalization of illicit drug use, our social welfare programs and federal discrimination laws are similarly punitive towards substance use. Indeed, federal antidiscrimination statutes explicitly exclude substance use disorder (SUD) involving current drug use from their definitions of disability, which has marked repercussions in employment, public accommodations, and — the focus of this Essay — housing.

Tenants with SUD are barred from asserting disability-based defenses in evictions resulting from their drug use, which is — of course — the defining symptom of SUD. As explained herein, this exclusion from disability-based protections is nonsensical, counterproductive from a public health perspective, and anomalous within reasonable accommodation jurisprudence.

Part I provides background on SUD, and Part II gives an overview of federal disability-based discrimination protections in the housing context. Part III describes the exclusion of illicit substance use from these protections and how, as a matter of both law and policy, such an exclusion is misguided. Part IV provides potential solutions.

I. THE ADDICTION EPIDEMIC

Addiction, clinically known as SUD, is ubiquitous in the United States. In 2020, over 40 million Americans had an SUD, as defined by the American Psychiatric Association in its most current Diagnostic and Statistical Manual of Mental Disorders (DSM-5). Of these cases, 18.4 million involved illicit drug use. This Essay will focus only on those with SUDs related to illicit substances, not alcoholism, unless stated otherwise. The DSM-5 defines SUD as “a cluster of cognitive, behavioral,
and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems.”

SUD is an all-consuming illness, and its repercussions extend far beyond the physical harm it inflicts; SUD can destabilize all aspects of a person’s life. Crucially, the disease is defined by the lack of control over substance use, which results from shifts in a person’s brain chemistry. As the DSM-5 explains: “An important characteristic of substance use disorders is an underlying change in brain circuits that may persist beyond detoxification, particularly in individuals with severe disorders.”

SUD is also inseparably linked to other mental illnesses. The DSM-5 lists various mental illnesses as comorbidities with SUD, and it is reported that nearly half of people with an SUD also have a mental illness. Mental illness and SUD often reinforce one another, as there is a “bidirectional” causal relationship between SUDs and other mental illnesses: An underlying mental illness “may contribute to the development or exacerbation of SUD,” while “an SUD may contribute to the development or exacerbation of a mental disorder.” It is often difficult to determine which illness preceded the other.

Given SUD’s all-encompassing nature, underlying chemical causes, and connection with other mental illnesses, it is unsurprising that recovering from SUD is a difficult, time-intensive process that is rarely linear. Indeed, relapses are very common. As stated in the DSM-5: “The behavioral effects of these brain changes may be exhibited in the repeated relapses and intense drug craving when the individuals are exposed to drug-related stimuli.” “After developing withdrawal symptoms, the individual is likely to consume the substance to relieve the symptoms.”

But such relapses are not a permanent barrier to someone’s recovery, as “[t]reatment of chronic diseases involves changing deeply rooted behaviors, and relapse doesn’t mean treatment has failed.”


11 See NAT’L INST. ON DRUG ABUSE, supra note 5, at 3.

12 AM. PSYCHIATRIC ASS’N, supra note 10, at 483.

13 Id. (emphasis added).

14 See id. at 481–82; SAMHSA, supra note 8, at 33–34.

15 SAMHSA, supra note 8, at 47.

16 Id.


18 See NAT’L INST. ON DRUG ABUSE, supra note 5, at 23 (“The chronic nature of addiction means that for some people relapse, or a return to drug use after an attempt to stop, can be part of the process . . . . Relapse rates for drug use are similar to rates for other chronic medical illnesses.”).

19 AM. PSYCHIATRIC ASS’N, supra note 10, at 483.

20 Id.

21 NAT’L INST. ON DRUG ABUSE, supra note 5, at 23.
II. BACKGROUND ON REASONABLE ACCOMMODATIONS

The explicit exclusion of people struggling with SUD notwithstanding, the disability rights movement achieved a number of important legislative victories during the last half-century. These victories include the right to reasonable accommodations — one of the most integral forms of protection against disability-based discrimination. Though the specifics vary depending on the context, the underlying theory of reasonable accommodations is that a person with a disability is entitled to a modification to a system or program in order to ensure that the person has equal access to said system or program.22 In the housing context, this can include modifications to certain generally applicable rules, including rules that regulate disruptive behavior.23 Often, these modifications come in the form of “second chances” after a tenant violates their lease or program rules as a result of their disability.24

Before analyzing how individuals with SUD are excluded from these protections, though, the following sections provide background on reasonable accommodations more broadly, with a particular focus on “second chance” accommodations in the housing context.

A. Relevant Statutes

Though the Civil Rights Act of 196825 prohibited many forms of discrimination, it was not until 1973 that any federal law explicitly outlawed disability-based discrimination.26 Over the following twenty

23 See Jennifer L. Dolak, Note, The FHAA’s Reasonable Accommodation & Direct Threat Provisions as Applied to Disabled Individuals Who Become Disruptive, Abusive, or Destructive in Their Housing Environment, 36 IND. L. REV. 759, 760 (2003); see also, e.g., Roe v. Hous. Auth. of Boulder, 909 F. Supp. 814, 816–17, 822–24 (D. Colo. 1995) (denying the Boulder Housing Authority’s motion for summary judgment against a man with bipolar disorder because “assuming Roe is handicapped or disabled, before he may lawfully be evicted [the Housing Authority] must demonstrate that no ‘reasonable accommodation’ will eliminate or acceptably minimize any risk Roe poses to other residents,” id. at 822–23).
24 Sinisgallo v. Town of Islip Hous. Auth., 865 F. Supp. 2d 307, 342 (E.D.N.Y. 2012) (“[A] ‘second chance’ accommodation was suggested in the Joint Statement, and has been adopted as a reasonable accommodation by a number of courts.”); Super v. J. D’Amelia & Assocs., LLC, No. 09CV831, 2010 WL 3926887, at *6 (D. Conn. Sept. 30, 2010) (“Courts have accepted a second chance — that is, a tenant’s opportunity to remain in her dwelling notwithstanding the landlord’s disability-neutral justification for eviction — as an accommodation, provided that it is coupled with the tenant seeking assistance for her disability.”).
26 29 U.S.C. § 701; see also Shirey v. Devine, 670 F.2d 1188, 1193 (D.C. Cir. 1982) (describing the Rehabilitation Act of 1973 as the “first major federal statute designed to provide assistance to the whole population of handicapped persons”).
years, Congress enacted protections for people with disabilities in a piecemeal manner through various statutes.27

The earliest disability-based protections were enacted through Section 504 of the Rehabilitation Act of 1973.28 Section 504, however, is ultimately limited in its scope and application. Broader federal protections against disability-based discrimination were not enacted until 1988, when Congress amended the Fair Housing Act29 (FHA) to extend its protections to people with disabilities.30 A few years later, in 1990, Congress passed the Americans with Disabilities Act31 (ADA), a comprehensive civil rights law that covers employment, public accommodations, transportation, state and local government services, and telecommunications.32 All of these statutes consider a “failure to provide a reasonable accommodation” a form of prohibited disability-based discrimination.

Though similar in language, Section 504, the ADA, and the FHA apply to housing in slightly different, sometimes overlapping, contexts. Section 504 prevents any program or activity that either receives federal financial assistance or is conducted by an executive agency from discriminating against people with disabilities, meaning it applies to housing assistance programs receiving federal financial assistance, like public housing agencies and other housing administered by the Department of Housing and Urban Development (HUD).33 It does not, however, apply to unsubsidized market-rate housing.34 Similarly, the ADA applies to housing only in limited circumstances. Titles II and III of the ADA “require public entities and public accommodations to make reasonable modifications to policies, practices, or procedures to avoid

27 Dolak, supra note 23, at 759–60.
28 Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794). This statute is not found in “Section 504,” but it is colloquially known as Section 504 based on its original designation in Pub. L. No. 93-112. Each agency is responsible for administering its own Section 504 requirements. The Department of Housing and Urban Development (HUD) has outlined its requirements in 24 C.F.R. § 833. From here on out, references to Section 504 will also refer to HUD’s regulations implementing Section 504. Per said regulations, “[a] recipient shall modify its housing policies and practices to ensure that these policies and practices do not discriminate, on the basis of handicap, against a qualified individual with handicaps.” 24 C.F.R. § 833 (2021).
30 See id. § 3604(f)(3); Dolak supra, note 23, at 759.
32 Id. § 12101; see Dolak, supra note 23, at 759–60.
33 See Dolak, supra note 23, at 762–63.
34 See id. Section 504 does not, however, apply to the property owner receiving tenant-based Section 8 assistance — only to the housing authority administering the aid. Section 504 Frequently Asked Questions, U.S DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq [https://perma.cc/7QGA-YY4G].
discrimination.” Title II applies to services provided by federal entities, which include public housing agencies. Title III applies to common areas of otherwise residential properties that are made available to the public, such as a manager’s office. The FHA, however, applies more broadly. It applies to all entities that engage in the sale or rental of real estate, with minor exceptions. In sum, while all three statutes affect housing, only the FHA applies to private real estate and federally assisted housing, including Section 8 and public housing.

Despite the differing statutory mandates, what an individual must show to qualify for a reasonable accommodation in the housing context is the same under each statute. Specifically, a tenant must show that (1) they suffer from a handicap as defined in the relevant statute; (2) the landlord or program administrator knew of the tenant’s handicap or should reasonably be expected to know of it; (3) accommodations of the handicap “may be necessary” to afford the tenant an equal opportunity to use and enjoy the dwelling; and (4) the landlord or administrator refused to make such accommodations. Even if a tenant can demonstrate all four of these elements, the requested accommodation must still be “reasonable.” Further, landlords are not required to accommodate “individual[s] whose tenancy would constitute a direct threat to the

35 Reasonable Accommodations and Modifications, supra note 22.
36 Section 504 Frequently Asked Questions, supra note 34.
37 DENNIS STEINMAN, REASONABLE ACCOMMODATION IN HOUSING FOR THE DISABLED 5, https://www.kelrun.com/files/2013/05/FairHousingCLE_Lorman.pdf [https://perma.cc/76ZU-XBMU].
38 42 U.S.C. §3603(b) (excluding first, some “single-family house[s] sold or rented by an owner,” and second, “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence”); id. § 3604.
39 Edward G. Kramer, David G. Oakley & Diane E. Citrino, Cause of Action for Handicapped Discrimination in Housing in Violation of the Federal Fair Housing Act [42 U.S.C.A. §§ 3601 et seq.] and Related Federal Statutes § 12, in 22 CAUSES OF ACTION 2d (Clark Kimball & Mark Pickering eds., 2022) (“Congress [in passing the FHA] borrowed this language of ‘reasonable accommodation’ from case law interpreting § 504 of the Rehabilitation Act of 1973 . . . .”); Sinisgallo v. Town of Islip Hous. Auth., 865 F. Supp. 2d 307, 337 (E.D.N.Y. 2012) (“The relevant portions of the FHA, ADA, and Section 504 of the Rehabilitation Act offer the same guarantee that a covered entity, such as a public housing authority, must provide reasonable accommodations in order to make the entity’s benefits and programs accessible to people with disabilities.”); Consequently, “[a]nalysis of a reasonable accommodation claim under the three statutes is treated the same.” (alteration in original) (citation omitted) (quoting Super v. J. D’Amelia & Assoc., LLC, No. 09CV831, 2010 WL 3926887, at *3 (D. Conn. Sept. 30, 2010)); see also Wis. Cnty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 746 (7th Cir. 2006).
41 Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1042 (6th Cir. 2001) (describing landlord as agreeing to accommodate tenant by extending his lease one month while tenant sought treatment, id., although ultimately holding that subsequent accommodation was not reasonable, id. at 1045).
health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.42

Disability: Though the various statutes’ definitions of disability vary slightly, they all effectively define disability as a “physical or mental impairment which substantially limits one or more . . . major life activities.”43 “Major life activities” include “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”44 Ultimately, disability is defined broadly, and whether an individual has a disability is a fact-dependent question in almost all circumstances45 — except for, as explained below, those involving illicit substance use.

Necessity: In addition to proving the existence of a disability, a person claiming a right to a reasonable accommodation must show that the requested modification is necessary for them to have equal access to housing and is sufficiently related to their disability.46 The “demonstration of a direct linkage between the proposed accommodation and the ‘equal opportunity’ to be provided to the handicapped person . . . has attributes of a causation requirement.”47 This linkage is sometimes referred to as the “nexus” requirement.48 Crucially, this analysis does not require “necessity” in the strictest sense; a person need not demonstrate that no other alternatives exist to be entitled to the accommodation.49

Reasonableness: To determine if the accommodation is reasonable, the test is whether the proposed accommodation imposes an undue financial or administrative burden or requires “a fundamental alteration in the nature of a program.”50 But this does not mean that a landlord must bear no additional cost.51 As is true for the entire reasonable accommodation analysis, what is “reasonable” in any given circumstance

42 42 U.S.C. § 3604(f)(3); see also id. § 12182(b)(3). The exceptions address only the third and fourth factors: the reasonableness requirement and the threat to health and safety.
43 Id. § 3602(b); see also id. § 12102(1); 29 U.S.C. § 705(20). In addition to an ongoing disability, these protections also apply to people who have “a record of . . . an impairment,” or are “regarded as having . . . an impairment.” 42 U.S.C. § 12102(1)(B)–(C).
44 24 C.F.R. § 100.201 (2021); see also 28 C.F.R. § 35.108(c) (2020); 28 C.F.R. § 42.540(k)(2)(ii) (2020).
45 See Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996) (“The reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination.” (quoting Cal. Mobile Home Park Mgmt., 29 F.3d at 1418)); see also Austin v. Town of Farmington, 826 F.3d 622, 630 (2d Cir. 2016); Oxford House, Inc. v. City of Baton Rouge, 932 F. Supp. 2d 683, 688 (M.D. La. 2013) (stating that “a case-by-case evaluation is necessary” in the disability inquiry).
46 Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597, 604 (4th Cir. 1997).
47 Id.
49 Anderson v. City of Blue Ash, 798 F.3d 338, 361 (6th Cir. 2015).
50 Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979); see id. at 412; see also Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002).
51 See Sinigaglio, 865 F. Supp. 2d at 341.
is resolved on “a case-by-case basis.” This “highly fact-specific inquiry” should balance both parties’ needs.

**Threat to Health and Safety:** The FHA, ADA, and Section 504 all include exceptions to the reasonable accommodation requirement for behavior that poses a threat to the health and safety of others. Despite this provision’s seemingly broad language, the ADA explicitly states that it excludes from protections only individuals who are threats to health and safety *without* reasonable accommodations. In the disability context, “[t]he 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.” Courts have interpreted the FHA’s provision similarly, stating that if there is an accommodation provided that can eliminate the threat, landlords are nonetheless obliged to engage in the reasonable accommodation process.

**B. Reasonable Accommodation in Action:**

**Second Chances and Strike Systems**

The right to a reasonable accommodation is especially important in the housing context because it can serve as an affirmative defense to eviction or subsidy termination. These cases often center on people who are facing eviction after violating some generally applicable rule because of their disabilities. As a defense, the tenant argues that the landlord was required to reasonably accommodate them by modifying the violated rule to “allow [the tenant] to comply with the rules moving

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56 Id. (emphasis added).
59 See *Dolak*, supra note 23, at 761.
forward and permit them to continue their tenancy.\textsuperscript{60} Tenants sometimes seek permanent exemptions from or modifications of the violated rule. This could include an exception to the “no-pets” policy for an individual with a support animal, or the relaxation of certain administrative requirements for tenants with developmental disabilities.\textsuperscript{61}

In other instances, though, the accommodation sought is not a permanent modification of the rule, but a “second chance” after a lease violation.\textsuperscript{62} Though the lease violation would typically result in eviction, a tenant could argue that the lease violation was a result of their disability, such that evicting them because of the violation constitutes a failure to reasonably accommodate. Sometimes, the accommodation is framed as “forbear[ing] from evicting a tenant to offer the tenant an opportunity to seek and receive treatment.”\textsuperscript{63} In other cases, where the tenant has already obtained treatment and lease-violating behavior has already been mitigated, the accommodation is simply leniency and another opportunity to comply with the rules.\textsuperscript{64}

“Second chance” reasonable accommodations are often litigated in cases involving undesirable — sometimes violent or illegal — behavior stemming from mental illnesses.\textsuperscript{65} In such cases, even behavior that is objectively “threatening” or otherwise a basis for eviction can require a

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  \item \textsuperscript{60} Richard M. Glassman & Deena A. Zakim, \textit{Housing Rights, in \textit{Legal Rights of Individuals with Disabilities} \S 2.6.1} (Richard M. Glassman et al. eds., 3d ed. 2021).
  \item \textsuperscript{61} Chavez v. Aber, 122 F. Supp. 3d 581, 597 (W.D. Tex. 2015) (permitting service animal, despite property’s no-pets policy); Glassman & Zakim, supra note 60, \S 2.6.8(j) (“Occasionally, tenants request accommodations in the policies and procedures of the management office, at least regarding which management staff interact with the tenant and how they do so (in writing, in person, etc.).”).
  \item \textsuperscript{62} Glassman & Zakim, supra note 60, \S 2.6.1(c) (citing City Wide Assocs. v. Penfield, 564 N.E.2d 1003 (Mass. 1991)); \textit{see also} Super v. J. D’Amelia & Assocs., LLC, No. 09CV831, 2010 WL 3926887, at *6 (D. Conn. Sept. 30, 2010) (“Courts have accepted a second chance — that is, a tenant’s opportunity to remain in her dwelling notwithstanding the landlord’s disability-neutral justification for eviction — as an accommodation, provided that it is coupled with the tenant seeking assistance for her disability.”).
  \item \textsuperscript{63} Glassman & Zakim, supra note 60, \S 2.6.8(c).
  \item \textsuperscript{64} \textit{See, e.g.}, Bos. Hous. Auth. v. Bridgewaters, 898 N.E.2d 848, 859 (Mass. 2009).
lenient response if the behavior was a result of a mental illness. Landlords often cite the antidiscrimination statutes’ “threat to health and safety” provision to rebut a tenant’s claim of failure to accommodate, but courts have consistently rejected this argument. To succeed in invoking the “threat” provision, the landlord must show that the individual would pose a threat even after they were granted an accommodation.

This fact pattern is typical in eviction and subsidy-termination cases. In Roe v. Sugar River Mills Associates, for example, a tenant who was criminally convicted for assaulting another tenant with “obscene, offensive and threatening language” was subsequently threatened with eviction from the federally subsidized housing complex in which he resided. Nonetheless, the federal court denied the property’s motion for summary judgement because the property may have violated Roe’s rights under the FHA, as his outbursts may have been the result of a mental illness. The court concluded that it was possible that a “reasonable accommodation could eliminate the risk” of threat, such that the “health and safety” exceptions to the FHA did not apply.

Countless other cases reach similar results. In 529 West 29th LLC v. Reyes, for example, a man with schizophrenia had engaged in a “pattern of conduct that led to two fires in three months.” Though this was objectively a threat to the safety of other tenants, the court found that this threat could be mitigated with an accommodation — in this case, a second chance allowing Reyes the opportunity to continue treatment. Similarly, in Boston Housing Authority v. Bridgewaters, the Boston Housing Authority (BHA) sought to evict a tenant who had severely injured his brother. Emmitt Bridgewaters, who suffered from bipolar disorder, asserted a reasonable accommodation defense. He explained that the violent outburst had occurred because he had been taken off his medication due to side effects. By the time the trial took

66 See Dolak, supra note 23, at 768–69 (describing various cases involving threatening behavior in which a reasonable accommodation was required).
67 See, e.g., Bos. Hous. Auth., 898 N.E.2d at 861. Theoretically, landlords can also argue that the defendant never made a request for an accommodation, but it is not required that a tenant do so before litigation commences. See id. at 859.
68 Id. at 853, 855.
70 Id. at 637–38.
71 Id. at 640.
74 Id. at 477.
75 Id. at 478.
76 898 N.E.2d 848 (Mass. 2009).
77 Id. at 851.
78 Id. at 850, 852.
79 Id. at 852.
place, he was in treatment. The court rejected the BHA’s attempt to invoke the threat to health and safety provision and ruled for Bridgewaters.

This line of cases makes clear that reasonable accommodations can be required even in circumstances where the lease — or even the law — is violated.

III. DESERVING OF DISCRIMINATION: THE CURRENT USE EXCEPTION IN PRACTICE

Though the reasonable accommodation analysis is typically fact dependent, one type of disability is categorically excluded, no matter the circumstances: entities typically bound by reasonable accommodation laws are not required to provide accommodations for SUD involving current use of illicit drugs (“current use exception”).

The three aforementioned statutes all incorporate a current use exception, though the wording and placement of the exception differ slightly for each statute. Both Section 504 and the ADA have stand-alone provisions that apply broadly to the statutes’ other provisions. Specifically, these statutes state: “[T]he term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when [the] covered entity acts on the basis of such use.”

The FHA’s current use exception is framed slightly differently. As opposed to having a stand-alone provision or a section covering drug usage, the FHA’s current use exception falls within the FHA’s definition of “handicap,” saying: “[S]uch term does not include current, illegal use of or addiction to a controlled substance . . . .”

These inconspicuous statutory exceptions have caused immeasurable harm to tenants struggling with SUD. As explained herein, the current

80 Id.
81 Id. at 861.
82 See also Sinisgallo v. Town of Islip Hous. Auth., 865 F. Supp. 2d 307, 313–14, 338, 340–42 (E.D.N.Y. 2012) (holding that a man who attacked a neighbor as a result of his bipolar disorder might have been entitled to a reasonable accommodation, rejecting arguments that violent behavior without an accommodation automatically triggered the “health and safety” exception, id. at 341).
83 See 42 U.S.C. § 3602(h); 29 U.S.C. § 705(20)(C)(i); 42 U.S.C. § 12210. As explained infra section IV.B, pp. 413–17, these distinctions may be utilized to offer greater protection to those addicted to illegal substances.
84 42 U.S.C. § 12210(a); 29 U.S.C. § 705(20)(C)(i). The ADA goes on to state explicitly that this definition does not include individuals who “ha[ve] successfully completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs, or ha[ve] otherwise been rehabilitated successfully and [are] no longer engaging in such use.” 42 U.S.C. § 12210(b). Though this provision does not appear in the FHA, courts have interpreted the FHA’s current use exception to implicitly contain this same caveat. See United States v. S. Mgmt. Corp., 955 F.2d 914, 923 (4th Cir. 1992).
85 42 U.S.C. § 3602(h).
use exception is a relic of our country’s failed War on Drugs that only serves to exacerbate SUD and hamper efforts to combat substance use on a community-wide level.

A. History of SUD Exclusions

In the late 1980s and early 1990s, the infamous “war on drugs” reached its pinnacle. Both the Reagan Administration and the first Bush Administration oversaw the implementation of various federal statutes aimed at eliminating drug use, which they framed as a serious crime and a threat to society. It is against this backdrop that Congress amended the FHA in 1988 to extend to people with disabilities — but not to those currently struggling with SUD of illicit drugs. Just two years later, Congress passed the ADA, once again excluding ongoing SUD from its protections. It also amended Section 504 to exclude certain current SUD of illicit drugs. While both the ADA and FHA made important strides in ensuring accessibility of housing for disabled people, they left behind some of the most marginalized people with disabilities.

Unfortunately, this antidrug fervor only intensified in the following years, particularly as it related to low-income housing. In response to growing, typically racist tropes about rampant drug use in low-income housing, Congress included in its housing reform bill more stringent regulations related to federally subsidized housing and drug use. Specifically, the statutes state that drug use is grounds for denial or dismissal from a federally funded program. This rule, colloquially known

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87 Francis, supra note 86, at 891–92.
88 42 U.S.C. § 3602(b); Francis, supra note 86, at 893.
89 42 U.S.C. § 12110(a); Francis, supra note 86, at 902.
93 See Francis, supra note 86, at 897.
as the “one strike” policy,94 has been reinforced by HUD-promulgated guidance.95

Despite the fact that this approach to drug use is known as the “one-strike” policy, the Supreme Court has made clear that, while a public authority can evict a tenant (and their whole family)96 for a single instance of drug use, it is not required to do so.97 In recent years, HUD has even encouraged recipients of federal funding to use their discretion in terminating someone’s participation in a program for drug use.98 While discretion is ultimately better than automatic eviction, it has nonetheless lent itself to the policies being enforced disproportionately against Black and Latino families.99

But subsidized housing does not have a monopoly on antidrug fervor. Many municipal governments encourage or require private landlords to make drug use a material violation of the lease, while other private landlords do so of their own volition.100 Unsurprisingly, these policies have also been disproportionately enforced against Black and Latino residents.101

For those struggling with SUD, these anti-drug-use rules mean that they can be evicted because of their disability—a textbook example of discrimination. But instead of stopping this discrimination, antidiscrimination statutes’ current use exceptions sanction it.

B. The Exception in Practice

Because of the current use exception, disabled tenants caught using illicit substances are not protected by antidiscrimination statutes. This means they cannot assert a reasonable accommodation defense in eviction or subsidry termination cases. This is true even if they are clinically diagnosed with SUD, such that their brain chemistry makes it difficult

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95 See Dep’t of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 129 (2002); Williams, supra note 94, at 774.
96 See 24 C.F.R. § 966.4(b)(ii)(B) (specifying that “any member of the [tenant’s] household’s” criminal drug use is grounds for termination of whole household).
97 See Rucker, 535 U.S. at 133–34 (“The statute does not require the eviction of any tenant . . . .”).
99 See Williams, supra note 94, at 771, 774 (“[T]he fact remains that like every other aspect of drug enforcement, low-income people of color experience these collateral consequences most acutely.” Id. at 771.).
101 See id. at 193, 205.
to resist drug use.\textsuperscript{102} Whereas these statutes might entitle other individuals to a second chance after violating a lease because of their disabilities, they categorically exclude those with SUD from their protections.

Cases interpreting these provisions demonstrate their detrimental effects in practice. In \textit{A.B. ex rel. Kehoe v. Housing Authority},\textsuperscript{103} a court denied a woman relief from an eviction under antidiscrimination statutes, despite her being “in court ordered drug rehabilitation at the time she was evicted,” because “she made a ‘mistake’ on one occasion in 2011 and had taken an illegal drug.”\textsuperscript{104} She had specifically requested an accommodation to the housing authority’s “one strike” policy, which was rejected.\textsuperscript{105} The court made no distinction between habitual use and a relapse and, in doing so, undermined the struggling woman’s recovery process. Citing the ADA’s implementing regulations, the court found that the law did not bar the eviction, reasoning that:

\begin{quote}
‘[T]he term disability . . . (does) not include individuals currently engaged in the illegal use of drugs when the covered entity acts on the basis of such use.’ The point is that it is perfectly permissible for an entity — an employer, a public housing authority etc. — to take an adverse action against someone who is caught using drugs.\textsuperscript{106}
\end{quote}

While the above passage comes from a federal district court case, the current use exception arises most often in eviction and subsidy-termination cases, which are typically adjudicated in state courts or agency administrative hearings.\textsuperscript{107} In \textit{In re Moore v. New York City Housing Authority},\textsuperscript{108} for example, the Housing Authority sought to terminate the tenancy of Doreen Moore for her possession of marijuana and crack cocaine.\textsuperscript{109} In response, Moore explained that she struggled with epilepsy, which forced her to “self-medicate” with marijuana, and

\begin{footnotes}
\item[102] See \textsc{Am. Psychiatric Ass’n}, \textit{supra} note 10, at 483.
\item[103] No. 11 CV 163, 2012 WL 1877740 (N.D. Ind. May 18, 2012), aff’d, 498 F. App’x 620 (7th Cir. 2012).
\item[104] Id. at *4.
\item[105] Id. at *2.
\item[106] Id. at *4 (alteration in original) (emphasis omitted) (citations omitted) (quoting 29 C.F.R. § 1630.3(a)).
\item[107] Summary process evictions typically fall to state courts, with the exception of appeals of decisions to federally funded housing authorities. Accordingly, there are innumerable cases at the state and administrative levels that demonstrate how the current use exception works in practice. While there is no unified database of state housing court cases throughout the United States, a study of private market housing in New York City showed that in Manhattan alone, there were more than 6000 drug-related evictions between 1988 and 2009. See L. Michelle Bruijn & Michel Vols, \textit{Eviction as a Tool for Crime Control: Fighting Drug-Related Crime in the Netherlands and the United States}, in \textsc{Global Perspectives in Urban Law: The Legal Power of Cities} 87 (Nestor M. Davidson & Geeta Tewari eds., 2019). This number is likely an undercount, given how many individuals vacate the premises prior to the eviction being filed.
\item[109] Id. at *2.
\end{footnotes}
had also undergone treatment for SUD. In other words, Moore asserted that her drug use was the result of a disability such that evicting her for the drug use constituted a failure to accommodate. The court squarely rejected Moore’s argument, citing the current use exception of both the ADA and Section 504. The court went on to say the Housing Authority “is not required to provide petitioner with an accommodation that allows her to engage in illegal activities.” This is despite the fact that courts routinely require reasonable accommodations that provide leniency to tenants who have engaged in illegal activity, such as harassing, choking, or assaulting fellow tenants.

Similarly, in Boston Housing Authority v. Gomez, the BHA filed a summary process action against Juan Gomez after he was charged with possession of marijuana. Gomez’s defense asserted that both federal and Massachusetts antidiscrimination statutes provided him with an affirmative defense, explaining that:

> [F]or a number of years he had received counseling and therapy for depression, anxiety and substance abuse. He testified that as part of his treatment, he received medication to manage his symptoms. The defendant claims that he had been drug free until his Medicaid eligibility ended and he was unable to afford the medication. He claims he used the marijuana as a substitute for the medication that he was unable to afford.

While the court could have decided that the BHA was required to accommodate him by providing extra time to find community or government services to help pay for his medications, it instead denied him the accommodation on account of his drug use. It explained that “under federal and state law the defendant is not entitled to a reasonable accommodation to address a current, illegal use or addiction to a controlled substance.”

In Trinity Franklin Hill Phase One, LP v. Kirnon, the plaintiff sought to evict Edward Kirnon for “drug-related criminal activity in violation of his lease.” The landlord, whose property was federally subsidized, explicitly referenced the “One Strike and You’re Out” policy.

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110 Id. at *3.
111 Id. at *7.
112 Id. at *7–8.
113 Id. at *7.
114 See Dolak, supra note 23, at 768; Ligatti, supra note 65, at 92.
116 Id. at *3.
117 Id.
118 Id. (citing Peabody Props., Inc. v. Sherman, 638 N.E.2d 906 (Mass. 1994)).
120 Id. at *1.
in evicting Kirnon. He specifically requested that the landlord “allow [him] to maintain his tenancy, so as to avoid a lapse in his treatment that would seriously threaten his health.” Kirnon was even “willing to provide evidence of his efforts to remain drug free, in the form of regular drug [testing] and support group attendance.” By the time the eviction was commenced, Kirnon had completed treatment for drug dependency and was no longer “currently” using illicit drugs. Nonetheless, the court found that Kirnon still fell within the current use exception because he was using drugs at the time of the lease violation. The court allowed Kirnon’s eviction.

C. Critiques of the Current Use Exception

The current use exception is, first and foremost, illogical in that it denies tenants protections when their disabilities are most severe. It is also counterproductive from a public health perspective. Lastly, the current use exception is anomalous within reasonable accommodation jurisprudence and unjustifiably singles out illicit drug use as categorically unforgivable.

1. Denies People Protection When They Need It Most. — Federal antidiscrimination statutes acknowledge that addiction is a disability. Indeed, the Acts explicitly protect alcoholism and individuals recovering from SUD. Despite accepting that SUD is a legitimate medical condition, the Acts go on to say that at the moment this disease is most severe — when individuals are still using drugs and their chemical dependence is most intense — it no longer qualifies as a disability.

The backwardness of this approach is most evident when looking at how the exception is applied. Though they have been wildly inconsistent in their interpretations of “current,” courts often determine if the exception applies based on the tenant’s drug use at the time the lease violation at issue occurred, as was the case in Trinity. Under this

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121 Id.
122 Id. at *4.
123 Id. at *3.
124 Id.
125 Id. at *5.
126 Id. at *6.
127 See supra notes 43–45 and accompanying text; supra notes 83–85 and accompanying text.
128 Trinity, No. 12-H-84SP001057, at *5; see Ryan Schmitz, Substance Use as a Second-Class Disability: A Survey of the ADA’s Disarmament of Individuals in Recovery, 73 ME. L. REV. 93, 113–16 (2020); cf. Martinez v. Bos. Hous. Auth., No. 17-H-84CV000200, at *8–10 (Mass. E. Hous. Ct. Mar. 6, 2017) (stating that the BHA found that the exception did not apply because the tenant had been sober for over a year by the time hearing took place).
interpretation, so long as the tenant used drugs within a few months of the lease violation, they are considered to be a “current user.” Of course, this means that all evictions wherein the violation is drug use will fall into the current use exception. Many courts have concluded it does not matter if the tenant has since recovered and stopped using drugs by the time the adjudication takes place.129

Only individuals who have been in recovery without relapse for an uncertain duration of time at the time of the lease violation can escape the current use exception, creating an inevitable paradox. Those evicted for illicit drug use as a result of SUD are necessarily “current users,” categorically prohibited from a reasonable accommodation defense. But to escape the current use exception, a tenant must have abstained from drugs for some untold number of months.130 By the time the tenant has been sober long enough to evade the exception, however, the tenant is unlikely to need the defense; the tenant is probably not engaging in lease-violating behavior that stems from drugs they used many months prior. Indeed, if an individual proves they had abstained from drug use for a sufficiently long period of time, it is unlikely they would be able to prove the disease impaired a “major life activity” or that there was a nexus between the drug use and the lease violation. In short, “the closer one gets to experiencing the symptoms of a substance use disorder, the smaller one’s chances of successfully vindicating one’s rights under the ADA.”131

2. Counterproductive from a Public Health Standpoint. — The current use exception serves only to exacerbate SUD. It harms both individuals in recovery and communities trying to combat addiction. It also punishes people for relapsing, despite relapse being typical during recovery, even among those who do eventually recover.

(a) Makes Recovery Less Likely. — The practical effect of the current use exception is that it robs tenants with SUD of a crucial affirmative defense to eviction — sometimes their only defense — making it easier for landlords to oust them. Evicting individuals with SUD, however, is more likely to exacerbate SUD than prevent it.

For one, the threat of eviction is unlikely to help a person overcome SUD. Again, SUD is marked by the inability of a person to resist a drug.132 The cravings are powered by imbalances in brain chemistry

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129 See, e.g., Trinity, No. 12H84SP001957, at *5.
130 See Schmitz, supra note 128, at 103.
131 Id. at 96.
that won’t be deterred by logic or threat of repercussion, absent treatment.\textsuperscript{133} It is more likely that the threat of eviction deters individuals from seeking help — even in cases of emergency.\textsuperscript{134}

Rather, evicting tenants with SUD will only exacerbate their addictions. Both statistics and common sense can confirm that stable housing is a crucial component of successful recovery.\textsuperscript{135} Housing is one of our most fundamental needs, and housing security is a necessary precursor to addressing any challenge, let alone one as difficult as overcoming SUD. Indeed, the Substance Abuse and Mental Health Services Administration (SAMHSA) and mainstream treatment programs consider stable housing to be one of the four main components of rehabilitation.\textsuperscript{136} Conversely, it is well documented that eviction harms individuals’ mental health, further inhibiting recovery.\textsuperscript{137}

Of course, eviction that results in homelessness will most seriously hamper recovery. While there are long-standing, often racist tropes about people becoming homeless because they squander their money on drugs,\textsuperscript{138} the more inconvenient truth is that the experience of being homeless can itself cause or exacerbate SUD.\textsuperscript{139} The stress associated with homelessness can push individuals to cope using illicit substances, which can in turn lead to addiction. And for those already struggling with SUD, homelessness will place them into communities where even more dangerous and addictive drugs are readily available.\textsuperscript{140}

\textsuperscript{133} See supra Part I, pp. 392–93.

\textsuperscript{134} Cf. Alisha Jarwala & Sejal Singh, When Disability Is a “Nuisance”: How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes, 54 HARV. C.R.-C.L. L. REV. 875, 884 (2019) (describing how towns and cities penalize tenants for calls for emergency services, even when those calls arise from a disability).

\textsuperscript{135} Timothy P. Johnson & Michael Fendrich, Homelessness and Drug Use: Evidence from a Community Sample, 32 AM. J. PREVENTIVE MED. S211, S216 (2007).


\textsuperscript{137} See, e.g., Megan Stuart, Comment, Housing Is Harm Reduction: The Case for the Creation of Harm Reduction Based Termination of Tenancy Procedures for the New York City Housing Authority, 13 N.Y.C. L. REV. 73, 83 (2009).


\textsuperscript{139} Stuart, supra note 137, at 83 (quoting Brian W. Weir et al., Uncovering Patterns of HIV Risk Through Multiple Housing Measures, 11 AIDS & BEHAV. S31, S32 (2007)); see also Johnson & Fendrich, supra note 135, at S216 (“Evidence from this community sample highlights the equally plausible adaptation hypothesis, which interprets homelessness as a risk factor for subsequent drug use.”).

\textsuperscript{140} See Stuart, supra note 137, at 82–83.
There is a cyclical relationship between housing instability and SUD, wherein each worsens in response to the other: SUD can be directly responsible for an eviction or denial of housing, but housing insecurity and homelessness can also cause or exacerbate SUD and undermine any attempts at recovery.141

Nor is evicting those with SUD likely to reduce drug use on a community-wide level. For localities bearing the brunt of the addiction epidemic, widespread eviction of those with SUD will only frustrate their efforts to limit the substance use. Given the way that stress from eviction and homelessness can drive substance use rates, multiplying these effects on a mass scale will actually increase drug use, and the addiction and deaths that accompany it.142 Indeed, a study reviewing evictions for over thirteen years found that counties with “[h]igher levels of eviction rates were consistently associated with higher rates” of drug overdose.143

(b) Does Not Account for Nature of Recovery. — The current use exception also ignores the reality of recovering from SUD. As the DSM-5 explains, the disease is characterized by repeated failed attempts to abstain from drug use, as the “[t]he behavioral effects of [addiction-induced] brain changes may be exhibited in the repeated relapses and intense drug craving when the individuals are exposed to drug-related stimuli.”144 Roughly forty to sixty percent of people recovering from SUD will experience at least one relapse during their healing process, and relapse is most common during the first year of recovery.145 Nor does relapse mean that “treatment has failed.”146

Instead of recognizing relapse as a common experience in recovery that in no way precludes a person’s eventual recovery, the current use exception punishes it, making it more likely that the individual’s single relapse becomes permanent. Under the current use exception, a single slipup can erase months of hard-earned sobriety, as courts treat a relapse no differently than ongoing current use.

Take, for example, the story of the tenant in Kehoe. A.B.’s mother had already enrolled in a substance use treatment program and was

\(^{141}\) Id.

\(^{142}\) Weir et al., supra note 139, at S32 (“Depression and anxiety may result from housing transience or from the sense of vulnerability associated with living in unstable housing. In response, individuals may initiate, increase, or relapse into substance use.” (citations omitted)).


\(^{144}\) AM. PSYCHIATRIC ASS’N, supra note 10, at 483.


\(^{146}\) NAT’L INST. ON DRUG ABUSE, supra note 5, at 23.
working towards overcoming her disease.147 But, like so many others struggling with addiction, A.B’s mother did not have a linear recovery. She relapsed in one instance and was caught and evicted.148 Had she stayed stably homed after this relapse, she would have been far more likely to resume her program and treat this relapse as a small step backwards. But evicting someone for a relapse — which is a normal, even common part of recovery — is likely to make this small step backward a permanent reversal.

3. Inconsistent with the General Approach to Reasonable Accommodation Law. — In addition to being counterproductive from a public health perspective, the current use exception is also anomalous within the operation of reasonable accommodation law. It is widely understood that “accommodation requests are not analyzed in a vacuum — courts have held that these requests are fact-specific inquiries that lend themselves to case-by-case determinations.”149 Categorical bans, such as those on current substance use, are uncharacteristic of reasonable accommodation jurisprudence.

The current use exception is therefore an idiosyncratic provision that deems substance use a uniquely unforgivable act. But public policy cannot justify the singled-out exclusion of illicit substance use. If anything, illicit drug use is often less disruptive than behavior resulting from other disabilities that would nonetheless be protected by “second chance” reasonable accommodations, such as violence towards other tenants or starting fires.150

At the very least, drug use is not categorically severe enough to justify a departure from reasonable accommodation law’s case-by-case approach. There is no support for the contention that all illicit drug use constitutes disruptive behavior, especially if it occurs in the privacy of the individual’s apartment.151

While many of the behaviors for which tenants are granted a “second chance” as a reasonable accommodation have been deemed morally undesirable, only as a vestige of the War on Drugs is drug use singled out as distinctly unforgivable behavior.152

IV. A NEW APPROACH

Part IV discusses solutions to problems posed by the current use exception and the potential counterarguments to each solution. Section A

148 See id. at *4.
149 Ligatti, supra note 65, at 89.
150 See supra section II.B, pp. 398–401.
151 See Stuart, supra note 137, at 100.
152 See Francis, supra note 86, at 891.
focuses on statutory solutions, while section B looks at possible reinterpretations of existing law.

A. Abolishing the Current Use Exception

Congress should amend the FHA, ADA, and Section 504 to strike the current use exceptions. This would allow those struggling with SUD to defend themselves from eviction at their most vulnerable moments by requesting a “second chance” reasonable accommodation. Doing so could provide a necessary reprieve for struggling tenants, giving them time to seek out potentially life-saving SUD treatment. This is especially crucial for Black and Latino tenants, for whom it is often more difficult to obtain treatment.\(^{153}\) And for tenants who have already recovered by the time their trial or hearing occurs, abolishing the current use exception would ensure that individuals are not unjustly punished for symptoms of their disease. Lastly, abolishing the provision would also better comport with the reality of SUD recovery, in which relapse is recognized as a temporary step backwards — not a permanent bar to recovery.

Objections to striking the current use exception would likely focus on the rights and safety of other tenants in multifamily housing properties. Indeed, this concern was the alleged motivation for policies regarding illicit drugs and multifamily housing.\(^{154}\) Of particular concern are families living in low-income housing who want to provide safe, drug-free environments for their children to grow up in.\(^{155}\) Moreover, neighbors might worry that tenants given second chances will abuse their right to reasonable accommodation.

These arguments ignore that many tenants, like the tenant in *Trinity*, have already recovered from SUD by the time their reasonable accommodation defense is adjudicated. Assuming they remain in recovery, these tenants would not pose any threats to the rights and safety of other tenants going forward.

But even for tenants who have not fully recovered at the time of adjudication, concerns regarding the safety of other tenants ignore that reasonable accommodation requirements are already properly limited. The elements of a reasonable accommodation claim, like the “necessary” and “reasonable” requirements, along with the exceptions for “threats to health and safety,” ensure that property owners are not required to provide second chances to individuals who would cause lasting legitimate harms to the residential community.\(^{156}\) For one, a tenant asserting a


\(^{154}\) See Francis, supra note 86, at 893.

\(^{155}\) See id. at 896–97.

\(^{156}\) See supra notes 41–42 and accompanying text.
reasonable accommodation defense must still demonstrate that their requested accommodation is “reasonable” and necessary.\footnote{Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1042, 1047 (6th Cir. 2001) (determining that tenant’s proposed accommodations were not “reasonable” under the FHA).} For example, it is unlikely that an individual with SUD who was orchestrating a large-scale distribution of illicit drugs could demonstrate that this behavior was a result of his disability and that leniency would be reasonable in this instance.\footnote{See Martinez v. Bos. Hous. Auth., No. 17-H84-CV-000020, at *9–10 (Mass. E. Hous. Ct. Mar. 6, 2017) (holding that tenant charged with possession with intent to distribute had not presented evidence to establish that the drug possession was “related to her disability,” id. at *9). I do not believe that distribution of drugs is sufficient reason to evict a tenant either, but I acknowledge others might have this concern for the sake of argument.} Moreover, a landlord can still overcome this defense if he proves that, despite the accommodation, the tenant nevertheless constitutes a threat to the health and safety of other tenants.\footnote{See supra notes 54–57 and accompanying text.} Landlords could likely demonstrate that defendants who had already been given multiple chances and still failed to improve would thus still constitute a threat to the health and safety of other tenants.\footnote{Cf. City Wide Assocs. v. Penfield, 564 N.E.2d 1003, 1005 (Mass. 1991) (affirming application of reasonable accommodation defense to halt eviction, but noting that it was conditioned on “the absence of further significant damage”).}

More broadly, however, these concerns are best addressed by courts on a case-by-case basis. Undoubtedly, property owners have an interest in limiting the use of illicit drugs, especially highly addictive and dangerous substances, on their properties in certain situations. But courts evaluate reasonable accommodations on a case-by-case basis in almost all other circumstances.\footnote{See, e.g., United States v. Cal. Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1418 (9th Cir. 1994).} They are well equipped to balance the rights of both parties, and there is no reason to depart from this approach in the context of drug use.

Opponents might also argue that having no current use exception would implicitly condone or even encourage illicit drug use. But such concern disregards the large body of reasonable accommodation jurisprudence, particularly as it relates to second chance accommodations. Giving tenants second chances or opportunities to find treatment for illicit drug use stemming from SUD simply adopts the approach that reasonable accommodation law takes toward all other lease violations related to a disability. It does not condone drug use any more than the Sugar River Mills court condoned the tenant’s threatening of another tenant\footnote{See Roe v. Sugar River Mills Assocs., 820 F. Supp. 636, 637, 640 (D.N.H. 1993).} or the Bridgewaters court condoned assault.\footnote{See Bos. Hous. Auth. v. Bridgewaters, 898 N.E.2d 848, 860–61 (Mass. 2009).} Rather, it realizes that certain undesirable behaviors stem from disability and that leniency should be provided in those circumstances to ensure that individuals with disabilities have equal access to housing.

\footnote{See supra notes 54–57 and accompanying text.}
B. A Closer Look at the Statutory Framework: Reinterpreting the Current Use Exception Under the FHA

Short of amending the statutes to remove the current use exception, this Essay suggests an alternate reading of the FHA’s current use exception, which would protect some individuals struggling with SUD. Specifically, this reading would be useful in cases wherein the individual struggles with a mental illness or other disability that is closely tied to their SUD. This reading relies on the well-established connection between SUD and other mental illnesses, which are protected by federal antidiscrimination laws. Though it is a more limited solution, it would still expand the number of individuals who can successfully defend themselves from eviction based on drug use.

As explained above, both the ADA and Section 504 current use exceptions apply broadly to any individual “currently engaging in the illegal use of drugs, when [the] covered entity acts on the basis of such use.” This means that if a landlord evicts a person for illicit drug use, it does not matter whether the illicit drug use was a result of SUD or other disabilities that might implicate drug use. The ADA and Section 504, thus, make clear that any illicit drug use, regardless of which disability is in question, automatically disqualifies individuals from the Acts’ protections.

But the FHA’s current use exception is more narrowly limited; it is contained only within the FHA’s definition of disability. As a result, it can be read to apply only in circumstances where the sole disability alleged is SUD. This distinction was noted as early as 1994, in a dissenting opinion from the Massachusetts Supreme Judicial Court:

The Fair Housing Act excludes from the definition of “handicap” the current, illegal use of drugs, but it does not exclude necessarily from its protection a current user of illegal drugs who has some other handicap. Thus, while the defendant could not argue that current drug use constituted a handicap under the Fair Housing Act, he still had a handicap because he was a quadriplegic.

Over twenty years later, the court in Trinity Franklin Hill Phase One v. Kirnon took a similar approach. Though the court ultimately denied Kirnon his reasonable accommodation, its justifications for doing so lend some support to a more nuanced reading of the FHA’s

164 29 U.S.C. § 705(20)(C)ii (emphasis added); 42 U.S.C. § 12210(a) (emphasis added); see also 28 C.F.R. § 35.131(a)(1) (2020) (“[T]his part does not prohibit discrimination against an individual based on that individual’s current illegal use of drugs.”).
167 Id. at *6.
current use exception. As noted above, the court flatly denied Kirnon an accommodation to the extent it relied on SUD, noting that it did not fall within the FHA’s definition of disability. But Kirnon also argued that his drug use was because of his HIV and depression, not simply SUD, such that he still qualified as disabled under the Act. While the court ultimately found that Kirnon had not demonstrated a sufficient “nexus” between the drug use and his HIV, the court did explicitly note that it “assume[d] Kirnon’s current drug use at the time of his arrest did not automatically disqualify him from requesting a reasonable accommodation.” This implies that an individual who establishes a “nexus” between their drug use and some other protected disability, such as chronic depression or other mental illness, might still be protected by the FHA.

Apart from isolated examples like these, however, this view has failed to gain traction. Most courts have interpreted the FHA’s current use exception interchangeably with the ADA’s.

But there have been recent regulatory developments that indicate a growing recognition that the statutes do, in fact, differ. In 2011, in response to a growing number of states’ legalization of marijuana, HUD published guidance prohibiting use of medical marijuana as a reasonable accommodation at federally funded properties. Though this particular policy choice is unlikely to help individuals with SUD, HUD’s justification for its decision may nonetheless provide an opening for a more nuanced interpretation of the current use exception. Namely, the guidance distinguishes between the FHA’s current use exception and those found in the ADA and Section 504. As the guidance notes:

Unlike the language in Section 504 and the ADA, this provision does not categorically exclude individuals from protection under the Fair Housing Act. Rather, it prevents a current illegal drug user or addict from asserting that the drug use or addiction is itself the basis for claiming that he or she is disabled under the Act. Thus, if a person claims that medical marijuana use or addiction is the sole condition for which that person seeks a reasonable accommodation, that individual is not “handicapped” within the meaning of the Fair Housing Act, and no duty arises to accommodate the sole condition for such use. However, a person who is otherwise disabled (e.g., cancer, multiple sclerosis) is not disqualified from the definition

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168 Id. at *5.
169 Id. at *4.
170 Id. at *5.
171 See sources cited supra note 39.
173 Id. at 7 (“The Fair Housing Act’s illegal drug use exclusion is defined differently from the exclusion found in Section 504 and the ADA.”).
of “handicap” under the Act merely because the person is also a current illegal user of [drugs].

As the guidance implies, the language of the FHA seems to permit reasonable accommodations in evictions for drug use, so long as the drug use is a result of a separate, covered disability.

In practice, this could mean that tenants who are disabled in multiple ways could still assert their rights in drug-related evictions. Most obviously, individuals with both mental illness and SUD could rely on the well-documented connection between mental health and SUD to request a reasonable accommodation in the form of a second chance. Take, for example, a tenant who is diagnosed with both clinical depression and SUD. If she were served a notice to quit on account of heroin use, she would not be able to claim a reasonable accommodation defense under the ADA and Section 504 because the covered entity (landlord) is acting “on the basis of [illicit drug] use.” However, she might be able to claim a reasonable accommodation defense and obtain a second chance under the FHA because of her depression and its connection to SUD. As explained above, SUD and other mental illnesses work to reinforce each other. This is well documented, such that she would likely be able to demonstrate a “nexus” between her drug use and her depression, a condition that is a qualified disability under the FHA. This nexus argument might also apply in instances where the initial addiction resulted from pain management of some other disability. Roughly eight to twelve percent of individuals using opioids for chronic pain — often prescribed for other longstanding disabilities — will develop an opioid use disorder. In both of these circumstances, a second chance could provide the tenant with the opportunity to seek out potentially life-saving treatment.

It does not appear that any federal courts have outright rejected this argument. The most closely analogous cases are those involving tenants requesting permission to use medical marijuana as an accommodation. In one such case, a federal court cited the HUD guidance as

174 Id. (emphasis added).
178 The Massachusetts Supreme Judicial Court, however, has rejected this interpretation, but long before the 2011 HUD guidance. See Peabody Props., Inc. v. Sherman, 638 N.E.2d 906, 906–09 (Mass. 1994).
being “logically and legally sound,” and heeded its direction to analyze reasonable accommodation claims separately under the FHA. Even when these cases do not ultimately permit medical marijuana use, they nonetheless provide support for interpreting the FHA’s current use exception more narrowly.

That this reading of the FHA has not been widely accepted, however, is not without reason. The most obvious hurdle to a reinvented interpretation of the FHA is the Act’s legislative history. The House report on the 1988 Fair Housing Amendments Act, for example, includes the following in explaining the current use exception:

This amendment is intended to exclude current abusers and current addicts of illegal drugs from protection under this Act. The definition of handicap is not intended to be used to condone or protect illegal activity. . . . Similarly, individuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected if they fell under the definition of handicap. The Committee does not intend to exclude individuals who have recovered from an addiction [sic] or are participating in a treatment program or a self-help group such as Narcotics Anonymous.

Of course, legislative history is not controlling, and a substantial number of judges would likely find such an argument entirely unpersuasive. Even judges who are open to considering legislative history cannot use it to undermine the plain meaning of the statute. As the Supreme Court has noted: “If the statutory language is plain, [the Court] must enforce it according to its terms.” Here, the FHA is clear that current illicit drug use is not a disability, but it does not categorically exclude people currently using drugs from protection, even if a few members of Congress thought that it had that effect.

This interpretation of the FHA finds even more support in considering the “whole code rule.” Under this rule, statutory terms are given the meaning that “fits most logically and comfortably into the body of both previously and subsequently enacted law.” In other words, reading statutes most logically in light of the corpus juris requires acknowledging that differences in language between statutes cannot be glossed over if we are to properly assign meaning to statutory wording. Here,

180 Forest City, 71 F. Supp. 3d at 730.
181 Cf. id.
reading the FHA in a manner that is consistent with “subsequently enacted law” requires recognizing differences in wording and in structure that exist between the FHA, on the one hand, and the ADA and Section 504, on the other hand. Such differences in language might also further undermine arguments that Congress had intended to categorically bar all individuals caught using illicit drugs from asserting a claim for a reasonable accommodation, as did the ADA and Section 504. If the FHA were to effectuate the same policy as the ADA and Section 504, one would expect the same language to appear in all three. This argument is especially convincing in light of the fact that Congress amended the FHA to protect against discrimination based on disability just a few years before enacting the ADA.\textsuperscript{186}

This more limited reading of the exception is also more consistent with the Supreme Court’s jurisprudence related to the FHA. The Court has long heeded the Act’s stated policy “to provide, within constitutional limitations, for fair housing throughout the United States.”\textsuperscript{187} Accordingly, in interpreting an “exception,” like the current use exception, the Court should do so “narrowly in order to preserve the primary operation of the [policy].”\textsuperscript{188}

Ultimately, the potential critiques of this renewed interpretation of the FHA do not outweigh the arguments — based in both the law and public policy — that support it.

CONCLUSION

The current use exception has caused immeasurable harm since its enactment. It deems SUD of illicit drugs uniquely unforgivable, rendering those struggling with SUD second-class citizens, even among a group of people that has historically faced oppression. Beyond its cruelty, it is simply counterproductive and actually exacerbates SUD, making recovery less likely. Given our country’s evolved understanding of addiction, Congress should work to abolish this provision. Short of that, courts and agencies should interpret the FHA’s current use exception in a way that is more compatible with the nature of SUD.

\textsuperscript{186} See Dolak, \textit{supra} note 23, at 759–60.


\textsuperscript{188} \textit{Id.} at 731–32 (alteration in original) (quoting Commissioner v. Clark, 489 U.S. 726, 739 (1989)).