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Los Angeles under federal investigation over disabled housing

U.S. attorney is looking into whether laws designed to protect the disabled were ignored on projects using federal funds.

December 11, 2011 | By David Zahniser, Los Angeles Times

The U.S. attorney has launched a fraud investigation to determine whether Los Angeles city officials ignored federal laws designed to protect the disabled when building or fixing up housing.

City Atty. Carmen Trutanich and the Community Redevelopment Agency received letters last week from the U.S. attorney's civil fraud unit instructing them to preserve records for housing developments that have received federal funds through the city since 1988 — a time frame that covers scores of projects.

The investigation spans January 2001 to the present, the letters said. If violations are uncovered, city agencies that used federal housing funds could face financial penalties, lose out on future grants or possibly become the subject of a criminal investigation, said Bill Carter, Trutanich's senior deputy.

"The federal government is obviously taking this investigation very seriously," he said.

Carter said he does not know what sparked the federal inquiry. But Becky Dennison, co-director of the advocacy group known as the Los Angeles Community Action Network, said disabled rights activists have repeatedly gone to the redevelopment agency to complain that housing built or renovated with agency funds has violated provisions of the Americans With Disabilities Act.

In testimony and in person, activists alleged that doors were sometimes too heavy for wheelchair users to open, elevators were not working in at least one city-funded building, and managers either refused to rent to wheelchair users or did not have apartments available for them, Dennison said.

The redevelopment agency convened a task force to come up with strategies for addressing complaints two years ago, part of a settlement of a lawsuit over the downtown Alexandria Hotel, according to documents. That action alleged that disabled tenants were wrongly evicted and faced discrimination during repairs to the building.

Dennison, whose group was a plaintiff in the lawsuit, said her group made recommendations to the task force that were not accepted by redevelopment officials, including the creation of a database of all wheelchair accessible units that have been funded by the city. The recommendations "never went anywhere," Dennison said, "and it was clear the violations were widespread."

Christine Essel, the top executive at the redevelopment agency, referred questions to the office of Mayor Antonio Villaraigosa, which referred questions to the U.S. attorney's office, which had no comment. Madeline Janis, one of Villaraigosa's redevelopment commissioners, confirmed that her agency had received complaints from as many as 15 disabled rights activists over the last six years.

"I was compelled by their stories and very interested in seeing the agency develop a policy," she said. "I don't have information on whether they were legitimate or not."

Paula Pearlman, executive director of the Disability Rights Legal Center, said activists for the disabled are frequently treated as gadflies by decision makers. She said that, based on interviews and investigations by her group, L.A. officials have not been ensuring that their redevelopment projects comply with federal law.

"People go to rent them and there are no accessible units, or they go to rent them, and the luxury units are accessible but not the low-income housing units," she said.

Carter said city officials are trying to determine whether the federal investigation focuses exclusively on redevelopment projects or takes in other city agencies, such as the Community Development Department and the Housing Department — both of which provide federal funds for housing projects. Either way, the letters from the Department of Justice cap a year of other investigations at City Hall, covering an array of agencies and allegations.

The FBI conducted a sting at the Department of Building and Safety, arresting two employees on suspicion of accepting bribes. Department officials launched their own inquiry and fired two additional employees, one of whom has filed an appeal.

Federal prosecutors are also investigating allegations that Advanced Development and Investment, an affordable housing developer, defrauded the city of tens of millions of dollars by inflating invoices for projects that had received millions of dollars in city subsidies. In June, the City Ethics Commission opened its own investigation into that developer's lobbyist, former Los Angeles City Councilman Richard Alatorre, according to documents obtained by The Times.

Meanwhile, L.A. County Dist. Atty. Steve Cooley is probing allegations that Villaraigosa's appointees on the housing authority board violated conflict-of-interest laws and engaged in "double dipping" — getting reimbursed twice for the same expense.

The letters sent to Trutanich and the redevelopment agency, both dated Nov. 30, said federal prosecutors are trying to determine whether city officials falsely told the federal Housing and Urban Development Department that they were in compliance with federal regulations requiring protections for those with disabilities.

"Obviously, this is troubling, particularly on top of all the other investigations happening in the city today," said City Controller Wendy Greuel. "As someone who served at HUD and knows housing issues, these are laws that need to be followed, plain and simple."

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Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by amending Class E airspace designated as an extension to Class C airspace area for City of Colorado Springs Municipal Airport, Colorado Springs, CO. Airspace reconfiguration is necessary due to the decommissioning of the Black Forest TACAN. Also, the geographic coordinates of the airport would be updated to coincide with the FAA's aeronautical database. Controlled airspace is necessary for the safety and management of IFR operations at the Airport.

Class E airspace designations are published in paragraph 6003, of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at City of Colorado Springs Municipal Airport, Colorado Springs, CO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 6003 Class E airspace designated as an extension to Class C surface areas.

* * * * *

ANM CO E3 Colorado Springs, CO [Amended]

City of Colorado Springs Municipal Airport, CO
(Lat. 38°48′21″ N., long. 104°42′03″ W.)

That airspace extending upward from the surface within 2.4 miles northwest and 1.2 miles southeast of the City of Colorado Springs Municipal Airport 025° bearing extending from the 5-mile radius of the airport to 8.9 miles northeast and within 1.4 miles each side of the airport 360° bearing extending from the 5-mile radius of the airport to 7.7 miles north of the airport.

Issued in Seattle, Washington, on November 8, 2011.

William Buck,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2011–29635 Filed 11–15–11; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR–5508–P–01]

RIN 2529–AA96

Implementation of the Fair Housing Act's Discriminatory Effects Standard

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Proposed rule.

SUMMARY: Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act or Act), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.[1] HUD, to which Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules implementing the Act, has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate.

The reasonableness of HUD's interpretation is confirmed by eleven United States Courts of Appeals, which agree that the Fair Housing Act imposes liability based on discriminatory effects. By the time the Fair Housing Amendments Act became effective in 1989, nine of the thirteen United States Courts of Appeals had determined that the Act prohibits housing practices with a discriminatory effect even absent an intent to discriminate. Two other United States Courts of Appeals have since reached the same conclusion, while another has assumed the same but did not need to reach the issue for purposes of deciding the case before it.

Although there has been some variation in the application of the discriminatory effects standard, neither HUD nor any Federal court has ever determined that liability under the Act requires a finding of discriminatory intent. The purpose of this proposed rule, therefore, is to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

DATES: *Comment due date:* January 17, 2012.

ADDRESSES: Interested persons are invited to submit written comments regarding this proposed rule to the

[1] This preamble uses the term "disability" to refer to what the Act and its implementing regulations term a "handicap."

Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410. All communications should refer to the above docket number and title. There are two methods for submitting public comments.

1. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jeanine Worden, Associate General Counsel for Fair Housing, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–0500, telephone number (202) 402–5188. Persons with hearing and speech impairments may contact this phone number via TTY by calling the Federal Information Relay Service at (800) 877–8399.

SUPPLEMENTARY INFORMATION:

I. Background

A. History of Discriminatory Effects Liability Under the Fair Housing Act

The Fair Housing Act declares it to be "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." [2] Congress considered the realization of this policy "to be of the highest priority." [3] The language of the Fair Housing Act prohibiting discrimination in housing is "broad and inclusive";[4] the purpose of its reach is to replace segregated neighborhoods with "truly integrated and balanced living patterns." [5] In commemorating the 40th anniversary of the Fair Housing Act and the 20th anniversary of the Fair Housing Amendments Act, the House of Representatives recognized that "the intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States." [6]

In keeping with the "broad remedial intent" of Congress in passing the Fair Housing Act,[7] and consequently the Act's entitlement to a "generous construction," [8] HUD, to which Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules to carry out the Act,[9] has repeatedly determined that the Fair Housing Act is directed to the consequences of housing practices, not simply their purpose. Under the Act, housing practices—regardless of any discriminatory motive or intent—cannot be maintained if they operate to deny protected groups equal housing opportunity or they create, perpetuate, or increase segregation without a legally sufficient justification.

Accordingly, HUD has concluded that the Act provides for liability based on discriminatory effects without the need for a finding of intentional discrimination. For example, HUD's Title VIII Complaint Intake, Investigation and Conciliation Handbook (Handbook), which sets forth HUD's guidelines for investigating and resolving Fair Housing Act complaints, recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases.[10] In adjudicating charges of discrimination filed by HUD under the Fair Housing Act, HUD administrative law judges have held that the Act is violated by facially neutral practices that have a disparate impact on protected classes.[11] HUD's regulations interpreting the Fair Housing Act prohibit practices that create, perpetuate, or increase segregated housing patterns.[12] HUD also joined with the Department of Justice and nine other Federal enforcement agencies to recognize that disparate impact is among the "methods of proof of lending discrimination under the * * * Act" and provide guidance on how to prove a disparate impact fair lending claim.[13]

In addition, in regulations implementing the Federal Housing Enterprises Financial Safety and Soundness Act, HUD prohibited mortgage purchase activities that have a discriminatory effect. In enacting these regulations,[14] which prescribe the fair lending responsibilities of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), HUD noted that "the disparate impact (or discriminatory effect) theory is firmly established by Fair Housing Act case law" and concluded that disparate impact law "is applicable to all

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[2] *See* 42 U.S.C. 3601.

[3] *Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (internal citation omitted).

[4] *Id.* at 209.

[5] *Id.* at 211.

[6] H. Res. 1095, 110th Cong., 2d Sess., 154 Cong. Rec. H2280–01 (April 15, 2008) (2008 WL 1733432).

[7] *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982).

[8] *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731–732 (1995).

[9] *See* 42 U.S.C. 3608(a) and 42 U.S.C. 3614a.

[10] *See, e.g.*, Handbook at 3–25 (the Act is violated by an "action or policy [that] has a disproportionately negative effect upon persons of a particular race, color, religion, sex, familial status, national origin or handicap status"); *id.* at 2–27 ("a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations"); *id.* at 2–27 to 2–45 (HUD guidelines for investigating a disparate impact claim and establishing its elements).

[11] *See e.g.*, *HUD* v. *Twinbrook Village Apts.*, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001) ("A violation of the [Act] may be premised on a theory of disparate impact."); *HUD* v. *Ross*, 1994 WL 326437, at *5 (HUD ALJ July 7, 1994) ("Absent a showing of business necessity, facially neutral policies which have a discriminatory impact on a protected class violate the Act."); *HUD* v. *Carter*, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992) ("The application of the discriminatory effects standard in cases under the Fair Housing Act is well established.").

[12] *See* 24 CFR 100.70.

[13] *Policy Statement on Discrimination in Lending*, 59 FR 18,266, 18,268 (Apr. 15, 1994).

[14] *See* 24 CFR 81.42.

segments of the housing marketplace, including the GSEs." [15]

Moreover, all Federal courts of appeals to have addressed the question have held that liability under the Act may be established based on a showing that a neutral policy or practice either has a disparate impact on a protected group [16] or creates, perpetuates, or increases segregation,[17] even if such a policy or practice was not adopted for a discriminatory purpose.

The Fair Housing Act's discriminatory effects standard is analogous to the discriminatory effects standard under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), which prohibits discriminatory employment practices. The U.S. Supreme Court held that Title VII reaches beyond intentional discrimination to include employment practices that have a discriminatory effect.[18] The Supreme Court explained that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." [19]

It is thus well established that liability under the Fair Housing Act can arise where a housing practice is intentionally discriminatory or where it has a discriminatory effect.[20] A discriminatory effect may be found where a housing practice has a disparate impact on a group of persons protected by the Act, or where a housing practice has the effect of creating, perpetuating, or increasing segregated housing patterns on a protected basis.[21]

B. Application of the Discriminatory Effects Standard Under the Fair Housing Act

While the discriminatory effects theory of liability under the Fair Housing Act is well established, there is minor variation in how HUD and the courts have applied that theory. For example, HUD has always used a three-step burden-shifting approach,[22] as do many Federal courts of appeals.[23] But some courts apply a multi-factor balancing test,[24] other courts apply a hybrid between the two,[25] and one court applies a different test for public and private defendants.[26]

Another source of variation is in the application of the burden-shifting test. Under the burden-shifting approach, the plaintiff (or, in administrative proceedings, the complainant) must make a prima facie showing of either disparate impact or perpetuation of segregation. If the discriminatory effect is shown, the burden of proof shifts to the defendant (or respondent) to justify its actions. If the defendant or respondent satisfies its burden, courts and HUD administrative law judges have differed as to which party bears the burden of proving whether a less discriminatory alternative to the challenged practice exists. The majority of Federal courts of appeals that use a burden-shifting approach place this burden on the plaintiff,[27] analogizing to Title VII's burden-shifting framework.[28] Other Federal courts of appeals have kept the burden with the defendant.[29] HUD has, at times, placed this burden of proving a less discriminatory alternative on the respondent and, at other times, on the complainant.[30]

C. Scope of the Proposed Rule

This proposed rule establishes a uniform standard of liability for facially neutral housing practices that have a discriminatory effect. Under this rule, liability is determined by a burden-shifting approach. The plaintiff or complainant first must bear the burden

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[15] The Secretary of HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), 60 FR. 61,846, 61,867 (Dec. 1, 1995).

[16] *See, e.g., Graoch Assocs. #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007); *Reinhart* v. *Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Charleston Housing Auth.* v. *U.S. Dep't of Agric.*, 419 F.3d 729, 740–41 (8th Cir. 2005); *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Simms* v. *First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson* v. *Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith* v. *Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), judgment aff'd, 488 U.S. 15 (1988); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 149–50 (3d Cir. 1977); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 988–89 (4th Cir. 1984); *Metro. Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

[17] *See, e.g., Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007); *Hallmark Developers, Inc.* v. *Fulton County, Ga.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curium); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 987 n.3 (4th Cir. 1984); *Metro. Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290–1291 (7th Cir. 1977); *United States.* v. *City of Black Jack, Missouri*, 508 F.2d 1179, 1184–86 (8th Cir. 1974); *see also Trafficante*, 409 U.S. at 209–210.

[18] *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–34 (1971).

[19] Id. at 431.

[20] *See, e.g.*, 42 U.S.C. 3604(a), (b), (f)(1), (f)(2); 42 U.S.C. 3605; 42 U.S.C. 3606. Liability under the Fair Housing Act can also arise in other ways, for example, where a reasonable person would find a notice, statement, advertisement, or representation to be discriminatory, see 42 U.S.C. 3604(c), or where a reasonable accommodation is refused, see 42 U.S.C. 3604(f)(3). The Act also imposes an affirmative obligation on HUD and other executive departments and agencies to administer their programs and activities related to housing and urban development in a manner affirmatively to further the purposes of the Fair Housing Act. See 42 U.S.C. 3608(d); *see also* 3608(e)(5).

[21] A "discriminatory effect" prohibited by the Act refers to either a "disparate impact" or the "perpetuation of segregation." *See, e.g. Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007) (there are "two types of discriminatory effects which a facially neutral housing decision can have: The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.").

[22] See, e.g., *HUD* v. *Pfaff*, 1994 WL 592199, at *8 (HUD ALJ Oct. 27, 1994); *HUD* v. *Mountain Side Mobile Estates P'ship*, 1993 WL 367102, at *6 (HUD ALJ Sept. 20, 1993); *HUD* v. *Carter*, 1992 WL 406520, at *6 (HUD ALJ May 1, 1992); *Twinbrook Village Apts.*, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *see also Policy Statement on Discrimination in Lending, 59 FR. 18,266, 18,269 (Apr. 15, 1994)* (applying three-step test without specifying where the burden lies at each step).

[23] *See, e.g., Oti Kaga, Inc.* v. *S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *Lapid -Laurel, L.L.C.* v. *Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 466–67 (3d Cir. 2002); *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Huntington Branch NAACP* v. *Town of Huntington, N.Y.*, 844 F.2d 926, 939 (2d Cir. 1988).

[24] *See, e.g., Metro. Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (four-factor balancing test).

[25] *See, e.g., Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1252, 1254 (10th Cir. 1995) (three-factor balancing test incorporated into burden shifting framework to weigh defendant's justification); *Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 373 (6th Cir. 2007) (balancing test incorporated as elements of proof after second step of burden shifting framework).

[26] The Fourth Circuit has applied a four-factor balancing test to public defendants and a burden-shifting approach to private defendants. *See e.g., Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 989 n.5 (4th Cir. 1984).

[27] *See, e.g., Gallagher* v. *Magner*, 619 F.3d 823, 834 (8th Cir. 2010); *Graoch Associates # 33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 373–74 (6th Cir. 2007); *Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1254 (10th Cir. 1995).

[28] *See, e.g., Graoch*, 508 F.3d at 373 (6th Cir. 2007) ("claims under Title VII and the [Fair Housing Act] generally should receive similar treatment"); *Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1254 (10th Cir. 1995) (explaining that in interpreting Title VII, "the Supreme Court has repeatedly stated that the ultimate burden of proving that discrimination against a protected group has been caused by a specific * * * practice remains with the plaintiff at all times") (internal citation omitted).

[29] *See, e.g., Huntington Branch NAACP* v. *Town of Huntington, N.Y.*, 844 F.2d 926, 939 (2d Cir. 1988); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977).

[30] *Compare, e.g., HUD* v. *Carter*, 1992 WL 406520, at *6 (HUD ALJ May 1, 1992) (respondent bears the burden of showing that no less discriminatory alternative exists), *and Twinbrook Village Apts.*, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001) (same), *with HUD* v. *Mountain Side Mobile Estates P'ship*, 1993 WL 367102, at *6 (HUD ALJ Sept. 20, 1993) (complainant bears the burden of showing that a less discriminatory alternative exists), *and HUD* v. *Pfaff*, 1994 WL 592199, at *8 (HUD ALJ Oct. 27, 1994) (same).

of proving its prima facie case of either disparate impact or perpetuation of segregation, after which the burden shifts to the defendant or respondent to prove that the challenged practice has a necessary and manifest relationship to one or more of the defendant's or respondent's legitimate, nondiscriminatory interests. If the defendant or respondent satisfies its burden, the plaintiff or complainant may still establish liability by demonstrating that these legitimate nondiscriminatory interests could be served by a policy or decision that produces a less discriminatory effect.[31]

HUD proposes this standard for several reasons. First, Title VII, enacted four years before the Fair Housing Act, has often been looked to for guidance in interpreting analogous provisions of the Fair Housing Act.[32] HUD's proposal is consistent with the discriminatory effects standard confirmed by Congress in the 1991 amendments to Title VII.[33] Second, HUD's proposal is consistent with the discriminatory effects standard applied under the Equal Credit Opportunities Act (ECOA),[34] which borrows from Title VII's burden-shifting framework.[35] There is significant overlap in coverage between ECOA, which prohibits discrimination in credit, and the Fair Housing Act, which prohibits discrimination in residential real estate-related transactions.[36] The interagency *Policy Statement on Discrimination in Lending* analyzed the standard for proving disparate impact discrimination in lending under the Fair Housing Act and under ECOA without differentiation.[37] Under HUD's proposed framework, parties litigating a claim brought under both the Fair Housing Act and ECOA will not face the burden of applying inconsistent methods of proof to factually indistinguishable claims. Third, by placing the burden of proving a necessary and manifest relationship to a legitimate, nondiscriminatory interest on the defendant or respondent and the burden of proving a less discriminatory alternative on the plaintiff or complainant, "neither party is saddled with having to prove a negative."[38]

II. This Proposed Rule

A. Subpart G—Discriminatory Effect

1. Discriminatory Effect Prohibited (§ 100.500)

HUD proposes adding a new subpart G, entitled "Prohibiting Discriminatory Effects," to its Fair Housing Act regulations in 24 CFR part 100. Subpart G would confirm that the Fair Housing Act may be violated by a housing practice that has a discriminatory effect, as defined in § 100.500(a), regardless of whether the practice was adopted for a discriminatory purpose. The housing practice may still be lawful if supported by a legally sufficient justification, as defined in § 100.500(b). The respective burdens of proof for establishing or refuting an effects claim are set forth in § 100.500(c). Subsection 100.500(d) clarifies that a legally sufficient justification does not defeat liability for a discriminatory intent claim once the intent to discriminate has been established.[39]

This proposed rule would apply to both public and private entities because the definition of "discriminatory housing practice" under the Act makes no distinction between the two.[40]

2. Discriminatory Effect Defined (§ 100.500(a))

Under the Fair Housing Act and this proposed rule, a "discriminatory effect" occurs where a facially neutral housing practice actually or predictably results in a discriminatory effect on a group of persons (that is, a disparate impact), or on the community as a whole (perpetuation of segregation).[41] Any facially neutral action, *e.g.* laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act and this rule.

Disparate Impact. Examples of a housing policy or practice that may have a disparate impact on a class of persons delineated by characteristics protected by the Act include a zoning ordinance restricting private construction of multifamily housing to a largely minority area (*see Huntington Branch*, 844 F.2d at 937); the provision and pricing of homeowner's insurance (*see Ojo* v. *Farmers Group, Inc.*, 600 F.3d 1205, 1207–8 (9th Cir. 2010) (en banc)); mortgage pricing policies that give lenders or brokers discretion to impose additional charges or higher interest rates unrelated to a borrower's creditworthiness (*see Miller* v. *Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 253 (D. Mass. 2008)); credit scoring overrides provided by a purchaser of loans (*see Beaulialice* v. *Federal Home Loan Mortg. Corp.*, 2007 WL 744646, *4 (M.D. Fla. Mar. 6, 2007)); and credit offered on predatory terms, (*see Hargraves* v. *Capitol City Mortgage*, 140 F. Supp. 2d 7, 20–21 (D.D.C. 2000)). Further examples of such claims can be found in the following court cases: *Keith* v. *Volpe*, 858 F.2d 467, 484 (9th Cir. 1988), where the city's land-use decisions that prevented the construction of two housing developments for city residents displaced by a freeway had a greater adverse impact on minorities than on whites because two-thirds of the persons who would have benefited from the housing were minorities; (*Langlois*, 207 F.3d at 50, where public housing authorities' use of local residency preferences to award Section 8 Housing

[31] *See Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 373–74 (6th Cir. 2007); *Oti Kaga, Inc.* v. *S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1254 (10th Cir. 1995).

[32] *See, e.g., Trafficante*, 409 U.S. at 205; The Secretary of HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), 60 FR 61,846, 61,868 (Dec. 1, 1995). Short form cite see n. 15.

[33] *See* 42 U.S.C. 2000e–2(k).

[34] ECOA prohibits discrimination in credit on the basis of race and other enumerated criteria. *See* 15 U.S.C. 1691.

[35] *See* S. Rep. 94–589, 94th Cong., 2d Sess. (1976) ("judicial constructions of antidiscrimination legislation in the employment field, in cases such as *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971), *and Albemarle Paper Co.* v. *Moody* (U.S. Supreme Court, June 25, 1975) [422 U.S. 405], are intended to serve as guides in the application of [ECOA], especially with respect to the allocations of burdens of proof."); 12 CFR 202.6(a), n. 2 (1997) ("The legislative history of [ECOA] indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness."); 12 CFR part 202, Supp. I, Official Staff Commentary, Comment 6(a)–2 ("Effects test. The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), and the burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e–2).").

[36] *See* 59 FR 18,266.

[37] *See* 59 FR 18,266, 18,269 (Apr. 15, 1994).

[38] *Hispanics United of DuPage Cnty.* v. *Vill. of Addison, Ill.*, 988 F.Supp. 1130, 1162 (N.D. Ill. 1997).

[39] It is possible to bring a claim alleging both discriminatory effect and discriminatory intent as alternative theories of liability. In addition, the discriminatory effect of a challenged practice may provide evidence of the discriminatory intent behind the practice. *See, e.g., Vill. of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). But proof of intent to discriminate is not necessary to prevail on a discriminatory effects claim. *See, e.g., Black Jack*, 508 F.2d at 1184–85.

[40] *See* 42 U.S.C. 3602(f) (defining "discriminatory housing practice" as "an act that is unlawful under Section 804, 805, 806, or 818," none of which distinguish between public and private entities); *see also Nat'l Fair Housing Alliance, Inc.* v. *Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 59–60 & n.7 (D.D.C. 2002) (applying the same impact analysis to a private entity as to public entities, noting that a "distinction between governmental and non-governmental bodies finds no support in the language of the [Act] or in [its] legislative history").

[41] *See, e.g., Graoch Associates # 33, L.P.*, 508 F.3d at 378.

Choice Vouchers likely would result in an adverse impact based on race; *United States* v. *Incorporated Village of Island Park*, 888 F. Supp. 419, 447 (E.D.N.Y. 1995), where a housing program's preference for residents of the Village, most of whom were white, had a disparate impact on African-Americans; *Charleston Housing Auth.*, 419 F.3d at 741–42, where the housing authority's plan to demolish 50 low-income public housing units—46 of which were occupied by African Americans—would disproportionately impact African Americans based on an analysis of the housing authority's waiting list population, the population of individuals income-eligible for public housing, or the current tenant population; and *Smith* v. *Town of Clarkton, N.C.*, 682 F.2d 1055, 1065–66 (4th Cir. 1982), where the town's withdrawal from a multi-municipality housing authority effectively blocked construction of 50 units of public housing, adversely affecting African American residents of the county, who were those most in need of new construction to replace substandard dwellings).

Perpetuation of Segregation. A person or entity may be liable for a housing policy or practice that has a discriminatory effect on the community because the practice has the effect of creating, perpetuating, or increasing housing patterns that segregate by race, color, religion, sex, familial status, national origin, or disability. Examples of such claims can be found in the following court cases: *Huntington Branch*, 844 F.2d at 934, 937, where the town's zoning ordinance, which limited private construction of multifamily housing to a largely minority neighborhood, had the effect of perpetuating segregation "by restricting low-income housing needed by minorities to an area already 52% minority"; *Dews* v. *Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 567 (N.D. Tex. 2000), where the town's zoning ordinance that banned multifamily housing and required single-family lots of at least one acre had the effect of perpetuating segregation by keeping minorities out of a town that was 94 percent white; *Black Jack*, 508 F.2d at 1186, where a city ordinance preventing the construction of low-income multifamily housing "would contribute to the perpetuation of segregation in a community which was 99% white"; and *Inclusive Communities Projects, Inc.* v. *Texas Dep't of Housing & Community Affairs*, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010), where the state's disproportionate denial of tax credits for nonelderly housing in predominately white neighborhoods had a segregative impact on the community.

3. Legally Sufficient Justification (§ 100.500(b))

A housing practice or policy found to have a discriminatory effect may still be lawful if it has a "legally sufficient justification." A "legally sufficient justification" exists where the housing practice or policy: (1) Has a necessary and manifest relationship to the defendant's or respondent's legitimate, nondiscriminatory interests;[42] and (2) those interests cannot be served by another practice that has a less discriminatory effect.[43] A legally sufficient justification may not be hypothetical or speculative. In addition, a legally sufficient justification does not defeat liability for a discriminatory *intent* claim once the intent to discriminate has been established.

4. Burdens of Proof (§ 100.500(c))

The burden-shifting framework set forth in the proposed rule for discriminatory effect claims finds support in judicial interpretations of the Act, and is also consistent with the burdens of proof Congress assigned in disparate impact employment discrimination cases. *See* 42 U.S.C. § 2000e-2(k). In the proposed rule, the complainant or plaintiff first bears the burden of proving its prima facie case, that is, that a housing practice caused, causes, or will cause a discriminatory effect on a group of persons or a community on the basis of race, color, religion, sex, disability, familial status, or national origin.

Once the complainant or plaintiff has made its prima facie case, the burden of proof shifts to the respondent or defendant to prove that the challenged practice has a necessary and manifest relationship to one or more of the housing provider's legitimate, nondiscriminatory interests.

If the respondent or defendant satisfies its burden, the complainant or plaintiff may still establish liability by demonstrating that these legitimate, nondiscriminatory interests could be served by a policy or decision that produces a less discriminatory effect.

B. Examples of Housing Practices With Discriminatory Effects

Violations of various provisions of the Act may be established by proof of discriminatory effects. For example, under 42 U.S.C. subsections 3604(a) and 3604(f)(1), discriminatory effects claims may be brought under the Act's provisions that make it unlawful to "otherwise make unavailable or deny [ ] a dwelling" because of a protected characteristic. Discriminatory effects claims may be brought pursuant to subsections 3604(b) and 3604(f)(2) of the Act prohibiting discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of" a protected characteristic. For residential real estate-related transactions, discriminatory effects claims may be brought under section 3605, which bars "discrimination against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of" a protected characteristic. Discriminatory effects claims may also be brought under section 3606, prohibiting discrimination in the provision of brokerage services.

HUD's existing Fair Housing Act regulations provide examples of housing practices that may violate the Act, based on an intent theory, an effects theory, or both. The proposed rule adds examples of discriminatory housing practices that may violate the new subsection G because they have a discriminatory effect. The cases cited in Section II.A.2 of this preamble identify housing practices found by courts to create discriminatory effects that violate or may violate the Act. These cases are provided as examples only and should not be viewed as the only ways to establish a violation of the Act based on a discriminatory effects theory.

III. Solicitation of Comments

The Department welcomes comments on the standards proposed in this rule, including whether a burden-shifting approach should be used to determine when a housing practice with a discriminatory effect violates the Fair Housing Act and, where proof is required of the existence or nonexistence of a less discriminatory alternative to the challenged practice, which party should bear that burden. These comments will help the Department in its effort to craft final regulations that best serve the broad, remedial goals of the Fair Housing Act.

[42] *See, e.g., Charleston Housing Auth.*, 419 F.3d at 741 ("[u]nder the second step of the disparate impact burden shifting analysis, the [defendant] must demonstrate that the proposed action has a manifest relationship to the legitimate non-discriminatory policy objectives" and "is necessary to the attainment of these objectives") (internal quotation marks omitted); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 988–89 (4th Cir. 1984); 24 CFR 100.125(c); 59 FR 18,266, 18,269; *see also* 60 FR at 61,868.

[43] *See, e.g., Oti Kaga, Inc.* v. *South Dakota Housing Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003).

IV. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). The proposed rule has been determined to be a "significant regulatory action," as defined in section 3(f) of the Order, but not economically significant under section 3(f)(1) of the Order. The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule proposes to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

Discriminatory effects liability is consistent with the position of other Executive Branch agencies and has been applied by every Federal court of appeals to have reached the question. Given the variation in how the courts have applied that standard, HUD's objective in this proposed rule is to achieve consistency and uniformity in this area, and therefore reduce burden for all who may be involved in a challenged practice. Accordingly, the undersigned certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) Imposes substantial direct compliance costs on state and local governments and is not required by statute, or (ii) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule would not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 100

Civil rights, Fair housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 100 as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

1. The authority for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3620.

2. In § 100.65, a new paragraph (b)(6) is added to as follows:

§ 100.65 Discrimination in terms, conditions and privileges and in services and facilities.

* * * * *

(b) * * *

(6) Providing different, limited, or no governmental services such as water, sewer, or garbage collection in a manner that has a disparate impact or has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.

3. In § 100.70, add a new paragraph (d)(5) to read as follows:

§ 100.70 Other prohibited conduct.

* * * * *

(d) * * *

(5) Implementing land-use rules, policies, or procedures that restrict or deny housing opportunities in a manner that has a disparate impact or has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.

4. In § 100.120, amend paragraph (b) to read as follows:

§ 100.120 Discrimination in the making of loans and in the provision of other financial assistance.

* * * * *

(b) Prohibited practices under this section include, but are not limited to:

(1) Failing or refusing to provide to any person, in connection with a residential real estate-related transaction, information regarding the availability of loans or other financial assistance, application requirements, procedures, or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Providing loans or other financial assistance in a manner that results in disparities in their cost, rate of denial, or terms or conditions, or that has the effect of denying or discouraging their receipt on the basis of race, color, religion, sex, handicap, familial status, or national origin.

5. In part 100, add a subpart G as follows:

Subpart G—Discriminatory Effect

§ 100.500 Discriminatory Effect Prohibited

Liability may be established under this subpart based on a housing practice's *discriminatory effect,* as defined in § 100.500(a), even if the housing practice is not motivated by a prohibited intent. The housing practice may still be lawful if supported by a legally sufficient justification, as defined in § 100.500(b). The burdens of proof for establishing a violation under this subpart are set forth in § 100.500(c).

(a) *Discriminatory effect defined.* A housing practice has a *discriminatory effect* where it actually or predictably:

(1) Results in a disparate impact on a group of persons on the basis of race, color, religion, sex, handicap, familial status, or national origin; or

(2) Has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.

(b) *Legally sufficient justification.* A *legally sufficient justification* exists where the challenged housing practice: (1) Has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3610, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and (2) those interests cannot be served by another practice that has a less discriminatory effect. The burdens of proof for establishing each of the two elements of a *legally sufficient justification* are set forth in § 100.500(c)(2)–(c)(3).

(c) *Burdens of proof in discriminatory effects cases.*

(1) A complainant, with respect to claims brought under 42 U.S.C. 3610, or a plaintiff, with respect to claims brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice causes a *discriminatory effect.*

(2) Once a complainant or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the complainant or plaintiff may still prevail upon demonstrating that the legitimate, nondiscriminatory interests supporting the challenged practice can be served by another practice that has a less *discriminatory effect.*

(d) *Relationship to discriminatory intent.* A demonstration that a housing practice is supported by a *legally sufficient justification,* as defined in § 100.500(b), may not be used as a defense against a claim of intentional discrimination.

Dated: October 4, 2011.

John Trasviña,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 2011–29515 Filed 11–15–11; 8:45 am]

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DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

USACE's Plan for Retrospective Review Under E.O. 13563

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is seeking public input on its plan to retrospectively review its Regulations implementing the USACE Regulatory Program at 33 CFR parts 320–332 and 334. Executive Order 13563, "Improving Regulation and Regulatory Review" (E.O.), issued on January 18, 2011, directs Federal agencies to review existing significant regulations and identify those that can be made more effective or less burdensome in achieving regulatory objectives. The Regulations are essential for implementation of the Regulatory mission; thus, USACE believes they are a significant rule warranting review pursuant to E.O. 13563. The E.O. further directs each agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. Section 404(e) of the Clean Water Act authorizes USACE to development general permits, including nationwide permits (NWPs), for minor activities in waters of the U.S. for a period of five years. Accordingly, every five years, USACE undergoes a reauthorization process for the NWP program and includes public notice and provides an opportunity for public hearing. Comments for the NWP program are submitted during the reauthorization process. Therefore, USACE is currently complying with the E.O. 13563 direction to periodically review its existing significant regulations. Other regulations will be reviewed on an as-needed basis in accordance with new laws, court cases, etc.

DATES: Written comments must be submitted on or before January 17, 2012.

ADDRESSES: You may submit comments, identified by docket number COE–2011–0028, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: regulatory.review@usace.army.mil Include the docket number, COE–2011–0028, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, ATTN: CECW–CO–R (Ms. Amy S. Klein), 441 G Street NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2011–0028. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or email. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

11-0262

10-1032 MAGNER V. GALLAGHER

DECISION BELOW: 619 F.3d 823

LOWER COURT CASE NUMBER: 09-1209

QUESTION PRESENTED:

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer ... or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Respondents are owners of rental proper es who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African--American, and Respondents rent to many African--Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans.

The following are the questions presented:

1. Are disparate impact claims cognizable under the Fair Housing Act?

2. If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

CERT. GRANTED 11/7/2011

11-0262

Understanding the Public Health Implications of Prisoner Reentry in California

State-of-the-State Report

Lois M. Davis, Malcolm V. Williams, Kathryn Pitkin Derose, Paul Steinberg, Nancy Nicosia, Adrian Overton, Lisa Miyashiro, Susan Turner, Terry Fain, Eugene Williams III

Prepared for The California Endowment

HEALTH and
INFRASTRUCTURE, SAFETY, AND ENVIRONMENT

This work was prepared for The California Endowment and produced within the RAND Health Promotion and Disease Prevention Program and the RAND Infrastructure, Safety, and Environment Safety and Justice Program.

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Summary

Introduction

As an increasing number of prisoners are released from prisons and return to local communities, there are key questions about (1) what health care needs they have and (2) what role health plays in affecting their success at integrating back into communities. In terms of the first issue, prior research has found that the prison population is disproportionately sicker, on average, than the U.S. population in general, with substantially higher burdens of infectious diseases (such as HIV/AIDS, tuberculosis, and hepatitis B and C), serious mental illness, and comorbidities, or co-occurring disorders (National Commission on Correctional Health Care, 2002).

In terms of the second question, about the impact of ex-prisoners' health care needs on reentry, research shows that individuals with physical and mental health problems reported poorer employment outcomes than those without such problems (Mallik and Visher, 2008). Also, ex-prisoners returning to communities face a number of obstacles to accessing care, as low insurance rates among this population limit their ability to access health care services and provide case managers with few options for linking them to services. Further, many providers lack experience in treating this population.

Such concerns are especially acute in California, where the number of individuals released from California prisons has increased nearly threefold over the past 20 years. Most of the state's prisoners ultimately will return to California communities, bringing with them a host of health and social needs that must be addressed. Yet the public is largely unaware of the health needs of released prisoners, and the

challenges they present to their communities are not being addressed explicitly, despite the fact that reentry directly affects almost every California community.

Further, the current debate about California's 2011 Public Safety Realignment Plan has focused on public safety concerns in counties rather than on how counties will meet the rehabilitative and health care needs of individuals who will be housed and supervised at the local level. At the same time, implementation of the 2010 Patient Protection and Affordable Care Act (ACA) (Pub. Law 111-148) will eliminate a critical barrier to accessing care for many ex-prisoners. The ACA will expand Medicaid eligibility to include all non-Medicare-eligible citizens and legal residents[1] under age 65 with incomes up to 133 percent[2] of the federal poverty level, opening up the possibility for many ex-prisoners and other individuals involved with the criminal justice system to become eligible for Medicaid (or Medi-Cal in California) and to have drug treatment services, prevention services, and wellness programs—services important to the reentry population—more fully covered. Thus, California is at a critical juncture: It faces numerous challenges, but recent changes in policy also present important opportunities to improve the state's ability to meet the needs of individuals returning from state prison.

It is critical to address the public health challenges of returning ex-prisoners to assist communities in meeting the reentry needs of this population. We also need to better understand the impact of incarceration on their families and children of incarcerated parents, their risk factors, and what options exist to change the trajectories of their lives.

This state-of-the-state report examines the specific health needs of California's reentry population, the public health challenges of reentry in California, and the policy options for improving access to safety-net resources for this population.

To achieve this overall goal, the study first examined the health care needs of the reentry population by analyzing data from the Bureau

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[1] That is, legal residents who have been in the country five years or longer.

[2] Taking into account the 5 percent waiver under the ACA, this would translate to incomes up to 138 percent of the federal poverty level.

of Justice Statistics (BJS) Survey of Inmates in State and Federal Correctional Facilities; conducted a geographic analysis to identify where parolees are concentrated in California (all 58 counties) and which counties and communities are disproportionately affected by prisoner reentry; and examined the types of health care services available in four counties—Alameda, Los Angeles, San Diego, and Kern—and developed measures to assess the capacity of the safety net in these counties to meet the health care needs of the reentry population.

The study then "bored down more deeply" in Alameda, Los Angeles, and San Diego counties, using focus groups with former prisoners and their family members and key-actor interviews with relevant service providers and community groups to understand the experiences of returning prisoners in seeking care and the role that health plays in their efforts to reintegrate back into the community and rejoin their families, what models of service provision are being used by local communities for this population, and what factors have facilitated or hindered ex-prisoners' and providers' efforts. In addition, we sought to understand the impact that incarceration has had on families, including what challenges they face and the need for programs and services.

Assessing Prisoner Health Care Needs and the Capacity of the Health Care Safety Net

Health Care Needs Are High, but Mental Health and Drug Treatment Needs Are Even Higher

Our analysis of self-reported data from the BJS survey of California inmates provides a rich understanding of the range of physical health, mental health, and substance abuse problems that this population brings upon their return to local communities. We found that returning prisoners self-report a high burden of chronic diseases, such as asthma, diabetes, and hypertension, as well as infectious diseases, such as hepatitis and tuberculosis—conditions that require regular access to health care for effective management.

In addition, the burden of mental illness and drug abuse or dependence is especially high in this population. About two-thirds of Cali-

fornia inmates reported having a drug abuse or dependence problem, but only 22 percent of those inmates reported receiving treatment since admission to prison. More than half of California inmates reported a recent mental health problem, with about half of those reporting receiving treatment in prison. These results underscore the importance of access to mental health and alcohol and drug treatment services and of continuity of care for this population. But the likelihood of ex-prisoners receiving adequate health care once they are released is poor given the high rates of uninsurance among this population and other barriers to accessing care.

Certain Counties and Communities Are Disproportionately Affected by Reentry

A number of trends complicate the successful reentry of parolees into communities. Our analysis of the geographic distribution and concentration of parolees across California and in the four focus counties showed that reentry disproportionately impacts 11 counties statewide and that, within counties, parolees tend to cluster in certain communities and neighborhoods. Such clustering has implications for linking to and providing health care services to this population and for considering how to effectively target reentry resources. As illustrated by Los Angeles County, which has a combination of both urban and more sparsely populated areas, there is a need to tailor outreach and service delivery strategies to areas where the reentry population is more concentrated versus areas where it tends to be more dispersed.

Our analyses also showed that African-American and Latino parolees, in particular, tend to return to disadvantaged neighborhoods and communities, defined by high poverty rates, high unemployment rates, and low educational attainment. This suggests that reentry will be especially challenging for these groups.

Access to Health Care Safety-Net Resources Varies Substantially

An important contribution of this study is formally defining what the health care safety net is for the reentry population and developing measures to assess the capacity of the safety net to meet this population's health care needs. Taking into account differences in capacity,

the underlying demand for safety-net services, and travel distance, our measures of accessibility (i.e., of potential versus realized access) showed that parolees' access to health care safety-net facilities varies by facility type, by geographic area, and by race/ethnicity. As policymakers consider how to improve access to health care services for the reentry population in California, they will need to take into account this variation in counties' safety nets.

In all the counties, community clinics appear to play an important role in filling gaps in primary care coverage vis-à-vis the reentry population. For mental health care and drug and alcohol treatment, separate networks provide services to the reentry population and serve as the initial safety net for them. These include, for example, the parole outpatient clinics (POCs), the Parolee Services Network (PSN), state-funded community-based alcohol and drug treatment programs, and Proposition 36 (the Substance Abuse and Crime Prevention Act), which diverts nonviolent drug offenders to treatment instead of incarceration. But these networks have limited capacity and, as discussed below, have been impacted by budget cuts, suggesting that much of the reentry population must rely instead on county mental health and alcohol and drug treatment services.

Budget Cuts Have Impacted the Health Care Safety Net the Reentry Population Relies On

Because of budget cuts, the California Department of Corrections and Rehabilitation (CDCR) has reduced funding for rehabilitative services, including alcohol and drug treatment programs, by 40 percent. The treatment capacity of in-prison substance abuse programs (SAPs) went from a capacity of 10,119 treatment slots in June 2008 to only 2,350 slots in January 2010 (CDCR, Division of Addiction and Recovery Services, *Annual Report*, 2009; CDCR, "Adult Programs Key Performance Indicators January 2010–December 2010," 2010).

Budget cuts have also impacted treatment networks out in the community. For example, the PSN, which provides community-based alcohol and drug treatment and recovery services to parolees in 17 counties statewide, has had its funding reduced. Community-based treatment programs have experienced cutbacks in state funding result-

ing in reductions in local treatment capacity. Finally, although Proposition 36 remains in effect, it is no longer being funded. Beginning in October 2011, Proposition 36 will become instead a fee-based, participant self-pay counseling program.

Given these changes, individuals leaving state prison are returning to California's communities having received less and less rehabilitative programming. This means that the reentry population will have greater unmet needs and will have to be even more self-determined than previously.

Understanding the Perspectives of Ex-Prisoners and Providers About Health Care Challenges

Ex-Prisoner Perspectives

Health Needs Were Ranked Lower Than Other Basic Needs. Focus group participants tended to view their physical health care needs as distinct from their mental health care and substance abuse treatment needs. For example, focus group participants typically ranked health needs lower than economic considerations, such as housing and employment, which were described as the most important challenges they faced. Yet participants also identified "getting sober" and finding regular care and support for mental health issues as critical.

Many discussed their struggles with substance abuse problems, and, in a number of instances, these problems were the underlying factor that resulted in their incarceration. Substance abuse problems often continued after release, resulting in violations of their parole or new crimes that led to their being returned to prison. A number of focus group participants reported having problems accessing substance abuse treatment programs in prisons, noting the limited availability of programming slots.

Other commonly mentioned health concerns included oral health problems, diabetes, hypertension, cancer, prostrate problems, and infectious diseases, such as hepatitis, tuberculosis, and sexually transmitted diseases. Also, a number of participants discussed feeling depressed at times during their period of incarceration and after release.

Factors mentioned by focus group participants as limiting their access to health care while in prison included long waiting times to be seen by a physician or nurse, correctional staff serving as informal gatekeepers and influencing what type of care prisoners might receive, and a general indifference by the system.

As a result, focus group participants felt that it was up to them to do what they could to stay healthy. They expressed an interest in preventive health care and informally shared information among themselves about what one could do to stay healthy and about what type of screening exams were important. There were some misperceptions about what preventive care was needed and when, which added to the viewpoint that the correctional health care system was indifferent to their needs.

Few Received Prerelease Planning or Help in Transitioning Their Care to Community Providers. Most focus group participants had not participated in prerelease planning classes, and some felt that what little they had received was inadequate. Instead, they tended to rely on word of mouth, on a mentor in prison, or on family members, or they were self-motivated to find out where they could go to seek services. Participants who needed substance abuse treatment or help with housing or employment tended to rely on other offenders with prior experience in seeking out such care in the community.

Transitioning of care to community providers was problematic in several instances. For example, participants with diabetes or cancer reported little or no continuity of care. Many focus group participants lacked health insurance and had little prior contact with a community's health care system, making it difficult for them to understand basic steps, such as knowing where to go to get care or their medications refilled.

PACT Meetings Are One Way to Link Individuals to Health Care Services, but the Meetings Vary in the Information Available. Individuals released on parole are required within a specified period of time to attend a Parole and Community Team (PACT) meeting at which a variety of providers (e.g., housing, employment, drug treatment) are available to briefly discuss what services they offer. Focus group participants varied in their knowledge about the PACT meetings. The types

of providers present at these meetings also can vary from meeting to meeting, making it an inefficient way for parolees to learn about what services may be available to them.

The type of information focus group participants desired to know was how to apply for Medi-Cal insurance and for General Relief, where to go to get free health care, and where to seek treatment for specific problems. In addition, they were interested in information related to housing, transportation, and employment.

The focus group participants suggested that one way to improve access to information is to have community health care providers routinely participate in the PACT meetings. More importantly, they said that having this information available prior to release from prison, including packets specifically tailored to each individual county, would be particularly helpful.

Family Is Important for Motivating Individuals to Change and in Helping with the Reentry Process. A number of focus group participants honed in on the central role that family plays in providing them motivation to seek rehabilitative services while incarcerated and in assisting them with their transition back to the community. For example, individuals mentioned being motivated to participate in substance abuse treatment programs while incarcerated and continuing to do so upon release, with the goal of reuniting with their family and children. Upon release, family also helped them meet basic needs, such as food, housing, clothing, or help in finding jobs. At the same time, in some instances, family reunification also could be a significant stressor.

Ex-Prisoners' Stressed the Importance of Culturally Competent Care and Getting Information on Health Services and Health Insurance Enrollment Prerelease. Some of the focus group participants felt that having access to support services that were provided in a culturally competent manner was important. A primary concern was having someone who understood their experience of incarceration, who would treat them with respect, and who could help them access services. Also, they felt it was important to have health care providers and staff who are empathetic to their circumstances and needs. They tended to prefer interacting with staff who had been formerly incarcerated them-

selves or who had substantial experience in working with the reentry population.

Participants also felt that having information available prior to release from prison on where to seek health care services and how to apply for Medi-Cal or get their benefits reinstated was important. They also suggested that packets specifically tailored to each individual county would be the best way to get this information to them.

Provider Perspectives

The Reentry Population Has Substantial Treatment Needs. From the providers' perspective, the reentry population has substantial mental health and substance abuse treatment needs, as well as significant health problems, including diabetes, hypertension, renal disease, and infectious diseases, such as HIV/AIDS and hepatitis C. As several providers noted, this is a population with a large amount of unmet need; illnesses such as uncontrolled diabetes, asthma, and hypertension that are typically the result of neglect or lack of access to care.

Also, this is a population with a range of other non-health-related needs, such as those related to transportation, employment, housing, and family reunification. Given this complex set of needs and the prevalence of untreated health conditions, parolees tend to be more resource-intensive to treat. Also, health care providers face the challenge of how to link these individuals with a range of other services. And when making treatment decisions for individuals who may be homeless, providers must take into account, for example, whether the individual has a place to keep his or her medications.

Inadequate Discharge Planning Raises Concerns About Continuity of Care. From the perspective of providers, a particular concern is continuity of care for those being released with serious medical conditions or mental health or substance abuse treatment needs. Lack of adequate medications upon release is problematic because it often can take time for an individual to access care in the community. As a result, individuals are at risk of self-medicating, and problems with timely access to care can negatively impact continuity of care.

Some providers had tried to coordinate with prison facilities in their region to establish bridging services for those about to be released

and who likely would need health care from their network of clinics or health centers. However, they were unsuccessful in doing so.

Lack of medical records was also seen as problematic, because providers are faced with treating individuals without any information about their past health status and care. For individuals with infectious diseases, such as HIV/AIDS or hepatitis—important public health concerns—providers felt it was critical to know what kind of care and education a patient had received while incarcerated. This was also true for those with chronic health and mental health conditions.

Financial and Communication Barriers Limit Access to Care. The providers identified a number of factors that make it difficult for recently released prisoners to access care, including lack of health insurance or funding. These factors also hinder the ability of providers and nonprofit community organizations to link individuals to needed services. Other factors include communication barriers, lack of understanding of the complexities of accessing safety-net health care services, long waiting times for appointments, and the impact of budget cuts, which limit treatment options. Combined, these barriers make it difficult for recently released prisoners to successfully navigate the health care system. They also make it challenging for health care providers and community programs to assist individuals in placing them into treatment and in referring them to services.

For example, the lack of health insurance means that although inpatient treatment programs may be available for those with mental illness, the cost is often prohibitive. Even counseling clinics that provide services on a sliding fee scale may be too expensive for these individuals, who simply lack the ability to pay. As a result, one mental health counselor tended to rely on crisis homes, which are, at best, only as a stopgap measure. In addition, long wait times to see a psychiatrist at county mental health clinics mean that some individuals are at risk of running out of medications or of self-medicating.

Individuals Are Reluctant to Seek Help from Parole. Parole outpatient clinics are one way that individuals with mental health problems can be seen by a psychiatrist and prescribed medications. However, providers commented that there are important disincentives for an individual to seek help from these clinics or for a parolee to ask his

or her parole officer for help in accessing services. Providers said that individuals reported that they felt the parole officer may view them as troublemakers or as individuals who need to be watched closely if they report needing help accessing drug treatment or mental health services.

Communication Issues and Difficulties Navigating the Health Care System Are Key Concerns. Providers commented that adaptive behaviors that may have worked in an incarcerated setting, such as intimidating others and not trusting them, are seen as maladaptive and even threatening in a health care setting. Individuals released from prison may misinterpret delays in appointments or long waiting times as a sign of disrespect or rejection. In addition, individuals often have difficulties navigating the health care system, and the different silos in the health care and social services systems can complicate the referral process for those with a complex set of needs. Therefore, having patient navigators who are empathetic and understand the experience of incarceration was seen as essential in helping the formerly incarcerated to link to services.

Providers Are Uncertain About How to Access the Reentry Population. The providers interviewed had the sense that they are increasingly serving the reentry population but lack the data to quantify this assessment. In general, they do not know whether an individual was formerly incarcerated unless that individual self-identifies or there is another mechanism for disclosure. Nonprofit community organizations that serve the reentry population are important referral mechanisms for community health care providers.

Budget Cuts Have Impacted Providers. Providers interviewed reported on the various effects of state, county, or city budget cuts. These included having to eliminate programs, such as HIV or dental programs, or cut back on services, such as mental health programs. A provider from a community assessment center noted that it needed to reassess whether to focus only on conducting assessments or to continue to also provide other services, such as drug treatment and mental health care. State-level cuts in community-based treatment programs meant the elimination of one provider's sober living facility. Importantly, budget cuts also have impacted alcohol and drug treatment program models, including decreasing the length of stay in residential treatment programs.

Providers' Suggested Ways to Improve Access to Health Care Services. As for suggestions on how to improve access to care and better facilitate the transition of their care to community health care providers, our interviewees indicated that there is an important need for bridging services to help transition ex-prisoners' care to community providers and to address such issues as ensuring an adequate supply of medications, obtaining the medical records or developing a detailed history that can accompany the individual, and having individuals begin the process of reinstating benefits prior to release for health insurance and other services.

A related set of recommendations centered around the critical need for patient navigators who can help individuals understand the health care system, help communicate and serve as patient advocates, and help individuals access a range of services.

Prisoner Family Perspectives

As of 2000, an estimated 856,000 California children—approximately 1 in 9—have a parent involved in the adult criminal justice system (Simmons, 2000). When a parent is incarcerated, the children of that parent also are deeply affected. Not only do such children lose a parent, they must also cope with altered systems of care—such as having to live with grandparents or even having to go into foster care. Parental incarceration can have a range of negative effects on children, including feelings of shame, social stigma, loss of financial support, weakened ties to the parent, poor school performance, increased delinquency, and increased risk of abuse or neglect.

Our discussion with a small group of seven caregivers enabled us to explore these issues. Most of them were grandmothers who provided us with initial insights about the experiences of caregivers providing this type of kinship care to children with incarcerated parents. They discussed the challenges of raising young children and teenagers, of coping with behavioral problems among these children, and of trying to keep their families together (but not knowing where to turn to for help). Although our discussion was exploratory in nature and not indicative of the full range of experiences of caregivers, the themes and issues that the discussion participants raised were conistent with the research literature.

For caregivers who were middle-aged and older, the experience of being thrust into a caregiver role later in life was emotionally and physically trying. Most of the caregivers were motivated to try and keep the family together in that they did not want these children to go into the foster care system.

The support needs for children mentioned by the caregivers included assistance with school and tutoring services; mentoring opportunities; role models; and programs aimed specifically at children with incarcerated parents that enable them to feel less isolated. They emphasized the importance of having positive male role models for teenage boys, in particular. They also felt it was important to provide the children, especially teenagers, with a realistic understanding of what the juvenile justice system is like so that they understand the negative consequences of getting involved in crime.

The caregivers we spoke to said that the children they cared for had mixed feelings about seeing their parent when they returned from prison. The challenges that a newly released incarcerated parent faces in terms of meeting basic needs, such as employment and housing, also had a direct effect on their children, who experienced them firsthand. A common experience was the child going back to live with the parent, but eventually returning to the grandparent because of the unstable living situation they found themselves in.

Lastly, the support needs of caregivers included better information on what community resources and social services are available to them, assistance in obtaining help for children with learning disabilities, mentoring and family support programs, and a critical need for respite care.

Conclusions and Recommendations

We began this study to assess the health care needs of the prisoner reentry population in California in 2008, at the beginning of what has now become the most significant national recession since the Great Depression. When we finished the initial set of analyses on the capacity of the health care safety net to meet the needs of this population in 2009, we

were already witnessing the impact of the recession on the safety net. Now, California's 2011 Public Safety Realignment Plan, the continuing impact of the economic crisis in terms of even deeper cuts to the health care safety net, and prospects of health care reform provide a changing landscape in which to assess the impact of prisoner reentry in California—one that places California clearly at a crossroads.

The results of our analyses over the past four years show the following:

- The capacity of the health care safety net varies across California communities by county, type of services, and race/ethnicity and, since our first report, has become even more constrained while demand has grown.
- California's new Public Safety Realignment Plan represents an almost tectonic shift in the state's criminal justice system that will have a number of implications for thinking about how to meet the health care and rehabilitative needs of the reentry population.
- Public safety realignment presents some challenges, such as the fact that traditional mechanisms for linking ex-prisoners to health care and social services—e.g., parole officers, PACT meetings—will change dramatically for individuals placed on county-level postrelease community supervision and for low-level offenders who will serve their time in county jail.
- Realignment also presents an important opportunity to address the public health issues associated with reentry, not only to reduce the size of the state's prison population and reduce the state's high parole revocation rates, but also to focus attention on the need to improve prerelease planning, build better mechanisms to transition care from correctional health to safety-net providers, and create local partnerships among probation, law enforcement, county agencies, and community- and faith-based organizations to better address the needs of those individuals returning back to communities.
- Health care reform provides important opportunities as well as challenges to expand insurance coverage through Medicaid for the reentry/criminal justice population, to improve access to drug treatment, and to better manage their care.

Given these findings, in Table S.1 we summarize our recommendations for how California can meet the public health challenges of reentry and to put into place mechanisms to be prepared for the new opportunities realignment and health care reform represent. These recommendations are based on a combination of our review of the literature and analyses of the BJS inmate survey, parolee data, data on the health care safety net in four counties, provider interviews, and focus group discussions with formerly incarcerated individuals and family members.

The recommendations in Table S.1 can be acted on at both the state level—by departments and agencies that have a role to play in preparing California for health care reform and public safety realignment—and the county level—by county probation, law enforcement, jail systems, county and community health care safety-net providers, and community organizations and leaders. More detail on these recommendations is provided in Chapter Six.

Final Thoughts

The changes described here that California is experiencing are also occurring in other states, as they, too, grapple with how to reduce corrections costs and the size of their prison populations. Ultimately, most individuals who are incarcerated will eventually return home to local communities. We began our study with the premise that the reentry population eventually will become part of the uninsured and medically indigent populations in counties. This is even more the case today.

Importantly, our analyses were conducted prior to the October 1, 2011, implementation of California's new Public Safety Realignment Plan. Therefore, our results of the geographic distribution and concentration of parolees and the capacity of the health care safety net reflect conditions prior to the implementation of this new policy. Nevertheless, we believe that these findings will provide the state and counties with an important context for understanding and examining the impact of realignment moving forward.

Table S.1
Preparing to Meet the Health Care and Rehabilitative Needs of California's Reentry Population: Summary of Recommendations

Recommendation	Description
What Can California Do to Prepare?	
Develop informed estimates about the percentage of the Medicaid expansion population that the reentry and criminal justice population will represent.	There is a need for more informed estimates of the size of the reentry/criminal justice population that will be eligible for Medicaid and of the likely impact of different enrollment strategies. These estimates should also take into account citizenship status and what percent of the reentry/criminal justice population will be eligible for subsidies as part of California's Health Benefit Exchange.
Develop Medicaid enrollment strategies.	The participation of the reentry/criminal justice population in Medicaid will largely depend on how much states' departments of corrections and county probabtion and jails facilitate enrollment in Medicaid, as well as other stakeholders. California may want to consider developing strategies to enroll or reinstate Medicaid benefits for the reentry/criminal justice population.
Leverage the experience of other states that have previously expanded coverage to childless adults under Medicaid.	Research on other states that expanded Medicaid coverage provides a rich source of information on issues and analyses California may want to undertake (e.g., effectiveness of different outreach efforts and enrollment practices on participation rates) to understand the impact of insurance expansion for the reentry/criminal justice population.
Develop health homes for the reentry/criminal justice population.	The Medicaid expansion population (including the reentry/criminal justice component) is expected to include individuals with multiple comorbidities and high rates of mental illness and substance abuse, suggesting that health homes will be an important way to manage their complex care needs.
Develop care/case management systems that can account for special populations' needs, including the reentry/criminal justice population.	California may want to consider applying for planning grants to support the development of tailored care/case management programs that will include coordination with social services and community organizations that serve special populations, including the reentry/criminal justice population.

Table S.1—Continued

Recommendation	Description
Assess workforce-development strategies for alcohol, drug, and mental health treatment.	Given that existing publicly funded treatment provider networks may become overwhelmed in the face of Medicaid expansion occurs and public safety realignment, California may want to consider establishing a health task force to identify workforce-development strategies that will help build treatment provider capacity in general, and specifically to meet the expected increase in demand for services by the reentry/criminal justice population.
Consider developing electronic medical records.	Electronic medical records are one tool by which to improve the transition of care from prison to safety-net providers; as such, California may wish to consider developing a pilot study to assess the feasibility of developing such records for the reentry/criminal justice population.
Consider expanding prerelease planning efforts.	CDCR's prerelease planning for prisoners with medical or mental health conditions is based on acuity and need; CDCR and counties may want to consider expanding prerelease planning to include those with chronic medical and mental health and substance abuse problems in general.
Undertake a comprehensive assessment of the impact of California's new Public Safety Realignment Plan to inform future policy refinements.	California's 2011 Public Safety Realignment Plan represents a profound change to the state's criminal justice system. The legislature may wish to consider allocating funding to undertake a comprehensive assessment of the impact of realignment and require counties to track a standard set of metrics to enable cross-county comparisons and facilitate an assessment of the plan's overall impact.
What Can Counties and Providers Do to Prepare?	
Develop county-level estimates to inform planning for rehabilitative services and for increased demand for mental health and alcohol and drug treatment.	Given the growing need for mental health and alcohol and drug treatment services, county departments of mental health and alcohol and drug treatment and safety-net providers will need more-informed estimates of the number of individuals that will make up the reentry/criminal justice population at the local level and of their expected demand for services.
Convene all relevant stakeholders for planning and coordination of services.	As counties refine their plans for implementing the Public Safety Realignment Plan and health care reform, they may want to consider broadening the group of stakeholders to include community- and faith-based organizations that have long been involved in serving the reentry/criminal justice population.

Table S.1—Continued

Recommendation	Description
Assess local capacity to meet new demands for health care.	Given the important role of local public health departments and agencies, counties might wish to draw on them in assessing local capacity for care, especially for those communities disproportionately affected by reentry and realignment, and in developing strategies for addressing service gaps for the reentry/criminal justice population.
Develop "welcome home" guidebooks tailored to individual counties, particularly for counties and communities with high rates of return.	Counties can use public safety realignment as a chance to improve and update these guidebooks to include problem-solving strategies—highlighting services that address immediate needs (e.g., housing, transportation, health care) and providing detailed information about local resources, especially about organizations committed to serving this population. They should be written in a culturally competent manner, take into account literacy levels, and be provided in Spanish and other languages as needed.
Train providers on cultural competence.	Counties may want to implement provider training to improve their cultural competence, especially in primary care/public health clinics and in other settings where the primary care and specialty care needs of the reentry/criminal justice population will be addressed. Also, counties could work with community-based and faith-based organizations to ensure this training includes the perspective of the formerly incarcerated.
Consider the role of patient navigators.	Being able to navigate the maze of needed services is critical. Staff who are experienced in working with this population or who have been formerly incarcerated themselves are particularly well suited to fulfill this role. Counties might want to undertake a demonstration project to explore the use of patient navigators, particularly in counties with large reentry populations.
Address the needs of families and those that care for children of incarcerated parents.	Given the importance of families to the successful reintegration of individuals returning from prison and the challenges the families face, there is a need for programs to address the needs of children of incarcerated children, the needs of caregivers (e.g., respite care), and the family reunification process. Also, to inform planning decisions, counties also need better estimates on the number of children with incarcerated parents.

In light of California's new Public Safety Realignment Plan and federal health care reform, California faces both substantial challenges and unprecedented opportunities to address the needs of this population by improving rehabilitative services at the local level and by improving access to health care for the reentry population (and other components of the criminal justice population) through Medicaid and other coverage expansions. Both will require the state and counties to establish new partnerships with the range of stakeholders that serve this population.

Lastly, private philanthropy can also play an important role in helping to address the uncertainty created by this unique confluence of public safety realignment at the state level and health care reform at the federal level. Such a role for California and national foundations includes supporting (1) local demonstration projects and collaboration among relevant stakeholders; (2) Medicaid enrollment strategies; (3) pilot projects to test innovative ideas; (4) efforts to increase the capacity of local communities and organizations to provide reentry services; and (5) ongoing evaluations and research on the impact of realignment and health care reform on the reentry population.

Table 2.7
Summary of Accessibility Results for Mental Health and Alcohol and Drug Treatment Providers, by County

Type of Treatment	Percentage of Parolees Who Fall into the Two Lowest Accessibility Quartiles
Mental Health Providers	
Alameda County	53
Kern County	27
Los Angeles County	51
San Diego County	38
Alcohol and Drug Treatment Providers	
Alameda County	42
Kern County	28
Los Angeles County	44
San Diego County	30

NOTE: Numbers in the table have been rounded.

Accessibility to mental health and alcohol and drug treatment providers also varied by race/ethnicity (Table 2.8). For example, in Kern and San Diego counties, between 15 and 22 percent of African-American parolees resided in areas with low levels of accessibility to alcohol and drug treatment resources, compared with 44 and 47 percent of African-American parolees in Alameda and Los Angeles counties, respectively. In terms of accessibility to mental health providers, more than half of African-American and Latino parolees in Alameda and Los Angeles counties resided in areas with low levels of accessibility. In comparison, a much lower percentage of African-American and Latino parolees in Kern and San Diego counties resided in areas with low levels of accessibility to mental health providers.

We found no difference in accessibility by race/ethnicity in San Diego County.

Table 2.8
Summary of Mental Health and Alcohol and Drug Treatment Accessibility Results by County and Race/Ethnicity

	Percentage of Parolees by Race/Ethnicity Who Fell into the Two Lowest Accessibility Quartiles		
Type of Provider/ County	African-American	Latino	White
Mental Health Providers			
Alameda County	57	52	38
Kern County	20	30	26
Los Angeles County	57	49	47
San Diego County	38	36	38
Alcohol and Drug Treatment Providers			
Alameda County	44	38	39
Kern County	15	32	30
Los Angeles County	47	45	37
San Diego County	22	36	30

NOTE: Numbers in the table have been rounded.

Discussion

It is well known that the prison population tends to be sicker on average than the general population. Our analysis of the BJS survey's self-reported data for California inmates provides a rich understanding of the range of physical health, mental health, and substance abuse problems that this population brings upon return to local communities. We found that returning prisoners bear a high burden of chronic diseases, such as asthma, hypertension, and diabetes, as well as infectious diseases, such as hepatitis and tuberculosis—all conditions that require regular access to health care services for effective management. In addition, the burden of mental illness and drug abuse or dependence is especially high in this population, underscoring the importance of access to mental health and alcohol and drug treatment services and the importance of continuity of care for this population. But the likelihood

of ex-prisoners receiving adequate health care once they are released is poor given the high rates of uninsurance among this population and other barriers to accessing care.

A number of trends complicate the successful reentry of parolees into communities. Our analysis of the geographic distribution and concentration of parolees across California and in the four focus counties showed that reentry particularly impacts 11 counties statewide and that, within counties, parolees tend to cluster in certain communities and neighborhoods. Such clustering has implications for linking to and providing health care services to this population and for considering how to effectively target reentry resources. As illustrated by Los Angeles County, which has a combination of both urban and more sparsely populated areas, there is a need to tailor outreach and service delivery strategies to areas where the reentry population is more concentrated versus areas where it tends to be more dispersed.

The fact that African-American and Latino parolees, in particular, tend to return to disadvantaged neighborhoods and communities—ones characterized by high poverty and unemployment rates—suggests that reentry will be especially challenging for these groups. Further, our analysis of the geographic distribution of safety-net resources illustrated that health care resources in these communities tend to be scarce.

Important study contributions are formally defining what the health care safety net is for the reentry population and developing measures to assess the ability of the safety net to meet ex-prisoners' needs. Across and within counties, the geographic distribution of safety-net facilities varied, and we identified geographic gaps in the location of health care facilities, including hospitals, clinics, mental health clinics, and alcohol and drug treatment providers vis-à-vis the concentration of parolees. Taking into account differences in capacity, the underlying demand for safety-net services, and travel distance, our analyses of accessibility (i.e., analysis of potential access) showed that parolees' access to health care safety-net facilities varies by facility type, by geographic area, and by race/ethnicity. As policymakers consider how to ensure access to services for the reentry population in California, they will need to take into account this variation in counties' safety nets.

Our analysis of the health care safety net presented here was conducted in 2009, just prior to the deep cuts made in rehabilitative programming for prisoners and in safety-net services within California. For example, the substance abuse network specific to parolees, the PSN, has had its funding reduced. CDCR has drastically cut its funding for community-based alcohol and drug treatment programs for ex-prisoners. And although Proposition 36 contracted treatment providers appear to be a viable source of care for the reentry population in each of the focus counties, these providers are no longer being funded by local counties. The impacts of these various changes are discussed further in subsequent chapters.

> I knew what I wanted this time. I had a couple of birthdays in there and you get a little bit more seasoned . . . so when I got out I knew what I immediately had to do, because I know it will affect me in my mind and just decide to go out and mess myself up. So I had to figure out where that came from, that's why I had to really jump into the 12 steps this time. I didn't waste no time getting deeply rooted in it. . . .

Views About Access to Substance Abuse Treatment Programs in Prison

Substance abuse treatment services in prison are provided through in-prison substance abuse programs (SAPs) that are overseen by CDCR's Division of Addiction and Recovery Services (DARS).[3] CDCR DARS contracts with community-based alcohol and drug treatment organizations[4] to provide most of the treatment services for inmates and for parolee offender participants. These organizations provide services to both men and women, to inmates in conservation camps, and to inmates in all four institutional security levels (I–IV) (CDCR Division of Addiction and Recovery Services, *Annual Report*, 2009, p. 30). Also, volunteers and inmates may run AA and NA meetings in the prison setting.

There are also community-based treatment programs.[5] These alcohol and drug programs provide continuing care services through substance abuse services coordination agencies (SASCAs). There are four

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[3] In fiscal year 2007–2008, 21,684 inmates received in-prison substance abuse treatment services, and 10,946 parolees participated in community-based treatment services funded by CDCR. In fiscal year 2007–2008, 41.2 percent of in-prison SAP completions had as their governing offense property crimes, 37.0 percent had drug-related crimes, 12.4 percent had crimes against persons, and 9.4 percent had other crimes (CDCR Division of Addiction and Recovery Services, *Annual Report*, 2009).

[4] These providers include the Amity Foundation, Center Point, Community Education Centers, Inc., Mental Health Systems, Phoenix House, Walden House, West Care, and the Contra Costa County and Orange County Offices of Education.

[5] These community-based treatment programs include Community-Based Substance Abuse Programs, the Female Offender Treatment and Employment Program (FOTEP), the In-Custody Drug Treatment Program (ICDTP), the Parole Substance Abuse Program (PSAP) (Senate Bill 1453), and the PSN.

SASCAs, one in each parole region. Providers such as Amity Foundation, Phoenix House, or Walden House are contracted to provide the community-based treatment services. However, as noted in our Phase I report, the treatment capacity of these programs represents only a small percentage of the total demand for alcohol and drug treatment services by the reentry population.

Problems with access to substance abuse treatment programs in prison were an important topic of discussion, with SAPs seen as beneficial by a number of the focus group participants. For example, one individual who was not "clean" said that the six months during which he was in the SAP helped him to understand about the effects of marijuana on the mind and body. Another individual who had participated in the SAP program for nine months said he had tried for many years to get clean prior to participating in the program. He also talked about how the SAP program helped his spirit by also ensuring that his kids received Christmas presents, which helped his depression about not being able to provide for them. Another individual who wanted to participate in the SAP program was unable to get into one of the treatment slots. Discouraged, he said that instead he looks toward God for spiritual help and that "I don't look to programs. I'm self-motivated."

Gaining access to SAPs though was problematic for many participants. Recent budget cuts by CDCR in programming have meant cuts in substance abuse treatment programs in the prison system (and cuts in funding for community treatment providers). In California, about 40 percent of funds for rehabilitative programs have been cut. Nonprofit community alcohol and drug treatment providers had their funding substantially reduced or eliminated. These focus group discussions were conducted after these cuts had occurred, and, depending on how recently the participant had been released from prison, their comments reflect the impact of these cuts in limiting access to in-prison substance abuse treatment programs.

Participants who had trouble accessing substance abuse treatment programs in prison relied instead on Alcoholics Anonymous or Narcotics Anonymous groups run by volunteers, though, in some instances, even these programs had been cut. For some inmates, this meant that they went long periods without access to any substance abuse treat-

ment services. One participant commented that he was without access to substance abuse treatment services for 6–7 months. As one individual commented, "People get tired. You ask for help and they say no." Another participant discussed how inmates organized their own 12-step meetings in prison. He was in a fire camp, and he said that they got their own AA books and would "pray in and pray out" of the meetings and discuss on their own "the book."

Focus group participants cited a number of examples of problems in gaining access to SAP programs. From their perspective, there is very little programming space available for substance abuse treatment. One participant asserted that there were only 12 slots for the AA program at one California prison facility, with 3,000 inmates on the waiting list. In the yard at the facility he was at, he said, there was only one dormitory with SAP programming. Another participant said that a facility he was at had two SAP dormitories that each housed 200 SAP participants, and both were fully occupied.

In addition, *focus group participants felt the decision about who gets substance abuse treatment programming is capricious* and often determined by correctional officers, without regard to whether one needed treatment. For example, one individual stated that in the prison yard, correctional officers were pulling inmates at random to go into the SAP dorms. He wanted access to SAP but was not permitted, whereas others who were not interested or had no substance abuse problems were still placed in a SAP dorm. Also, focus group participants commented that some inmates without substance abuse problems took up treatment slots because it was a way to get perks, such as being moved to a location closer to their family and because they believed that being in a program would look favorable when they came up for parole. In their view, these individuals were not motivated to change or to rehabilitate. Still, several other individuals commented that it is difficult when you have access to only 1–2-day treatment programs. They recognized that it was not sufficient to truly help them but said people still took them to get whatever programming they could.

Focus group participants also discussed the importance of having substance abuse programs available for those who were serving life sentences or lengthy sentences. They said that it was difficult to get access

to these treatment programs if one was in this category. In their view, these programs also helped them in terms of rehabilitation and earning credits toward parole. In addition, inmates who served as mentors also said they needed SAP programming to help them be effective mentors.

Further, *if individuals were near their release dates, they were not eligible to participate in substance abuse treatment programming.* For example, one individual stated that he was incarcerated in a private contract prison facility in another state. Since he was within the 60–90-day window of being released, he was told that it was too short a time to give him SAP programming. CDCR DAR's policy is that individuals are ineligible for SAP programming if they have a release date within the next six months; this policy reflects the old treatment model based on at least a six-month program (CDCR Division of Addiction and Recovery Services, *Annual Report*, 2009).

Finally, one individual on parole realized he had a serious drug problem. His desire to change was even stronger than his desire to stay out of prison, as illustrated in the following exchange:

> **Participant:** What gets me about it is, man, you guys do it on your own. I did it on my own and I know I was out there bad. I'm the only person in San Diego that got high that was sick of it. I went down to the parole office and told the parole officer, 'Man, I need you to lock me up.' They wouldn't lock me up—you know what I did, you know how I got locked up? I knocked out the windows [of the parole office] with an ashtray. I knocked out the whole window and then they handcuffed me.
>
> **Moderator:** So you could go back to prison because you didn't want to do drugs?
>
> **Participant**: I needed help.

Views About Access to and Quality of Health Care in Prison

Focus group participants expressed a number of concerns about their ability to access health care within prison and about the indifference of the health care system and correctional system.

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Findings

There has been a concern within the City of San Bernardino that inmates who were not residents prior to incarceration were released to the City upon parole. The data gathered from this survey showed this to be unfounded. A small minority of parolees (approximately 5 percent or 9 out of 170 respondents) reported living in the City of San Bernardino after incarceration but not before. Figures 9 and 10 represent these findings.

Figure 9: Residency Before Incarceration

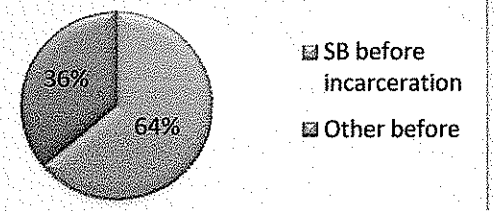
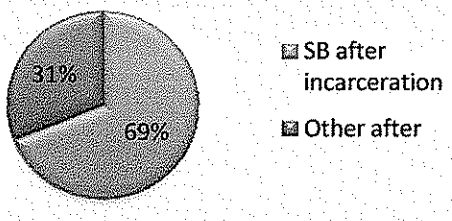


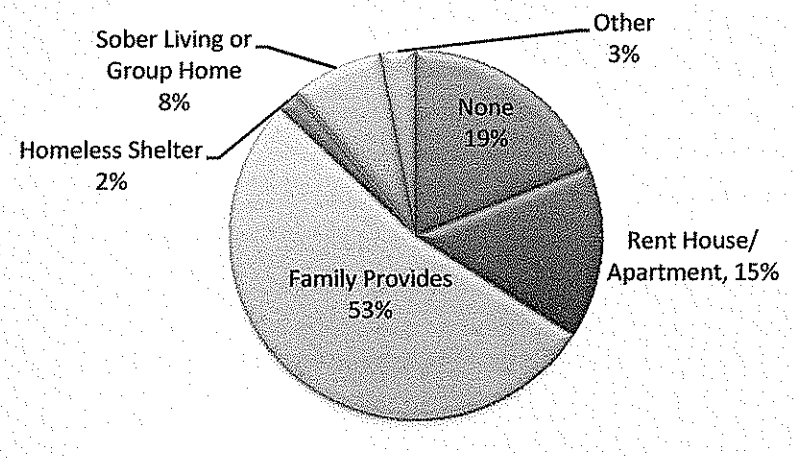
Figure 10: Residency After Incarceration



Basic Needs

Housing is among the most basic of needs returning parolees have. This research showed that 21 percent of respondents reported being homeless or living in shelters. More parolees reported living in family provided housing than any other option. This is significant because California law allows the warrantless search of any parolee residence, linking parolee issues with the larger issues of family and community. Survey respondents report a total of 325 children. This is one obvious connection between parolees and the larger community.

Figure 11: Housing



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"The Lynchpin To Parole Reform: A Case Study of Two Parolee Housing Proposals in Redlands, California"

Benjamin Singerman
Professor Joan Petersilia
California Prison Reform
Fall 2005

PART I: THE ISSUE OF PAROLEE HOUSING

1. Parolee Housing Should Be Supportive, Secure, and Efficient

The challenge of designing supportive, secure, and efficient housing for recently released parolees is the key to effectively reforming California's parole system. Parolees require supportive parolee housing so that they will not re-offend, and can successfully reintegrate into their communities. Communities require secure parolee housing, so that those who live near parolees will not suffer from increased crime and devaluation of their properties. State and local governments require efficient parolee housing so that they can easily and affordably keep track of parolees' whereabouts. Parolee housing has been called the "lynchpin that holds the reintegration process together."[1] If all three needs – *support, security, and efficiency – can be met, many of the problems that have recently* plagued California's parole system will be significantly reduced.

2. California's Parole System: A Billion Dollar Failure

In recent years, the California parole system has come under a great deal of criticism for its failings. In November 2003, the government's watchdog Little Hoover Commission labeled California's parole system a "billion-dollar failure."[2] According to the Commission, the goals of parole are not being realized.[3]

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[1] JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 219 (2005) (quoting Katherine H. Bradley, Noel C. Richardson, R. B. Michael Oliver, and Elspeth M. Slayter, "No Place Like Home: Housing and the Ex-Prisoner" Policy Brief. Boston: Community Resources for Justice. (2001)).
[2] LITTLE HOOVER COMMISSION, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES. 1 http://www.lhc.ca.gov/lhcdir/172/execsum172.pdf. (2003).
[3] *Id, at 56.*

California's parole system is not secure, which jeopardizes public safety. For example, in 2000, California Department of Corrections lost track of about 25% of the 117,000 parolees under its supervision, compared to a national average abscondence rate of only 9%.[4]

California's recidivism rate is also far above the national average: In California, 67% of prison commitments are returning parolees, compared to 35% nationally.[5] Only 21% of California parolees successfully complete parole, compared to 42% nationally.[6] Last year, California prisons held 165,000 inmates, of whom 58,725 were paroled felons who were re-incarcerated for violating parole.[7] These statistics suggest that California's current parole system does not offer parolees the support they need to reintegrate successfully into their communities.

Nor is California's current parole system efficient. California spends about $900 million a year on parolees who violate their parole and are sent back to prison, nearly one fifth of the $5 billion spent annually on the entire California prison system.[8] If recidivism and re-incarceration could be reduced by implementing high-quality parole supervision, the state would realize substantial savings even if the cost of supervising each parolee went up.

Shortly after the Little Hoover Commission report was released, Governor Schwarzenegger signed an agreement on his first day in office to reform the California

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[4] Id.
[5] Id, at i.
[6] Little Hoover Commission, "Commission Urges Parole Reforms," press release, (Nov. 13, 2003).
[7] Mark Martin, *California's System For Parolees Called Ineffective Revolving Door*, San Francisco Chronicle, Sep 10, 2005
[8] Id.

parole system.[9] The agreement settled a class action lawsuit over how California treats its parole violators.[10] However, progress thus far has been fitful. In April 2005, the state ended three programs under the settlement that diverted parole violators to halfway houses, drug treatment, or electronic monitoring instead of returning them to prison; the program was considered ineffective because it focused on parole violators instead of recently released parolees who had not re-offended.[11] Additionally, California's budget crisis forced the governor to propose a state budget that cut $95 million from inmate and parolee rehabilitation programs.[12] This is unfortunate, because high-quality parole supervision that effectively reduces recidivism is expensive in the short-term, even though it ultimately saves money through lower re-incarceration rates.

3. Why Housing Matters So Much

An essential ingredient to solving the challenges faced by the California parole system is to find all parolees supportive, secure, and efficient housing. When they are released from prison, about 97% of California inmates are placed on supervised parole.[13] Upon their release, they are each given $200 and a ride to the nearest bus stop.[14] Their most immediate concern upon release is finding shelter.[15]

Most California prisoners are released without the benefit of a "step down" process to help them successfully transition back into their communities.[16] This is

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[9] Dan Thompson, *No Contempt, But Judge Scolds Officials For Parole Programs*, San Diego Union-Tribune, May 12, 2005.
[10] Judy Campbell, *Parole Reform in Court*, The California Report, May 12, 2005.
[11] Id.
[12] *Cop-Out On Parole Reform*, Los Angeles Times, Editorial, May 4, 2005.
[13] Martin, *supra*, note 7.
[14] Id.
[15] See TRAVIS, *supra*, note 1.
[16] LITTLE HOOVER, *supra*, note 2, at 57.

unfortunate, because "[p]risoners should ideally make the transition from prison to the community in a gradual, closely supervised process."[17]

More specifically, to be effective, the supervision of parolees must be structured, be intensive, maintain firm accountability for program participation, and connect the offenders with pro-social networks and activities.[18] This allows them to reintegrate with their personal relationships, employment, and home communities in manageable steps, and allows the authorities the chance to test the parolees' progress.[19] A comprehensive RAND study of 9 programs in 14 states found that when parolees and probationers had at least two contacts a week with their probation or parole officers and participated in pro-social activities such as education, work, or community service, their recidivism rates dropped as much as 10 to 20% compared to other offenders.[20]

"I was lucky because I had a house, a supportive family, and a job waiting for me when I got out of prison," Tim O'Hearn, a parolee told me in an interview. "Most guys don't have that, which is why they fall back into the same old lifestyle and get into trouble again. Getting them into programs is the only way to give them the kind of support and structure that helped me succeed."

Instead, most California parolees are on their own when trying to find housing upon release. Without a stable residence, parolees cannot reintegrate effectively into their communities. "Continuity in substance abuse and mental health treatment is

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[17] JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 98 (2003)
[18] TRAVIS, *supra*, note 1, at 110 (discussing and quoting Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?* " FEDERAL PROBATION 62(2): 3-9
[19] Id.
[20] TRAVIS, *supra*, note 1, at 109-110.

compromised. Employment is often contingent upon a fixed living arrangement. And, in the end, a polity that does not concern itself with the housing needs of returning prisoners finds that it has done so at the expense of its own public safety."[21]

4. The Main Difficulties Parolees Face In Obtaining Housing

Parolees' housing options are frequently limited. State prisoners are often imprisoned far from the home communities to which they return, and have no opportunity to secure housing prior to their release.[22] Most prisoners return to live with their families, but this can present difficulties.[23] "Family dynamics surrounding prisoner reentry can be very complicated," and families may not always provide the necessary support and stability that parolees need to keep themselves out of trouble.[24] In addition to any emotional issues presented by family dynamics, parole conditions legally forbid parolees from living or associating with anyone involved with criminal activity, including family and friends.

High housing prices in many parts of California have made the private housing market cost prohibitive for most parolees, who tend to be poor.[25] Most parolees don't have enough money for a security deposit for a private rental. Furthermore, landlords are often reluctant to rent to parolees.

Many parolees also have trouble finding public housing. Federal policy prohibits drug offenders from living in public housing and receiving food stamps.[26] In selecting families for admission to public housing, the Public Housing Authority may consider the

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[21] Petersilia, *supra*, note 16, at 121 (quoting Bradley, et al., *supra*, note 1)
[22] Id.
[23] TRAVIS, *supra*, note 1, at 220.
[24] Id.
[25] Id, at 223.
[26] LITTLE HOOVER, *supra*, note 2, at 57.

criminal history of the applicant.[27] Furthermore, high demand for public housing has led to long waiting lists for admission: in Oakland, California, the average wait is 6 years. Parolees cannot wait that long to receive support: recidivism data shows that 30% of re-offenders are arrested within six months of release, and that after five years without an arrest, recidivism is very low.[28]

With no other options available, many parolees become homeless. California Department of Corrections officials estimate that 10% of the state's parolees are homeless. In large urban areas like San Francisco and Los Angeles, as many as 50% of parolees are estimated to be homeless.[29]

5. Community Opposition To Parolee Housing

Communities frequently oppose the placement of parolee group homes in their neighborhoods. This reflects their understandable concerns about the high recidivism rates of offenders: they fear parolee behavioral problems, rising neighborhood crime, increased comings and goings of non-related parties, and devaluation of their properties. Upon further consideration, this opposition is irrational. In most instances, "these criminals are returning to their community in any event. Giving them a place to live and structured assistance at release can provide residents with *more* security than if the inmate were simply on the streets."[30]

Nevertheless, a growing number of California communities have passed local ordinances restricting parolee housing. In Lancaster, in Los Angeles County, city officials designated a 20-block area of north downtown a "drug-free zone." The plan's goal is to

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[27] TRAVIS, *supra*, note 1, at 229.
[28] PETERSILIA, *supra*, note 16, at 18.
[29] Id, at 122.
[30] Id, at 100.

keep parolees and probationers out of the zone as a condition of their parole or probation. The law also makes it a criminal offense for anyone on parole or probation to rent or own property in the area.[31]

Three years ago, Fontana enacted an ordinance that required any group operating a non-state-licensed home with two or more parolees to acquire a conditional use permit from the city.[32] At the time, some homeowners were renting up to 12 beds to parolees in residential areas. Since the ordinance was passed, no non-state-licensed parolee homes have applied to move into Fontana.[33]

The city of Yucaipa recently adopted a moratorium on non-state-licensed parolee homes and is considering a provision similar to the one adopted by Fontana. It would require permits from anyone operating a home with two or more parolees. Bart Gray, captain of the sheriff's Yucaipa station, told the San Bernardino County Sun that the provision would ensure the safety of residents and keep crime rates down because it would let police know where parolees are living.[34]

However, law enforcement agencies already know the location of parolees.[35] The law is actually likely to have the opposite effect. If it reduces the availability of parolee housing, more parolees are likely to abscond, or become homeless. Then the police will be less likely to know where the parolees are living.

6. Poor Coordination Between State and Local Government

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[31] TRAVIS, *supra*, note 1, at 224.
[32] Fontana Ordinance No. 1385, adopted Nov. 19, 2002.
[33] Stacia Glenn, *Yucaipa Eyes Parolees*, San Bernardino County Sun, Aug 14 2005.
[34] Id.
[35] Id.

Due to budgetary constraints, California has in the past had trouble expanding, developing, and managing pre-release planning with community parole services.[36] In 2003, there were only approximately 900 re-entry prison slots and a small number of substance abuse treatment slots available for prisoners to be released using the ideal, "step down" transition process.[37] According to the Little Hoover Commission report, most communities already have a wide range of services that could serve parolees but often do not due to poor coordination or community opposition.[38]

There are several types of parolee group homes under California law. Despite the ordinances passed by Fontana and Yucaipa, California cities share power with the state government under California law to regulate the various types of parolee group homes, and cannot necessarily prevent the state from establishing any parolee group homes at all.

The cities do have the power to effectively prevent the state from establishing "large" parolee group homes within their city limits. "Large" residential care facilities are defined as those with seven or more parolee residents or beds. Large parolee group homes are licensed by the State of California, but are also subject to regulation by city governments, which may impose restrictions such as special permit requirements.[39]

Although cities must follow state-mandated procedures in considering the zoning and placement decisions of these large facilities, they have been effectively able to block construction of new large residential care facilities in their communities by citing various concerns including public opposition due to noise, public safety concerns, and questions

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[36] LITTLE HOOVER, *supra*, note 2, at 57.
[37] Id.
[38] Id.
[39] Redlands City Council Meeting, Sept 20, 2005, Agenda Item J-1, Request For Council Action on proposed Ordinance 2622, p. 3.

about the ability to properly control residents of the facilities. Indeed, even though the State of California currently has set aside funds for building more parolee re-entry centers, and has issued a Request for Proposals for their construction, communities have been unwilling to offer sites for such large facilities, fearing community backlash against housing parolees together in residential areas.

Currently, the State Department of Corrections and Rehabilitation operates just 19 re-entry facilities and 2 restitution facilities for all 58 counties of California.[40] In San Bernadino County, for example, no communities have been willing to accept a large parolee group home, and no such homes are currently in operation there.[41]

In the face of this opposition to large residential care facilities, the State has increasingly relied on small parolee group housing as places to house parolees. These small group homes consist of six or fewer persons or beds. A city has no ability to regulate small group homes that are licensed by the State of California. It cannot force state-licensed small group homes to request a city permit, nor can it subject the placement of such homes to the same strict notification and public hearing requirements that apply to large group homes.

Nevertheless, many parolee group homes are not licensed by the state. Because of the informal nature of these homes, it is difficult to quantify statewide exactly how many parolees choose to live with other parolees in an unlicensed, unregulated arrangement. One example of a type of unlicensed parolee group home is a so-called "sober living home." In a sober living home, six or fewer parolees live together and agree not to use

[40] California Department of Corrections, www.corr.ca.gov
[41] Oral communication by Jeffrey Gazer, California Department of Corrections, Parole Division, San Bernadino Unit; Redlands City Council Meeting; September 20, 2005.

drugs or alcohol as a condition to continue living in the home. A sober living home is a non-licensed cooperative living arrangement. It is not a residential care facility under the law, is not required or eligible to be licensed by the state, and is not subject to state Department of Alcohol and Drug Program oversight or regulatory requirements.

Brandy Pitt, the house manager for a sober living home in Redlands, California, described the sober living homes as currently "self-run, self-help facilities." Because they are not licensed, they do not have to hire professional staff, or meet state or city requirements beyond the strong restrictions already placed on the residents by virtue of their status as parolees.[42]

Despite their unregulated status, Pitt feels the homes are important and effective in giving structure and discipline to parolees with substance abuse problems. She said, "If you shut down sober living homes, instead of being tested and reporting to their parole officers if parolees start using again, no one will report them and they'll be stealing your mail and the stereo from your car so they can support their habit."[43]

The recent ordinances passed by Fontana and Yucaipa are designed to restrict or prohibit parolee group homes which are not licensed by the state, such as the sober living facilities described above. It is unclear under federal and state law whether local and city governments have the power to regulate and prohibit even these unlicensed parolee group homes, or whether such power is reserved to the state. Whether the recent ordinances passed by Fontana and Yucaipa are legally and constitutionally permissible is an issue that may ultimately be decided by the courts. In the meantime, other cities in the Inland

[42] Oral communication by Brandy Pitt, Redlands City Council Meeting; September 20, 2005.
[43] Id.

Empire and Central Valley – such as Redlands, Victorville, Apple Valley, Adelanto, and Hesperia – are considering similar ordinances.[44]

By failing to consistently or adequately provide transitional housing and other "step down" services to released prisoners, and by failing to coordinate such services with local and city governments, the State has created the chaotic present system: a billion dollar failure. Parolees do not receive the housing and services they need to succeed, so they re-offend in high numbers. The State cannot keep track of its parolees, and the high recidivism rate makes communities fearful to allow parolees into their neighborhoods. Because of the State's failure to coordinate prison release and parolee services with local governments, some cities are now passing or considering their own piece-meal, counter-productive, and possibly unconstitutional legislation restricting parolee houses.

PART II: REDLANDS CASE STUDY

7. Two Proposals, Two Paths

On September 21, 2005, the city of Redlands passed a 45 day ban on new group homes for parolees. The moratorium forbids housing two or more unrelated parolees in a home not licensed by the state. The city is simultaneously considering two separate proposals for a long term solution to the problem of parolee housing. The first proposal is to adopt an ordinance like Fontana's, requiring city licenses for parolee homes that are not licensed by the state. The second proposal is for Redlands to work with the state

[44] Leroy Standish, *High Desert Home To 2,384 Parolees*, Victorville Daily Press, Nov. 6, 2005.

government to construct its own city-operated parolee housing facility, to be run by the Redlands police department.

These two proposals are notable because they represent two very different possible approaches that local communities can take as they consider how to deal with the issue of parolee housing. The first Redlands proposal, modeled on the Fontana ordinance, would impose fees on both established and new parolee homes not licensed by the state, and require them to obtain conditional use permits from the city of Redlands. The ordinance seems implicitly designed to effectively prohibit such non-licensed parolee group homes within the city. In Fontana, no new parolee group homes not licensed by the state have been established since the ordinance was passed. According to Casandra Harameio, who runs a facility for recovering addicts in Redlands, "I barely make my operating costs. This ordinance would shut me down."[45]

Brandy Pitt said of this proposed ordinance, "Even though you say you aren't shutting down the sober living homes, really you are, because they can't afford to pay for the permits."[46] This may be a popular political move in the short-run, but it does little to address the long-term need to design supportive, secure, and efficient parolee housing that reduces recidivism, abscondance, and threats to public safety.

The second Redlands proposal, by contrast, offers the possibility of a revitalized state-local partnership to tackle the issue of parolee housing. When asked about the problems that California faces in housing its parolees, Jeanne Woodford, the Undersecretary of California Department of Corrections and Rehabilitation, said that

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[45] Oral communication by Casandra Harameio, Redlands City Council Meeting; September 20, 2005.
[46] Supra, note 41.

"reaching out to communities is the best way to make re-entry programming more effective and to reduce recidivism."[47]

8. An Overview of Redlands

An analysis of Redlands, California suggests why two such distinct proposals for parolee housing might both be under consideration there. Redlands is one of the communities in the Inland Empire of San Bernadino County that have been considering or adopting severe restrictions on parolee housing, but Redlands is also in some ways distinct from its neighbors in ways that might help explain why it is also considering a progressive solution in the proposed city-run parolee housing facility.

Redlands, California is a city of about 70,000 people, located 70 miles east of Los Angeles in San Bernadino County.[48] One of the oldest cities of the so-called "Inland Empire" region east of Los Angeles, it was established in the late 19th century as a packing center and distribution hub for that region's then-growing citrus industry.[49] In 2003, there were about 24,000 households in Redlands. The city is about 74% white; 4% African American or black; 5% Asian; and 24% Hispanic or Latino, including Hispanics of any race.[50] Statewide, Californians are about 60% white, 7% black, 11% Asian, and

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[47] Personal communication, November 9, 2005.
[48] http://quickfacts.census.gov/qfd/states/06/0659962.html
[49] ENCYCLOPEDIA BRITANNICA, *Redlands* (DVD ed. 2003)
[50] TRAVIS, *supra*, note 1, at 224.
[50] Fontana Ordinance No. 1385, adopted Nov. 19, 2002.
[50] Stacia Glenn, *Yucaipa Eyes Parolees*, San Bernardino County Sun, Aug 14 2005.
[50] Id.
[50] Id.
[50] LITTLE HOOVER, *supra*, note 2, at 57.
[50] Id.
[50] Id.

32% Hispanic. About 10.5% of Redlands residents were below the poverty line in 1999, compared to 14.2% statewide. In 2000, the median value of an owner-occupied housing unit in Redlands was $159,300, compared to $211,500 for the state as a whole. Redlands is thus less racially diverse, less poor, and cheaper to own a home in than California on average.[51]

In the Inland Empire around Redlands, development and population growth in the last several decades have caused significant demographic shifts.[52] The region between Los Angeles and the old Inland Empire cities like Redlands and Riverside was a comparatively open and rural boundary between the regions until the 1970s. Since then, the region has been built up into new communities– with citrus groves and horse pastures becoming strip malls and chain restaurants – until no clear boundary remains.[53]

Because of high housing prices in established cities like Los Angeles and San Diego, middle- and working- class people have migrated from those areas to the Inland empire. San Bernadino's population grew 20.5% between 1990 and 2000, compared to 13.6% growth in California as a whole.[54] Between 1990 and 2000, the Inland Empire's white population increased only 7%, while the number of blacks grew 61%, Asians 62%,

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[50] Personal email communication from Dan McHugh, city attorney of Redlands. Also, see Redlands City Council Agenda Item No. J-1, September 20, 2005, Request For Council Action, 2-3.
[50] http://quickfacts.census.gov/qfd/states/06/0659962.html
[51] Id.
[52] David Holthouse, *Southern Poverty Law Center Intelligence Report*, Nov 3, 2005. http://www.alternet.org/module/printversion/27461
[53] Id.
[54] http://quickfacts.census.gov/qfd/states/06/06071.html

and Latinos 82%.[55] Today, the Inland Empire has more than 50 small and mid-sized cities with a combined population of about 3 million.[56]

The city of Redlands itself has not experienced the same growth as the area around it. Between 1990 and 2000, the Redlands population grew a mere 0.7%.[57] Nor has Redlands recently experienced an increasing crime rate. From 1998 to 2004, violent crime in Redlands decreased 32%, according to FBI statistics.[58] In 2004, there were 379 reported violent crimes in Redlands, according to FBI statistics.[59] Redlands currently has 171 active parolees, 148 of whom were Redlands residents or had family ties to the city of Redlands prior to their incarceration.[60] Very few of these parolees are sex offenders or high risk offenders.[61]

Redlands is thus a relatively low-crime community with a stable population. There are currently no small parolee group homes in Redlands that are not licensed by the state. However, neighbors of some existing state-licensed facilities, including a home for troubled juveniles, voiced concerns to the local government about noise, visitors coming to the facilities at late hours, inadequate control over the residents, and diminished property values around the facilities. Although it could do nothing to affect state-licensed facilities, the Redlands City Council nevertheless took up the issue.

One resident, Pastor Felix Jones, commented during the September 20, 2005 city council meeting considering the two proposals, "I want to caution us against over-reacting. We

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[55] Holthouse, *supra*, note 44.
[56] Id.
[57] http://quickfacts.census.gov/qfd/states/06/0659962.html
[58] http://www.fbi.gov/ucr/cius_04/
[59] http://www.fbi.gov/ucr/cius_04/
[60] Oral communication by Jeffrey Gazer, California Department of Corrections, Parole Division, San Bernadino Unit; Redlands City Council Meeting; September 20, 2005.
[61] Id.

shouldn't rush forward on this. There is no emergency here in Redlands."[62] The city council seemed ready to heed this advice.

9. The Debate In Redlands

The debate over parolee housing in Redlands was kindled by an existing state-licensed facility for troubled juveniles in the city at the intersection of Clover and University.[63] Neighbors of the home voiced concerns to the city officials about noise, visitors coming to the facilities at late hours, inadequate control over the residents, and diminished property values around the facilities.[64] Many were concerned that the state facilities might receive a license to operate housing one type of resident – for example, trouble juveniles or mentally ill senior citizens – and then "flip" the license to operate housing another, more dangerous type of resident – for example, high risk violent sex offenders.[65] Even though the Redlands City Council could do nothing to regulate a state-licensed facility like the one at Clover and University, and even though the facility at Clover and University subsequently closed, the Council nevertheless took up the issue of parolee housing, with the aim to assert as much local control as possible over non-state licensed facilities.[66]

On September 21, 2005, the Redlands City Council debated for three hours about how it could extend local control over small parolee group housing not licensed by the State of California. The first proposal was an ordinance proposed by Mayor Susan Peppler that would require nonlicensed group homes, including sober living homes, to get

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[62] Oral communication by Pastor Felix Jones; Redlands City Council Meeting; September 20, 2005.
[63] Redlands City Council Meeting, September 20, 2005.
[64] Id.
[65] Id.
[66] Id.

city conditional-use permits. These permits would cost an existing facility $1,900, and would cost a new facility $4,400, according to Peppler's proposal.

In order to receive a city license, a small group home would be subject to approval by the city based on an evaluation of the home's possible threat to the public health, safety, and welfare. As noted, it seems likely that, as in Fontana, which adopted a similar ordinance, the effect of this proposal would be to effectively prevent the establishment and operation of any non-state-licensed small group homes in Redlands. Many of the residents who spoke in favor of the proposal did not try to hide the fact that this was their goal:

"Do I want these people living next to me?" asked one resident, Cliff Cunningham, who spoke at the September 20 meeting and was representative of the residents who spoke in favor of the ordinance. "No, I don't."[67]

"Parolees chose their way of life," said another resident, Lois Luke. "I have no sympathy for them."[68]

However, most of the residents who spoke at the meeting opposed the proposed ordinance. Some were people who had been parolees, and who had previously lived in small "sober-living" group homes in Redlands. One of these speakers, Philip Rademacher, is now the cameraman who tapes the Redlands City Council meetings. "We're all parolees, but we're not degenerates," he said to the Council, urging them not to place onerous burdens on the establishment of small parolee homes. "I'm so blessed today that I got these chances in life" to live in such a home, which allowed him to overcome his addiction.

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[67] Id.
[68] Id.

Monica Will, a current parolee and resident at a sober living home since May, said, "The sober living home has real structure. It has helped me build a foundation, and make my goals to help my family and myself. I know I've made mistakes, but I am just trying to get my life back together. It is very structured, so we are accountable for what we do."[69]

Alfred Martinez, chief deputy administrator for the Parole Division in Redlands, said at the meeting, "Our concern is that sometimes cities are moving to ban parolees. Regardless of where we place them, they are going to be in our communities."[70]

An alternative proposal for parolee housing was also put forward at the City Council meeting by Redlands Police Chief Jim Buermann. Rather than merely license private, non-state-licensed small group housing for parolees, he suggested that the city actually construct and operate a single, large local parolee re-entry facility which would serve as transitional housing for many parolees. This proposal suggested that the parolee housing be operated by the police department.

Under Chief Buermann's proposal, parolees would stay at the re-entry facility for the first three months of their release. This would give the parolees positive structure as they adjusted to life outside prison, found employment, participated in programs such as drug rehabilitation or job training, and re-connected with their families and communities. It would also give the police an opportunity to get to know the parolees. The city of Redlands would retain control of the facility, and would either operate it directly or would supervise any privately contracted staff. Only parolees with prior ties to Redlands

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[69] Id.
[70] Id.

would be permitted to enter the Redlands facility, so that it would not become a "dumping ground" for parolees from all over the region.

Chief Buermann stated at the City Council meeting on September 20, "From my perspective, these parolees are at a fork in the road. We are either going to facilitate their road to rehabilitation, or their road back to prison."[71]

On October 4, Chief Buermann reported back to the Redlands City Council that shortly after the September 20 City Council meeting, he was contacted by California Cabinet Secretary Roderick Hickman, who was appointed the Secretary of the California Department of Corrections and Rehabilitation by Governor Schwarzenegger in July, 2005, and who oversees the entire California correctional system, including parole. Buermann reported that Hickman expressed significant interest in Redlands becoming a model for California cities as to how to safely manage inmates returning to their communities. Hickman pledged full support of the state department in helping Redlands develop a police-managed reentry facility.[72] Hickman agreed that under this proposal, the re-entry facility would be paid for by the state, but managed locally by the Redlands Police Department.

Mayor Peppler emphatically said that she still favored her original proposal and was opposed to Chief Buermann's proposal. She said Chief Buermann's proposal was "dangerous" and "irresponsible." "There is a reason that no communities will accept these re-entry facilities," she said.[73] However, she also professed that her own proposal was not designed to ban all parolee housing, only housing for high risk parolees and sex

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[71] Id.
[72] Redlands City Council Meeting, October 4, 2005.
[73] Id.

offenders. She suggested that her proposed ordinance would not prohibit sober living facilities, which she claimed to support for nonviolent offenders with substance abuse problems.

Chief Buermann noted that parolees would be returning to Redlands anyway. "Any cop, any parole officer will tell you, homeless parolees are a danger to the community," he said.[74] The other council members expressed a range of tentative opinions about the Buermann proposal, from tentative support to a desire for more information before making a final decision on which proposal to favor. The City Council ultimately voted to extend the temporary moratorium on new parolee housing in Redlands while it conducted further research.[75]

II. Legal and Constitutional Issues Around The Redlands Licensing Proposal

The proposed ordinance that requires small group parolee housing to obtain conditional use permits not only is questionable public policy, it presents several legal and constitutional issues. Although the Fontana ordinance on which it is based has not been challenged in court to date, these issues could present potential bases for court challenges against these types of ordinances in the future.

There are three main questions that may potentially form a legal basis for challenging or attacking the legality of the Redlands ordinance These questions are: (1) do the city's delegated land-use powers and zoning enabling laws permit it to regulate housing arrangements for a certain designated class of persons, namely parolees, or to regulate the private alcohol consumption by this class of persons in such living

[74] Id.
[75] Id.

arrangements under the auspices of regulating parolee sober living arrangements?; (2) does state preemption of alcohol regulation prohibit the city from attempting to regulate parolee sober living arrangements by regulating private alcohol consumption or to enforce a city-mandated prohibition on private alcohol consumption by the parolee-residents of these homes?; (3) do federal and state antidiscrimination and fair housing laws prohibit the city from regulating parolee or sober living housing arrangements?

The city of Fontana's similar ordinance regulating parolee homes in residential family zones using the conditional use permit has been in effect since November 2002 with no apparent problems or legal challenges against it. This may indicate that the ordinance is politically or even possibly legally viable.

Polk County, Iowa has also proposed a similarly structured ordinance regulating the areas in which convicted sex offenders may reside within a residential zone. The ordinance under consideration in Redlands mirrors one recently implemented in Des Moines that would restrict convicted sex offenders from residing within 2,000 feet of certain child-oriented facilities including public parks, public libraries, public swimming pools, and multi-use recreational trails, in addition to the current residency restrictions for sex offenders around schools and day care centers mandated by existing Iowa state law.

Following this example, it is reasonable to think that if a city may restrict residency for a certain class of ex-convicts, namely sex offenders, without issue, then a city ordinance restricting residency for a similar class of citizens—parolees—for similar public safety concerns might withstand legal scrutiny as well.

The strongest avenue for challenging the proposed Ordinance might be a claim that the city's delegated land-use power from the state or its zoning enabling laws do not

include the authority from the state to regulate parolee or sober living housing arrangements under the auspices of local land-use regulation powers. This is an argument that would be made by citing the pertinent laws and state-delegated land-use authority in Redlands.

A second possible attack on the ordinance would be a claim that the city does not have legal authority to regulate parolees using conditional use permits under occupancy limitation laws. The claim would be specifically that the city's proposed residency restrictions on certain classes of people – in this case, parolees – would not count as a legitimate "land-use" such that it would fall under the city's delegated authority to regulate land-use.

This second possible attack on the ordinance draws from two related cases that deal with the topic of a city's ability to regulate based on occupancy limitations. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) involved a city ordinance that restricted land use to single-family dwellings, where the word "family" was defined as one or more related persons or a number of persons not exceeding two that were unrelated. The U.S. Supreme Court upheld the constitutionality of this ordinance since the ordinance did not involve a fundamental right guaranteed by the Constitution and did not involve a procedural disparity inflicted on some persons, but not others.

However, in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), the Supreme Court found that a city's housing ordinance which attempted to regulate which members of an extended family network could permissibly live together under the zoning definition of "family" was unconstitutional because it bore no rational relationship to any permissible state objective and violated the Due Process Clause of the Fourteenth

Amendment by infringing on the sanctity of family autonomy. Unlike the Belle Terre ordinance, this ordinance defined "family" in such a way that a second grandchild was excluded from living in the dwelling. The Court distinguished this case from *Belle Terre* by saying that the Belle Terre ordinance drew the line between related and unrelated individuals, while the East Cleveland ordinance distinguished between degrees of related individuals. The Court said here that cutting off the definition of "family" to include only the nuclear family was unfounded, since the security and support benefits characteristic of families were traditionally provided by the extended family as well.

However, the Court's loosening of the definition of "family" past the nuclear family does not seem like it would extend to a group of unrelated persons whose sole common characteristic is that they are on parole from a federal or state prison, and it would be unlikely that six or fewer parolees living in a common dwelling would qualify as a "family" for legal purposes. In fact, in *Belle Terre*, the Court explicitly authorized it as within legislature's purview to define family on the basis of related versus unrelated persons. This indicates that this second avenue of attack on the ordinance is unlikely to succeed.

A third possible avenue for attacking the ordinance would be to make a claim that ordinance violates fair housing or equal protection laws. A potential fair housing or equal protection claim may arise if, as a result of the proposed ordinance, most or all parolee homes were relegated to poorer, more minority-influenced areas of the city, and if most parolees who were relegated to the minority neighborhoods were themselves minorities. In this case, the ordinance might have a disparate impact effect of enforcing racial

segregation in housing by sending the minority parolees to existing minority neighborhoods and keeping them out of predominantly white neighborhoods.

However, because the ordinance has not yet been adopted, it is unclear what specific effect it would have in terms of racial demographics in Redlands. There is also the possibility that homes of six or fewer occupants fall under the federal housing law minimum occupancy limit for federal regulation, such that federal housing law would not even apply to them. This means that this third possible avenue for attack on the proposed ordinance is unlikely to succeed.

If the proposed ordinance were amended to regulate sober living homes as separate from parolee homes, so as to enforce sobriety in sober living homes by prohibiting private alcohol consumption by the occupants of the homes, then the ordinance might be vulnerable to a preemption challenge that the state's regulation of alcohol effectively prohibits the city from attempting to regulate it. Under state law, the city may not be permitted to prohibit certain classes of people or certain areas of the city from privately consuming alcohol. Generally, cities are not permitted, nor have ever attempted, to restrict private consumption of alcohol for certain classes of people or in certain areas within its borders. However, if the aim of the Ordinance would simply be to regulate those parolee homes that self-identify as "sober living arrangements" without any city-mandated adherence to such sober living principles, the preemption problem would disappear.

The ordinance is not likely vulnerable to attack on grounds that it violates disability law, or that it discriminates against parolees under the equal protection clause of the Constitution. Drug and alcohol addiction are explicitly *not* categorized as

disabilities for the purposes of federal antidiscrimination, disabilities, and fair housing law, so drawing a distinction around sober living parolee homes will most likely not implicate these protections. For purposes of equal protection law, parolees are not a suspect class, so that an ordinance regulating housing on the basis of parolee status would be subject only to a low level rational basis scrutiny by the courts. The proposed ordinance would likely pass rational basis scrutiny if challenged.

In summary, it therefore seems probable that the licensing ordinance, if passed by the city, would go unchallenged and could legally withstand any challenge brought against it. Nevertheless, there is a broad gap between what policies are legally and constitutionally permissible and what policies are in the best public interest. The proposed licensing ordinance would make it harder for the police to track and control parolees, and would make it harder to provide parolees with safe, secure, and efficient housing that they need.

PART III: CONCLUSION

The city of Redlands has the opportunity to be a model of providing supportive, secure, and efficient housing for recently released parolees by choosing to work with the state government to build and operate a large re-entry facility for Redlands parolees under the control of the Redlands police department. This facility would be expressly for parolees who are already going to be returning to the city of Redlands anyway, but it would provide the structure necessary to give the parolees the best possible chance to rehabilitate and reintegrate with the community successfully, and to give the community the security and control necessary to maintain the safety of Redlands residents. The

proposed Redlands ordinance to license and restrict parolee housing, in contrast, would only complicate and aggravate these challenges.

Research has shown that prisoners should ideally make the transition from prison to the community in a gradual, closely supervised process.[76] One example of a successful program is the Illinois Department of Correction's Chicago Day Reporting Center (DRC). The program is for high-risk parolees on the Southside of Chicago. The DRC program participants normally stay in the program for about six months, during which time they gradually progress through three phases, each with more relaxed restrictions on curfew, drug testing, and electronic monitoring. The inmates do not live at the facility, but report to it every day. They participate in many programs such as anger management, family reintegration, employment training, cognitive skills, GED and education courses, job development, and substance abuse treatment and education. Employees must be employed to get out of phase 3 and graduate from the program.

A recent evaluation of the program found that rearrest and reincarceration rates for the participants were significantly lower than those of a matched comparison group, such that the DRC participants were returned to prison at about half the rate of the comparison group at the end of year one and at the end of year three after release. The evaluation estimated that, even accounting for the cost of the program of about $6,600 per participant, the DRC program saved about $3.6 million over 3 years by lowering the reincarceration rate. The program thus was a success both for the participants and for society.

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[76] PETERSILIA, *supra*, note 16, at 98.

The choice that Redlands makes between the two proposals that it is considering could prove to be influential to the other communities that are considering similar ordinances. If Redlands can develop a model program of parolee housing, it could be a significant positive turning point in the reform of California's parole system.