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Location, Location, Mis-Location: How Local Land Use Restrictions Are Dulling Halfway Housing's Criminal Rehabilitation Potential

Matthew J. McGowan*

FORMER UNITED STATES ATTORNEY GENERAL ROBERT F. KENNEDY LED THE FIRST NATIONWIDE CRUSADE FOR PRE-RELEASE COMMUNITY REHABILITATION CENTERS that sparked an on-again-off-again American love affair with the unique, though not revolutionary, corrections model.¹ In 1961, the ill-fated United States Attorney General and First Brother could not have seemed more optimistic about the potential for these, as he formally dubbed them, “pre-release guidance centers” to become a central part of a modern corrections landscape.² Kennedy proclaimed in a legal journal that the centers were “no longer an experiment” and instead now a proven method “to redirect young lives.”³

Now commonly called “community correctional centers” or “residential rehabilitation centers,” halfway houses are facilities run by local, state, and federal agencies, private subcontractors using government funding, or sometimes nonprofits funded solely through charitable contributions. They exist in one form or another in most states and have played home to thousands of convicted criminals—either serving alternative sentences or serving the last days of traditional prison stints—over the past half-century. Their popularity and centrality to American justice has waxed and waned in the decades since Kennedy’s prediction, but, regardless of their prevalence at any one point in time, their span of use has afforded troves of data.

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1. See generally Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299 (2013) (discussing the fluctuations in popularity and use of halfway houses, as well as Kennedy’s role in supporting the institutions).

2. See Robert F. Kennedy, *Halfway Houses Pay Off*, 10 CRIME & DELINQ. 1 (1964).

3. *Id.* at 7.

Today, one might say that the jury is in: halfway houses do not definitively help or hurt recidivism rates.⁴ In other words, they are a wash from the standpoint of preparing their residents for a second chance in society. Fifty years of data about Kennedy's exalted rehabilitation model suggest that he was, to put it bluntly, wrong by about half. He was correct about the potential of halfway houses, but he was incorrect about their effectiveness as they would take shape in the United States.⁵

How could this be? How could a model that instilled so much hope rhetorically and theoretically have failed to live up to its own potential? This Article offers one possible explanation best summarized by the age-old real estate adage: "location, location, location." And, if one must blame a culprit, he or she might as well point the finger at another age-old real estate concept: "Not in My Back Yard," or "NIMBY," the ever-present influence of nearby landowners opposing any institution or facility that might depress property values. The problem in some respects boils down to neglect of the full complexity of criminal rehabilitation, which is just as much a function of place as it is of time. Yet, for whatever reason, the vast majority of debate, tinkering, legislation, study, and hand-wringing has focused on time.⁶ Sentence length has all but hijacked the conversation about sentencing.⁷ So little attention has focused on the second dimension, place.⁸

This Article argues that the halfway house model remains a promising and viable means of rehabilitation despite data suggesting that it has failed to affect recidivism rates one way or the other.⁹ The model is sound, but its implementation has failed because placing residential rehabilitation centers in the wrong neighborhoods negates some

4. See FAYE S. TAXEMAN, ET AL., BUREAU OF PRISONS, EXECUTIVE OVERVIEW: WHAT WORKS IN RESIDENTIAL REENTRY CENTERS 3 (Geo. Mason U. 2010).

5. See Kennedy, *supra* note 2; see, e.g., NICOLETTE BELL, ET AL., PA. DEP'T OF CORR., 2013 RECIDIVISM REPORT 27 (2013).

6. Lawrence W. Sherman, *Hot Spots of Crime and Criminal Careers of Places*, in CRIME AND PLACE 35, 38 (John E. Eck & David Weisburd, eds., 1995); see also Steven Arrigg Koh, *Geography and Justice: Why Prison Location Matters in U.S. and International Theories of Criminal Punishment*, 46 VAND. J. TRANSNAT'L L. 1267, 1269 (2013) ("[C]ommentators have failed to analyze how prison location advances the broader goals of criminal justice—deterrence, retribution, incapacitation, and rehabilitation—as well as emerging theories of victim-related 'restorative justice' and 'transitional justice.'").

7. Koh, *supra* note 6, at 1269.

8. *Id.*

9. DORIS LAYTON MACKENZIE, WHAT WORKS IN CORRECTIONS 185 (2006) (noting that, "[o]verall, there is insufficient evidence to conclude that community supervision . . . is effective in reducing recidivism").

benefits they might otherwise bestow on the criminal reintegration process. The proclivity for reoffending is at least to some extent a function of association, poverty, cultural influence, employment, and, yes, time.¹⁰ But these halfway houses all tend to place these vulnerable former convicts in precisely the places where other offenders, crime-permissive cultures, and unemployment surround them.¹¹ Unsurprisingly, all the time in the world cannot overcome these environmental predictors of crime or, in this context, predictors of reoffending.

The answer lies in the delicate balance between local land use laws, such as zoning or local permit approval processes, and the government's prerogative to carry out its criminal justice policies by placing these halfway houses in the right neighborhoods where they are not islands of the straight-and-narrow awash in a sea of shady actors, poverty, drugs, police on high alert, and limited employment prospects.¹²

Currently, the high courts of many states have held that state-level entities, such as corrections departments, must defer to local zoning ordinances when viable location alternatives exist.¹³ These courts further hold that eminent domain power alone does not give these state-level entities the presumption of exemption from local land use laws, absent some specific, statutory exemption from local zoning laws.¹⁴ This means that state-level entities are beholden to local land use controls that force them to tightly narrow their search for appropriate real estate.¹⁵ This effectively limits the ability of these state entities to remove the community release centers from high-crime areas.

Part I of this Article begins with a brief historical explanation of halfway houses as a model of criminal rehabilitation. Part II addresses why recidivism rates provide the most appropriate metric gauging

10. See, e.g., E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U.L. REV. 519, 577 (2012).

11. See *infra* Part V.

12. Issues arising due to the legal land use interplay between state and local interests receives much more discussion *infra* Part V, but see Laurie Reynolds, *The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing*, 71 MINN. L. REV. 611, 612 (1987), for a general primer on the topic.

13. Reynolds, *supra* note 12, at 613.

14. See discussion *infra* Part VI (noting a similar issues arises when it comes to homes for the mentally challenged; see, e.g., Marcia K. Lippincott, "A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons, 31 STAN. L. REV. 767, 769 (1979).

15. For one examination of the thorny issues arising in co-legislative disputes, see Jennifer H. Malitsch, *Defining Pennsylvania's Preemption Standards in Light of a Local Municipality's Efforts to Colegislative: An Analysis of Holt's Cigar Co. v. City of Phila.*, 19 WIDENER L.J. 689, 692 (2010).

halfway houses' success and how they apparently have failed to improve recidivism rates. Part III then delves into the body of scholarship that explains how an individual's likelihood of landing back behind bars is to some extent demonstrably tied to their location, meaning their surrounding cultural, economic, and criminogenic environment. Part IV discusses the sparse data on the sorts of neighborhoods where halfway houses ultimately end up and how local opposition typically relegates these facilities to disadvantaged neighborhoods. Finally, Part V wraps up the Article by calling on lawmakers to take steps to give corrections agencies the zoning exemptions they need to put halfway houses in neighborhoods more conducive to criminal rehabilitation—with or without, though optimally *with*, local blessings.

I. Halfway Houses: A Brief History

Halfway houses come in a variety of forms, but they can generally be put into three categories: (1) centers focused on mental health recovery; (2) centers focused on drug and alcohol addiction; and (3) facilities providing temporary shelter to criminals learning to reengage with society.¹⁶ This Article only addresses halfway houses for the third category, criminal rehabilitation and reentry.

Halfway houses gradually “reintegrate offenders into society by giving them some freedoms and responsibilities, while still monitoring their activities.”¹⁷ That might mean either reintegration in the form of pre-release residence, usually to complete a sentence, or sentences that send prisoners directly to a community program to serve the duration there.¹⁸ These facilities also sometimes house those who were initially released on parole, but committed a minor violation that does not quite rise to the level of requiring full-blown re-incarceration.¹⁹ In all situations, the “prisoner” usually retains some level of autonomy and freedom, whether to structure their schedule or to out-and-out roam the community during approved hours.²⁰ While mere supervision

16. S.E. Constanza et al., *Are Minority Areas Disproportionately Targeted for Halfway House Placement?*, 11 J. OF ETHNICITY IN CRIM. JUST. 256, 259 (2013).

17. Lisa Henderson, *Sex Offenders: You Are Now Free to Move About the Country. An Analysis of Doe v. Miller's Effects on Sex Offender Residential Restrictions*, 73 UMKC L. REV. 797, 828 (2005).

18. See MARY SHILTON, CTR. FOR CMTY. CORR., INCREASING PUBLIC SAFETY THROUGH HALFWAY HOUSES 4 (2003), <http://centerforcommunitycorrections.org/wp-content/3-halfway-houses-pub-safety.pdf>.

19. *Id.*

20. See Henderson, *supra* note 17, at 828.

centers—i.e., central facilities where parolees must routinely report to and meet with supervising law enforcement personnel—or substance-abuse treatment centers that are often court ordered or otherwise conditional on release do not fall within the confines of this Article, the halfway houses addressed here do sometimes incorporate substance-abuse or mental-health programs.

Little is certain about the true origins of penal halfway houses, but many agree that Christian monks created their distant cousin in England during the first century by providing shelters for inmates, whose release the monks secured from the Crown.²¹ Over the following centuries, religious groups administered similar facilities that focused primarily on providing food and shelter for socially maligned former convicts.²²

Perhaps the most recognizable forerunner to halfway houses emerged in Sir Walter Crofton's Irish System.²³ A controversial response to swollen inmate populations fed by draconian petty-offense sentencing, Crofton's idea was to alleviate inefficient public-works prisons filled with inmates with few skills, dim intellects, and lackluster work ethic.²⁴ The system bucked the then-universal paradigm, known as the Pennsylvania Model, that restitution and rehabilitation is best served through rigidity and isolation.²⁵ At the time, prevailing notions of corrections insisted that isolation, not social reintegration, reformed criminals.²⁶ The reasoning was that prisoner interaction bred a sort of "contamination" between inmates, "as though they would spread their criminality from one to another like a disease."²⁷ But in Crofton's reformed system, although prisoners spent their first nine months in solitary confinement, the so-called intermediate stages slowly ramped up re-socialization by placing them in groups, often within public-works confinement facilities where they would receive rewards for good behavior.²⁸ Corrections authorities designed a merit-points system to resemble the outside's emphasis on the carrot, as opposed to the stick, and to encourage proper social function.²⁹

21. ROBERT D. HANSER, *COMMUNITY CORRECTIONS* 6-7 (2d ed. 2014).

22. MCCARTHY ET AL., *COMMUNITY-BASED CORRECTIONS* 244-45 (4th ed. 2001).

23. *Id.*

24. Elizabeth Eileen Dooley, *Sir Walter Crofton and the Irish or Intermediate System of Prison Discipline*, 7 *NEW ENG. J. ON PRISON L.* 72, 76-78 (1981).

25. *Id.*; HANSER, *supra* note 21, at 364.

26. Dooley, *supra* note 24, at 80.

27. *Id.* at 82.

28. *Id.* at 80.

29. *Id.* at 82.

Most historians now agree that, across the Atlantic in the fledgling United States, Massachusetts first concocted an American concept of halfway houses in the early nineteenth century.³⁰ The Massachusetts Prison Commission, borrowing from community reentry models such as Crofton's, proposed a halfway house facility in 1817 as a method of combating alarmingly high recidivism rates.³¹ But the state's lawmakers would not budge, steadfast in their adherence to the Pennsylvania Model.³² For the next century or so only advocacy groups, usually religious ones, called for transitional reentry centers.³³ Some, particularly the Quakers, opened small facilities in cities like New York, Boston, and Philadelphia that welcomed criminals post-release.³⁴ But most community-release advocates ultimately faltered in the face of popular and political uneasiness about convicts behind functionally-unlocked doors.³⁵ By the Great Depression, according to one source, only one halfway home remained open in the United States: a charity-funded facility in Pittsburgh, Pennsylvania.³⁶

The pro-halfway house movement finally reached a sustained momentum in the 1950s when awareness about recidivism rates and ex-convicts' plight trickled through to the general public.³⁷ When Kennedy joined the movement in 1961, from his powerful pulpit atop the Department of Justice, Congress finally listened and opened a trio of juvenile pre-release centers.³⁸

The following decade saw perhaps the most significant growth of halfway house programs. By 1963, 200 young offenders called these three facilities home, and these centers appeared to be succeeding.³⁹ In 1964, the ink barely dry on Kennedy's article, halfway house advocates formed the International Halfway House Association (now the International Community Corrections Association), a key force behind the push for rethinking what it means to rehabilitate criminals.⁴⁰ Then came the Federal Prisoner Rehabilitation Act of 1965, which for the

30. MCCARTHY, *supra* note 22, at 245; HANSER, *supra* note 21, at 364.

31. HANSER, *supra* note 21, at 363.

32. *Id.* at 364.

33. *Id.*; see also JOHN M. MCCARTT & THOMAS J. MANGOGNA, GUIDELINES AND STANDARDS FOR HALFWAY HOUSES AND COMMUNITY TREATMENT CENTERS 2-3 (1976).

34. HANSER, *supra* note 21, at 364.

35. See *id.* at 363-65.

36. *Id.* at 365.

37. *Id.* at 366.

38. *Id.*

39. Cory T. Way, *Innovative Incarceration: Community Corrections in the Federal Bureau of Prisons*, 2 FED. PRISONS J. 21, 23 (1992).

40. Kennedy, *supra* note 2; HASNER, *supra* note 21, at 366.

first time authorized halfway houses for adults, among other things.⁴¹ White House endorsement of the movement in 1967 only further propelled the proliferation of halfway houses across the country.⁴² Thanks to sentencing laws structured around judicial discretion,⁴³ the bench even began sentencing individuals directly to these facilities, particularly for shorter-sentence offenses.⁴⁴ This opened halfway houses to two different types of residents, those who were pre-release and those who were directly sentenced.⁴⁵

America's belief in the effectiveness of rehabilitative corrections models waivered during the 1970s, and by the 1980s the United States' justice mindset veered toward attitudes of retribution—e.g., “tough on crime” and “War on Drugs”—but halfway houses nonetheless remained.⁴⁶ Community reentry programs are, after all, philosophically a subset of parole, and parole is alive and well in America.⁴⁷ From 1980 to today, the number of American parolees under state supervision more than quadrupled.⁴⁸ Considering the cost-per-prisoner savings afforded by community release, perhaps this is the result of simple dollars and cents.⁴⁹ Traditional incarceration cost more than \$28,000 per federal inmate in 2010, 9.4% more than it cost to house an inmate at one of the Bureau of Prison's contracting halfway houses.⁵⁰

In light of fickle public perception, halfway houses have remained notably resilient and appear to be here to stay. On an average day in 1967, about 300 federal offenders lived in halfway houses.⁵¹ That number soared to roughly 2,000 over the following decade.⁵² During

41. Pub. L. No. 89-176, 79 Stat. 674 (codified as amended at 18 U.S.C. § 4082 (2012)).

42. See Way, *supra* note 39, at 23.

43. 18 U.S.C. § 3621 (2012) (granting the Bureau of Prisons the authority to choose for itself where to place prisoners, just so long as it deems the chosen place sufficient for “health and habitability”).

44. See Way, *supra* note 39, at 23.

45. *Id.*

46. Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 501 (2008).

47. See generally Joan Petersilia, *Prisoner Reentry: Public Safety and Reintegration Challenges*, 81 PRISON J. 360 (2001) (discussing the state of the United States parole system, including its shortcomings and possible improvements).

48. LAURA M. MARUSCHAK & ERIKA PARKS, BUREAU OF JUST. STAT., NCJ 239686, PROBATION AND PAROLE IN THE UNITED STATES, 2011, 3 (rev. 2014); Medwed, *supra* note 46, at 502.

49. John Spyros Albanes, *Demystifying Risk Assessment: Giving Prisoners a Second Chance at Individualized Community Confinement Under the Second Chance Act*, 64 ADMIN. L. REV. 937, 943 (2012).

50. *Id.*

51. Way, *supra* note 39, at 23.

52. *Id.*

that time the Federal Bureau of Prisons increasingly contracted with state, local, and private entities to provide the facilities.⁵³ The number of these non-Bureau facilities nationwide went from five in 1967 to 400 by the end of the 1970s.⁵⁴ By 1983, the federal government had altogether ceased directly running halfway houses, leaving the task to contracting entities, states, and local governments.⁵⁵ Approximately 4,000 convicts lived in about 350 federally contracted halfway houses in 1992.⁵⁶ In 2013, according to the Department of Justice, an estimated 30,000 prisoners “passed through” federally funded halfway houses.⁵⁷

II. Halfway Houses: Broken Potential?

Most modern societies grapple with their own criminal justice systems. Certain theories have emerged to justify punishment, each one different from the next.⁵⁸ Five of the more prominent theories are corrective, utilitarian, retributive, a mixed retributive/utilitarian, and, finally, rehabilitative.⁵⁹ The rehabilitative theory is the lens through

53. *Id.*

54. *Id.*

55. *Id.* Much debate continues to swirl around the notion of privately run halfway houses. See, e.g., Kay Whitlock, *Community Corrections: Profiteering, Corruption and Widening the Net*, TRUTHOUT (Nov. 20, 2014), <http://www.truth-out.org/opinion/item/27555>; Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>. Empirical analysts themselves appear rather milquetoast on the cost/benefit balance of privatized corrections. JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUST. ASSISTANCE, NCJ181249, EMERGING U.S. ISSUES ON PRIVATIZED PRISONS, xi (2001). The findings from this report suggest that private prisons operate much the same as public facilities. AUSTIN, *supra* at 59. Private prisons offer only modest cost savings, which are basically a result of moderate reductions in “staffing patterns, fringe benefits, and other labor-related costs.” AUSTIN, *supra*. Although certainly worthy of study, this Article makes no distinction between private-run and government-run halfway houses’ effectiveness.

56. Way, *supra* note 39, at 23.

57. Press Release, U.S. Dep’t of Just., Fed. Halfway Houses to Boost Treatment Serv. for Inmates Prior to Release (March 24, 2014), <http://www.justice.gov/opa/pr/new-step-fight-recidivism-attorney-general-holder-announces-justice-department-require>.

58. Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEG. F. 405, 406-17 (2005), <http://chicagounbound.uchicago.edu/uclf/vol2005/iss1/11>.

59. See *id.* at 409-11. The first, corrective justice, fixates on the restoration of cosmic balance by restoring offended victims. *Id.* at 406. Utilitarian motivations always side with the heavier side in a cost-benefit balance, meaning a punishment is justified only insofar as it is not outweighed by a more severe societal harm resulting from it. *Id.* at 412. Retributivism stands for the age-old eye-for-an-eye principle that society should step in and punish an offender who deserves just desert for harms inflicted on another. *Id.* at 414-15. The retributive/utilitarian blend justifies a socially net-

which halfway houses receive the most appropriate justification.⁶⁰ It gauges criminal punishment's success or failure on whether a sentence restores an individual psychologically to the point where he or she re-enters outside life "a socially functional participant in the moral community."⁶¹ Such a system operates with the aim of "purging [offenders] of their desire to pursue criminal end and substituting motivations of a virtuous sort."⁶²

Halfway houses offer a pristine example of a rehabilitative model in practice by conditioning inmates for release in two ways: first, these facilities "de-prisonize" an inmate by psychologically placating the survival-of-the-fittest instinct incubated by the incarceration culture⁶³; and second, they attempt to teach residents "a skill set that may have never existed or that atrophied while he was incarcerated."⁶⁴ This is consistent with other rehabilitative methods of punishment available within prison confines, such as drug and alcohol detoxification, educational programs, and religious outreach.⁶⁵ In other words, a rehabilitative model's success can and should be gauged, at least to some degree, by how many of its prisoners cycle back into the system post-release.⁶⁶ Of course, halfway houses conceptually satisfy the aims of the other theoretical frameworks, but reentry schemes fall most squarely within the rehabilitative. The same is also true, perhaps to a lesser extent, of halfway house's furthering utilitarian aims.

Like rehabilitationists, utilitarianists might similarly favor halfway houses as tools to take otherwise socially errant individuals out of the society—the societal benefit—without removing them so much that their absence exacerbates an already acute problem of over-incarceration in a community—the countervailing social ill. Although the individual

benefit punishment only if by retributivist logic the offender actually deserves come-uppance. *Id.* at 413-14.

60. For a general discussion about the reemergence of rehabilitation as a central goal of the penal system, see Cullen, *supra* note 1 (explaining that, following a decade of pessimism and abandon about the potential to criminals, the following years saw rehabilitation once become a driving motive in American corrections).

61. Hurd, *supra* note 58, at 409.

62. *Id.* at 409-10.

63. S. David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235, 293 (2011).

64. *Id.*

65. Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 L. & SOC'Y. REV. 33, 42-43 (2011). These all share a common aim of "decreasing criminal behavior [by] . . . intervene [ing] at the human service level." James Bonta et al., *Exploring the Black Box of Community Supervision*, 47 J. OFFENDER REHAB. 248, 251 (2008).

66. Albanes, *supra* note 49 at 946.

deserves punishment and the community benefits from his or her losing the ability to recommit that offense, it suffers a greater harm if the outright removal and relocation perpetuates a community malaise related to the disappearance of so many criminals like him or her. Thus, halfway houses provide the benefit without any of the drawback. The offender's likelihood of recommitting that offense is minimized (through removal to a halfway house) without completely cutting him or her off from the neighborhood's social fabric (visits, unrestricted phone calls, the ability to earn income that might filter back to the area).⁶⁷ This utilitarian upside of halfway houses, however, diminishes when placed within poorer communities because these facilities might tend to exacerbate criminal influence within already crime-prone neighborhoods.⁶⁸

Regardless of the lens through which they are looking, many scholars argue a corrections model such as the halfway house prevails and fails on its recidivism rates.⁶⁹ Some, however, regard recidivism as a poor indicator of correctional effectiveness.⁷⁰ Those wary of recidivism as an accurate metric tend to argue that it fails to isolate the system's overall efficacy in the face of so many outside influences, such as "family, neighborhood, job market, [and] availability of treatment services."⁷¹ Setting aside these quibbles for now, one can assume that determining a program's effectiveness demands, first and foremost, an account of its impacts on recidivism; and by that telling metric halfway houses have failed, at least in the eyes of many scholars and experts.⁷² Even if "failed" is a bit strong, they nonetheless are ineffective at yielding results one way or another.⁷³ For example, a 2008 meta-study compiling data from fifteen other studies conducted

67. MCCARTHY, *supra* note 22, at 244.

68. See Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What is Promising*, 49 CRIME & DELINQ. 360, 367 (2003) ("[R]eturning a large number of parolees released from prison back to the community destabilizes the communities' ability to exert informal control over its members, as there is little opportunity for integration, often resulting in increased isolation, anonymity, and, ultimately, higher crime").

69. Ronald P. Corbett, Jr., *When Community Corrections Means Business: Introducing "Reinventing" Themes to Probation and Parole*, 60 FED. PROB. 36, 39 (1996).

70. *Id.*

71. *Id.*

72. See, e.g., Lauren Sukin, *When Jail is the Better Option: The Failure of Halfway Houses*, THE CENTURY FOUND. (June 23, 2015), http://www.tcf.org/work/workers_economic_inequality/detail/when-jail-is-the-better-option-the-failure-of-halfway-houses/ ("The recidivism rate for Community Education Centers (CEC), the company that runs 30 percent of all halfway houses nationwide, is as high as 67 percent.").

73. Bonta, *supra* note 65, at 251.

between 1980 and 2006 concluded that “on the whole, community supervision does not appear to work very well.”⁷⁴

A Pennsylvania Department of Corrections study stole headlines in 2013 when it reported that—much to the Commonwealth’s chagrin—ex-convicts released to a halfway house between 2005 and 2006 were actually more likely to land back in jail within the first year than those released directly back to the streets.⁷⁵ And not just by a little: one-year reincarceration rates for release-to-street parolees was 26.3% that year, compared to 36% for those released to a halfway house.⁷⁶ Notably, several years later, in 2010 and 2011, release-to-street reincarceration rates remained lower than those of release-to-halfway-housing numbers, respectively at 22.5% and 33.5%.⁷⁷

Jarring numbers like these raise doubts and hint at broken potential. If the worst inference from this data is true, utilitarians lose because the offender rinses back through the community and repeats, all while contributing to the area’s statistical criminality without exerting any positive influence there through his or her reform. And at worst, rehabilitationists similarly lose because rehabilitated criminals by definition do not return to jail. At best, halfway houses make little or nominal impact on psychological reform and social utility of reintegrated offenders. This begs the question of how something so carefully tailored for success could fall so flat and how, given the tremendous scientific gains within the area of psychology in recent decades, halfway houses could continue to show such paltry impact on recidivism rates. The answer, it seems, might partially lie not in what legal science knows but instead in what it only recently began to examine: physical location. As one scholar so colorfully inquired about the absence of spatial considerations in criminal sociology, “why aren’t we thinking more about wheredunit, rather than just whodunit?”⁷⁸

III. The Company You Keep: Place as Recidivism Predictor

This Section examines the question of whether the neighborhoods—the micro-environments in which these centers sprout up—could be counteracting much of the rehabilitative benefits and explain why

74. *Id.* at 251.

75. BELL, *supra* note 5, at 30.

76. *Id.* at 28.

77. *Id.*

78. Sherman, *supra* note 6, at 37.

they have failed to live up to their potential, at least the recidivism metric. The science insists that halfway houses should be driving down recidivism rates, but the data simply does not support such a conclusion.⁷⁹ While many unaccounted factors likely are at play in this discord between the theory and data, this Section asserts that location is one of the, if not the biggest, variables that should be accounted for and remedied before halfway houses can live up to their potential.⁸⁰

The criminological term most often employed to describe a successful rehabilitation is “desistance,” the idea being that offenders once inclined to wrong society have embraced a mindset that they will forever desist from such behavior.⁸¹ No single factor can determine an offender’s likelihood of recidivism or desistance because inquiry into the murky and tangled realm of criminal motivation does not lend itself well to easy, sweeping conclusions.⁸² For the most part the exact mechanics at interplay in the dynamics of recidivism continue to elude modern criminologists, their attempts to pinpoint exact predictors of recidivism often ending in frustration.⁸³ But research has made inroads by identifying some less-than-concrete factors that affect an offender’s risk level, such as the releasee’s location.⁸⁴ Indeed, a place-centric

79. Sukin, *supra* note 72 (“As a criminal justice tool, halfway houses have often been touted for reducing recidivism rates, but that claim is suspect.”).

80. Interestingly, very little legal scholarship has addressed the function of location in corrections systems. For one—and, apparently, the *only*—thorough discussion of prison placement, see Koh, *supra* note 6.

81. See John H. Laub and Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME AND JUST. 1 (2001).

82. See Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 789 (2014) (“What do we know for sure about recidivism? Of course, merely trying to state the most basic facts involves stipulating or submitting to certain contestable predicates, addressed in more detail below, about the definitions of recidivism. But we probably can agree on certain things. By broad and loose measures, surely most criminals recidivate, in the sense of committing more than one crime, or even committing crimes after some degree of punishment or control or supervision. One recent study suggests that at least 40 percent of all offenders released from prison in the United States were re-incarcerated for new crimes or violations within three years.”).

83. *Prisoner Release in the District of Columbia: The Role of Halfway Houses and Community Supervision in Prisoner Rehabilitation, Hearing Before the H. Subcomm. on the Dist. of Colum. of the H. Comm. on Gov’t Reform*, 107th Cong. 23 (2001) (statement of Rep. Constance Morella) (“While we know the numbers, we know too little about what works in the sense of keeping ex-prisoners out of jail. There is no hard substantive data to guide local policymakers on how to best cope with ex-inmates in terms of helping them become productive members of society, preventing additional crimes, and protecting the safety of the general public.”).

84. See TODD R. CLEAR, ET AL., PREDICTING CRIME THROUGH INCARCERATION: THE IMPACT OF RATES OF PRISON CYCLING ON RATES OF CRIME IN COMMUNITIES 166 (2014) (“One of the most important contributions of contemporary criminological research is the

theory of rehabilitation is gaining momentum insofar as it relates to the interplay between social contacts—that is, interpersonal relationships—and recidivism rates.⁸⁵

Numerous theories have emerged around this notion that the company one keeps plays as central a role in recidivism risk as the offenders' own identity.⁸⁶ One might say that these more modern thoughts on a proper correctional system run precisely contrary to the mindset taken by those noted above, who oppose recidivism as a metric of a system due to the rich interplay of so many outside influences.⁸⁷ As this Article argues, the system need not ignore these factors as beyond its control but embrace them as both controllable and, if properly taken into account, actually as weapons *against* recidivism. In this vein, this Section attempts to demonstrate that rather than being left to chance, place should become a corrections tool to impact an individual's ability to desist in the year or so immediately following prison release.⁸⁸

Location's important function in predicting recidivism appeals to common sense. In practice, law enforcement officials, like parole officers, seem to understand that one's surroundings can determine how much temptation exposure one will face on the outside.⁸⁹ With place comes association, which in turn implicates temptation, also known as risk.⁹⁰ For this reason, many parole officers and prison counselors urge soon-to-be-released individuals to carefully choose with

empirical demonstration of the recurrent importance of 'place' to understanding the nature of crime. This has meant that our understanding of crime is now heavily guided by context—what the communities are like where crimes occur and how that context facilitates crime (or does not).”).

85. See, e.g., Anna Macklin, *Community Management of Offenders: The Interaction of Social Support and Risk*, FED. PROB. 17 (2013); see also Gerben J. N. Bruinsma, *Urbanization and Urban Crime: Dutch Geographical and Environmental Research*, 35 CRIME & JUST. 453, 455-56 (2007) (“Studies that combine individual properties with structural neighborhood factors in multilevel models show mixed results, sometimes indicating that the impact of neighborhood characteristics on crime is low and sometimes showing that these aggregate properties have significant independent effects on crime.”).

86. HOWARD ABADINSKY, PROBATION AND PAROLE 306 (11th ed. 2011).

87. See Sukin, *supra* note 72.

88. *Id.*

89. See, e.g., D.C. CITIZENS UNITED FOR REHAB. OF ERRANTS, STARTING OUT, STARTING OVER, STAYING OUT, A GUIDE FOR DISTRICT OF COLUMBIA EX-OFFENDERS: HOUSING, FOOD, EMPLOYMENT AND OTHER RESOURCES 41 (4th ed. 2002), <http://www.csosa.gov/reentry/resources/dc-cure.pdf> [hereinafter CURE].

90. See Jason Matejkowski & Michael Ostermann, *Serious Mental Illness, Criminal Risk, Parole Supervision, and Recidivism: Testing of Conditional Effects*, 39 L. & HUM. BEHAV. 75, 78 (2015).

whom they reunite following release.⁹¹ Consider, for example, the following guidance from an information packet given to soon-to-be-released inmates in Washington, D.C.:

Should you go back to your old neighborhood? That depends. If the people in the old neighborhood will try to recruit you to engage in illegal activities, or tempt you to enter activities that brought you to jail in the first place, it would be better to stay away. Why expose yourself to temptation?⁹²

As the Enterprise Foundation's Rada Moss once told a writer with the National Housing Institute: "If someone wants to change their lives after prison, they will have to change how they live, *whom they live with and where they live.*"⁹³

From a more scientific standpoint, some empirical data supports a conclusion that post-incarceration placement plays at least some role in assessing a former convict's likelihood of reoffending.⁹⁴ For instance, one study employed metadata to pinpoint the characteristics that correlate with recidivism.⁹⁵ Two types of predictors were assessed: static and dynamic.⁹⁶ Static factors are things that cannot be changed, such as age, gender, and prior record.⁹⁷ Dynamic factors, however, are those that can be changed and are "used to design effective treatment programs."⁹⁸ Of six dynamic factors included in the study—ranging from substance abuse and social achievement to antisocial personality—"companions" was the most statistically correlative of the factors.⁹⁹ Moreover, another study showed that 35% of individuals returning to prison landed back there due to parole violations.¹⁰⁰ Drug-related violations, such as drug-test failure or

91. See, e.g., Isaac Rothwell & Jeff VanBuren, *Beyond Going Home: From Reentry to Reintegration*, 21 PRO SE 9, 10 (2011), <http://www.communityalternatives.org/pdf/Pro-Se-article.pdf>.

92. CURE, *supra* note 89, at 41.

93. Violet Law, *Life After Lockup*, 139 SHELTERFORCE ONLINE (2005), <http://www.nhi.org/online/issues/139/afterlockup.html> (emphasis added).

94. See Daniel S. Nagin, et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 127 (2009) (surveying several prominent scholars who have concluded that offenders' propensity to reoffend must account for their "placement into neighborhoods where criminal associations were readily available"). *But see* Jens Ludwig & Jeffrey R. Kling, *Is Crime Contagious?*, 50 J.L. & ECON. 491, 513 (2007) ("In principle, less serious types of criminal activity might be more susceptible to endogenous peer effects, as suggested by previous nonexperimental estimates.")

95. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 152 (2009) [hereinafter *WHEN PRISONERS COME HOME*].

96. *Id.*

97. *Id.*

98. *Id.* at 151.

99. *Id.* at 152.

100. *Id.* at 148.

absenteeism from treatment programs, constituted the second highest reason nationwide at almost 17%.¹⁰¹ Arrest or conviction for new offense was 70% of all parole revocations.¹⁰² Notably, though not surprisingly, the study found that 1.2% of recidivists reoffended because they “maintained contact with known offenders.”¹⁰³

In 2011, two researchers distilled the body of research on external influences affecting re-offense rates and, with an eye toward the role of place, identified six general aspects of disadvantaged neighborhoods that promote criminal behavior: (1) informal social control; (2) labor markets; (3) social isolation; (4) distance; (5) criminal opportunity; and (6) formal social control.¹⁰⁴ These factors all interrelate and, in some regards, bleed together when measured for a particular place.

A place’s informal social controls are a factor in likelihood of recidivism because disadvantaged areas pockmarked with low income, disproportionate youth, residential instability, and political disenfranchisement tend to exert less control over their residents, which equates to less behavioral deterrence and to a diminished allure of employment.¹⁰⁵ As one scholar points out, disadvantaged areas suffer from strained social cohesion, and more former inmates released into those areas pushes the neighborhood closer to the “tipping point” after which these communities “are no longer able to exert positive influences on the behavior of residents.”¹⁰⁶

The next factor, criminal opportunity, resembles association.¹⁰⁷ Tough neighborhoods are home to tough characters, which correlates with substance abuse and unemployment.¹⁰⁸ Not only that, but depressed areas also tend to have more former prisoners who in turn negatively influence one another.¹⁰⁹

Reoffending is almost a direct function of association.¹¹⁰ Or more colloquially, one is only as responsible as the company he or she

101. *Id.*

102. *Id.*

103. HUGHES, ET AL, BUREAU OF JUST. STAT., NCJ184735, TRENDS IN STATE PAROLE, 1990–2000, 14 (2001).

104. JEFFREY D. MORENOFF & DAVID J. HARDING, FINAL TECHNICAL REPORT: NEIGHBORHOODS, RECIDIVISM, AND EMPLOYMENT AMONG RETURNING PRISONERS 23-24 (2011).

105. *Id.*

106. Petersilia, *supra* note 47, at 548.

107. Constanza, *supra* note 16, at 270.

108. *Id.*

109. *Id.*

110. See Mark Halsey, *Assembling Recidivism: The Promise and Contingencies of Post-Release Life*, 97 J. CRIM. L. & CRIMINOLOGY 1209, 1229 (2007) (“One of the most common expectations of custodial and post-release staff is that those leaving secure

keeps. That much is known. The shakier question is whether an individual who has promised to avoid former relationships with other offenders—whether friends, family, or criminal affiliations such as gang members or crews—actually stays true to his or her word.¹¹¹

It stands to reason that society bears some responsibility for allowing a releasee the opportunity to reunite with these bad influences. These six influence factors are all affected by where the corrections systems release their wards, so a rehabilitative corrections model should more carefully examine its choice of the environment that will envelop these freshly released inmates.

But overcorrection on that end—e.g., disallowing releasees' periodic return to troubled neighborhoods, often where they grew up—could run headlong into the problem of exacerbating a poor area's already troublesome social isolation, itself a place-related factor in recidivism.¹¹² Social isolation in these areas is already theoretically of concern because poverty erodes support networks that would otherwise promote employment opportunity and perhaps even short-term neighbor-to-neighbor financial assistance; these are all eroded by and during a releasee's prison stint and all remedied to some extent by his or her return.¹¹³ Also, haphazard denial of a releasee's return to all associations in troubled neighborhoods smacks of a modern iteration of the Pennsylvania Model—rehabilitation through isolation—a tactic that history has proved ineffective.¹¹⁴

So, although a place's association opportunities can increase recidivism risk, by that same token a place's associations might also help reduce recidivism risk. This is demonstrated in practice by one common rehabilitative strategy, employing halfway houses to incubate successful transition from the prison mindset to another that might feel more at ease in a society beyond the barbed wire.¹¹⁵ Most importantly, though, this strategy rehabilitates by "facilitat[ing] *informal* social controls."¹¹⁶ These are the person-to-person interactions that connect offenders to "churches, law-abiding neighbors, families, and communities."¹¹⁷ Thus, the potential paradox emerges: Does restricting

care or prison should cease associating with their mates—or, by default, find a new group of (non-offending) friends.”).

111. *Id.*

112. *See id.* at 1232.

113. *Id.* at 1229-32.

114. *Id.*

115. McCARTHY, *supra* note 22, at 256.

116. WHEN PRISONERS COME HOME, *supra* note 95, at 19.

117. *Id.*

a rehabilitating individual's contacts with all members of troubled communities do just as much harm as good? It would seem so.

At the same time, careful halfway house placement to restrict certain associations does not necessarily mute the informal rehabilitative benefits woven into the social-fabric surrounding a newly released offender. One of the upsides of halfway houses is that, unlike prisons, they do not completely isolate offenders from the positive influence of whatever family or other support networks were available to them prior to offending.¹¹⁸ A halfway house system that accounts for place can strike the delicate balance between shielding a former offender from isolation and promoting positive social bonds—meaning criminogenic *engineering* through meticulous placement rather than heavy-handed and blanket restrictions on association. Halfway houses need not necessarily remove an offender from familiar social networks and relocate him or her hundreds, maybe thousands, of miles from those positively influencing family networks. Instead they might only partially withdraw an individual from the community by relocating them across town in perhaps a more well-to-do area. Even if their temporary rehabilitative setting sits clear across a sprawling city, offenders newly unhindered by jail-house restrictions nevertheless retain the freedom to occasionally visit loved ones, clergy, or community leaders—the positive influences in negatively influential areas. The takeaway here is that placing halfway houses in more affluent, less socially volatile areas does not throw the proverbial baby out with the bathwater. It places at-risk offenders at a distance from the bad, the ugly, while nonetheless preserving an offender's interaction with at least some of the good.

Now, to fully explore the spatial influences of recidivism risk, thought must go to more than just the *people* at play. Poverty also demonstrably equates to higher crime rates.¹¹⁹ Research has shown the deleterious effect placement in “urban ghettos” has on residents' proclivity to commit crimes as a result of surrounding “drug addiction, violence, and other social as well as environmental ills.”¹²⁰

118. See Mandeep K. Dhami et al., *Prisoners' Positive Illusions of Their Post-Release Success*, 30 L. & HUM. BEHAV. 631, 640 (2006) (“Specifically, an offense against the person and forecasted return to family/friends upon release were predictive of lower forecasts of recidivism, and more frequent charges of misconduct in prison were predictive of higher forecasts of recidivism.”).

119. See Maureen Klovers, *The Nexus Between Sprawl, Neighborhood Effects and Urban Crime*, 11 GEO. PUB. POL'Y REV. 35, 50 (2006) (“It is this concentrated poverty . . . that plays an important role in determining crime trends.”).

120. Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 520 (1994).

The labor market and distance aspects of any given location similarly affect an ex-convict's temptation to recidivate because poorer areas tend to have lower employment rates, and those who cannot find work often turn once more to crime.¹²¹ Not only do jobs need to be available, they need to be nearby.¹²² This raises the recidivism factor identified as distance.¹²³ Poor areas tend to end up farther from employment centers than affluent areas, complicating a parolee's ability and willingness to find employment—a major factor in recidivism.¹²⁴

Also, a place's formal social controls often impact recidivism risks.¹²⁵ Beyond the problems noted above, impoverished areas tend to suffer from lower police-presence-per-crime ratios.¹²⁶ And what police scrutiny is present can sometimes be particularly laser-like in focusing on parolees.¹²⁷

With these place-based considerations in mind, one study attempted to shed statistical light on the role of location in recidivism by tracking roughly 11,000 newly released inmates across Michigan in 2003.¹²⁸ Classifying areas as affluent based on local educational achievement, occupations, and income, the study found that returning inmates who landed in well heeled neighborhoods tended to enjoy a lower risk of rearrest, flight, or returning to prison for technical parole violations.¹²⁹ The study further concluded that affluent-area ex-convicts were not only more likely to find employment but also tended to receive higher wages when they did.¹³⁰

In all fairness, the study noted that affluence surrounding a parolee appears to promote criminal desistance to a far lesser extent when measured more cumulatively, meaning general exposure over a longer period and not just placement immediately post-release.¹³¹ But, at least for purposes of this Article, the longer-term risk of recidivism is immaterial. Halfway houses, taken in isolation as a recidivism-prevention tool, are usually only relevant in the period immediately

121. See Constanza, *supra* note 16, at 270.

122. See Gerrard, *supra* note 120, at 520

123. See *id.*

124. See *id.*

125. MORENOFF & HARDING, *supra* note 104, at 19-20.

126. *Id.* at 24.

127. *Id.* at 1.

128. *Id.* at 1.

129. See *id.*

130. *Id.* at 10.

131. *Id.* at 67.

following release. Most parolees enter these facilities straight out of prison and typically tend to remain there for less than a year. At least that is the case with federal ex-inmates; in 2007 Congress passed the Second Chance Act, which in part extended the maximum length of stay in a halfway house from six months to a year.¹³² Thus, even if time and the resulting mobility of former inmates dulls an affluent place's benefit to recidivism, in the immediate post-release short term—and the relevant period for this Article—the data is much more conclusive that place indeed does matter.¹³³

IV. Location, Location, Mis-Location

If the characteristics of a halfway house's neighborhood potentially—if not probably—affect its residents' likelihood of desistance, then the question turns to whether they currently are located in disadvantaged areas. As this Section shows, it appears that is precisely the reality. Unfortunately, only a handful of reliable studies have addressed the socioeconomic context of the hyper-local communities that are home to these halfway houses.¹³⁴ But the available data shows that halfway houses overwhelmingly tend to end up in impoverished areas.¹³⁵

After discussing where these facilities tend to operate, this Section explores how local interests in affluent areas have frustrated most efforts to place them nearby. It then offers a handful of examples of the local land use mechanism available to opponents to thwart the arrival of a halfway house.

A. *Halfway House Placement*

A recent study concluded that “white and suburban communities, regardless of their income, are less likely to have transitional housing.”¹³⁶ And yet “these are often ideal neighborhoods for populations

132. 18 U.S.C. § 3624 (2012); *see also* Mitchell, *supra* note 63, at 261.

133. *See, e.g.*, THE COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNSEL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 67-68 (2005), http://ncfy.acf.hhs.gov/sites/default/files/docs/15664-Report_of_the_Re-Entry.pdf.

134. WHEN PRISONERS COME HOME, *supra* note 95, at 121 (“Despite its importance, we know almost nothing about the exact housing arrangements of former prisoners, and estimates vary widely.”).

135. MARY SHILTON & MARGOT LINDSAY, CTR. FOR CMTY. CORR., SITING HALFWAY HOUSES—SOME SUGGESTIONS FOR CORRECTIONAL PROFESSIONALS: SELECTED READINGS AND REFERENCES, 4 (2003), <http://centerforcommunitycorrections.org/wp-content/2-halfway-houses-siting.pdf>.

136. Constanza, *supra* note 16, at 270.

in need.”¹³⁷ Based on an analysis of 169 halfway houses across Connecticut in 2000, the study found that areas home to halfway houses tended to have a median income of about \$45,000, compared to a statewide median income of \$64,000.¹³⁸ Halfway house towns also suffered from crime rates that were 2.5 times higher than in towns without a halfway house.¹³⁹ Halfway houses also operated in higher population densities of predominantly minority residents who were nearly twice as likely to draw welfare benefits than their counterparts in non-halfway house towns, indicating poverty.¹⁴⁰ The study theorizes that white, affluent communities routinely succeed in preventing the establishment of local halfway houses through political influence on policymakers that have the power to fund, locate, and design halfway house programs.¹⁴¹ Not surprisingly, those on the front lines of rehabilitative corrections programs generally agree these facilities consistently end up in industrial, remote, or poor areas as a result of wealthy, influential opponents.¹⁴²

B. *Anywhere but Here*

Few studies have sought hard numbers on public perception of halfway houses, but those that do show overwhelming public support for them, at least conceptually.¹⁴³ That last word is key because, as it turns out, what one loves in theory does not necessarily translate to practice when bringing the concept close to home threatens property values and safety. A quick Internet search for halfway house opposition turns up innumerable local media accounts of neighborhoods banding together in fierce opposition to proposed halfway houses.¹⁴⁴

137. *Id.* at 263.

138. *Id.* at 266.

139. *Id.* at 267.

140. *Id.*

141. *See id.* at 270.

142. SHILTON & LINDSAY, *supra* note 135, at 4.

143. JASON ZIEDENBERG, NAT'L INST. OF CORR., COMMUNITY CORRECTIONS COLLABORATIVE NETWORK: SAFE AND SMART WAYS TO SOLVE AMERICA'S CORRECTIONAL CHALLENGES 17-18 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028317.pdf> (citing a slew of studies about the unequivocal popularity of community corrections and concluding that “[t]he public supports a strong community corrections system that promotes public safety, holds people accountable, helps them get a job, helps them get treatment, pays back crime victims, and responds to offending in a swift and certain fashion.”).

144. *See, e.g.*, Robert Whale, *City Wants No Part of a 'Halfway House' for Federal Prisoners About to be Released*, AUBURN REP. (May 5, 2015, 1:50 PM), <http://www.auburn-reporter.com/news/301731251.html> (quoting a city statement asserting that “[w]e unequivocally oppose the siting of this type of service within our city, and that the location that they have identified was not zoned truly to even accommodate

When the proposed site just so happens to be a mansion with luxury accoutrements, such stories go national.¹⁴⁵

Laypeople within a randomly selected community tend to agree with social scientists that offenders who reenter into stable families are less likely to reoffend, and the public can “intellectualize,” and tends to agree, that some neighborhoods should play home to social-service facilities like halfway houses.¹⁴⁶ But their enthusiasm dwindles alongside a proposed facility’s distance from their home. Conceptually, and in somebody else’s community, halfway houses play a worthwhile role. But when one opens a stone’s throw away, that support sours quickly. One survey found that 77% of American survey respondents agreed with the halfway house concept, but 50% did not want one in their neighborhood.¹⁴⁷ Only 22% thought their neighbors would let a halfway house open in their area without a protest.¹⁴⁸

This sort of community opposition harms halfway houses not only in that they end up in suboptimal areas but also more broadly in that the resulting stigmatization actually decreases the total number of halfway houses, period.¹⁴⁹ Proposing these centers anywhere—poor neighborhoods or wealthy suburbs—often pulls the pin on a political hand grenade that elected officials want to dodge at all costs.¹⁵⁰ As a result of this political averment, already trickling government funding quickly dries up, leaving corrections officials to release “the vast majority of prisoners without needed housing and social supports. We should not be surprised when two-thirds of all prisoners are rearrested.”¹⁵¹

that kind of facility”); Chris Bolt, *Political Heavyweights Join Neighbors to Oppose Inmate Halfway House in Tipperary Hill*, WAER 88.3 (Oct. 29, 2014), <http://waer.org/post/political-heavyweights-join-neighbors-oppose-inmate-halfway-house-tipperary-hill>; Sharokina Shams & Richard Sharp, *Halfway House in South Sacramento? Decision Postponed*, KCRA (Feb. 11, 2013, 11:05 PM), <http://www.kcra.com/news/Halfway-house-in-South-Sacramento-Decision-postponed/18505198> (“[r]esidents of a South Sacramento neighborhood are protesting a proposal for a halfway house that would bring 50 federal parolees to a neighborhood already known for its high crime rates.”).

145. Christina Ng, *Florida Mansion Turned Halfway House Causes Stir*, ABC News (April 13, 2012), <http://abcnews.go.com/US/florida-mansion-turned-halfway-house-neighborhood-stir/story?id=16124428>.

146. See SHILTON & LINDSAY, *supra* note 135, at 2; see also ZIEDENBERG, *supra* note 143, at i.

147. ABADINSKY, *supra* note 86, at 395–96.

148. *Id.* at 396.

149. WHEN PRISONERS COME HOME, *supra* note 95, at 101.

150. *Id.*

151. *Id.*

Another secondary drawback to repeatedly placing these facilities in poorer areas, is that they engender resentment and disenfranchisement in the poor neighborhoods where the hand grenade ultimately does land.¹⁵² Residents in these areas, in many cases already feeling economically and politically oppressed, tend to resent the prospect of bearing a disproportionate amount of a social burden that in all fairness should be shouldered by rich and poor alike.¹⁵³ This “le[aves] residents feeling ‘dumped on’ and demeaned. While willing to accept some programs, the tendency to load an unresisting neighborhood has left its inhabitants determined to accept no more.”¹⁵⁴ Neighbors who harbor such feelings will no doubt manifest them, compounding the already-crushing stigma that can sometimes single-handedly push releasees back to crime.¹⁵⁵

It comes as no surprise, then, that halfway house proponents urge halfway house planners to go on the offensive from the outset to garner as much community support as possible prior to opening facility doors.¹⁵⁶ Many pro-community corrections groups implore halfway house operators to plunge into the political arena before bringing released offenders into the neighborhood.¹⁵⁷ One major reason for this educational blitz is the public’s lack of knowledge and because “halfway houses are often overlooked as an important part of public safety and crime prevention efforts, and members of the public often cannot describe those programs that exist in their communities.”¹⁵⁸ Setting legalities aside, remedying NIMBY’s pernicious effects on halfway house placement first and foremost will require renewed public

152. *Id.* at 102.

153. SHILTON & LINDSAY, *supra* note 135, at 4.

154. *Id.*

155. WHEN PRISONERS COME HOME, *supra* note 95, at 112.

156. SHILTON & LINDSAY, *supra* note 135, at 3. *But see* NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, 2 AMERICAN LAND PLANNING LAW § 60:18 (rev. ed. 2015) (“Social scientists have theorized that a more normal family environment will improve and help rehabilitate the lives of those inflicted with a variety of social problems. The argument is that if lesser offenders are placed in a better environment, they will more likely become conforming citizens. And so states and cities open up residential areas to include group homes for juvenile delinquents, alcoholics, and other “offenders” that disturb our lives. But just as we need recreation facilities (next door to you, not me) to become well-rounded people, social service type facilities make a strong claim for a residential environment. As a general proposition most people can intellectualize and agree that it is a good theory. Let’s try it, but again, not in my block.”).

157. SHILTON & LINDSAY, *supra* note 135, at 4.

158. *Id.* at 1.

education efforts.¹⁵⁹ And this does not necessarily mean propaganda and truth-bending. The data is, after all, favorable for halfway houses: Several studies have shown that these centers harm neither property values nor community safety.¹⁶⁰

V. Danger Zone: Land Use Law as Another Set of Bars

The legal underpinnings of halfway house placement are a lopsided, NIMBY-fueled, and often uproarious power struggle at a remarkably local level. States, meanwhile, have consistently failed to assert their own authority to override local oversight, usually as a result of either self-limitation through statute or external limitation by, for instance, courts.¹⁶¹ This Section begins with a brief overview of zoning law generally. It then addresses how localities have employed pro-NIMBY tactics to effectively bar new halfway houses. Finally, it assesses where and how states have failed to override that authority.

A. Zoning: Excluding Non-Local Influence from the Equation

From a federalism perspective, local land use control is a unique beast. Most areas of law employ a strictly tiered structure of authority where the Constitution trumps federal laws, federal laws trump state laws, and state law trumps local ordinances. But such is not the case with zoning, a system of local ordinances that overlap with, and sometimes even override, state directives.¹⁶² This is not because states are

159. Leonard A. Jason, et al., *Counteracting 'Not in My Backyard': The Positive Effects of Greater Occupancy Within Mutual-Help Recovery Homes*, 36 J. COMM. PSYCHOL. 947 (2008); Gerald P. López, *How Mainstream Reformers Design Ambitious Re-entry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 30 (2014) (“The public should also be informed of the large and growing number of people with criminal records in the community. The public should be aware that these individuals are routinely apart of everyone’s daily life and must be effectively re-entered back into society. Overall, individual stories can help put a human face on the problems facing re-entering prisoners.”).

160. Jerrald D. Krause, *Community Opposition to Correctional Facility Siting: Beyond the “NIMBY” Explanation*, 17 HUMBOLT J. OF SOC. REL. 239 (1991); see also MARGOT C. LINDSAY, U.S. DEP’T OF JUST., 131792, A MATTER OF PARTNERSHIP: PUBLIC INVOLVEMENT IN RESIDENTIAL COMMUNITY CORRECTIONS 8 (1990); AMANDA PETTERUTI, ET AL., JUST. POL’Y INST., HOUSING AND PUBLIC SAFETY 6 (2007). But see, e.g., Mitch Mitchell, *Sex Offender Who Left Fort Worth Halfway House Apprehended in Oklahoma*, FORT WORTH STAR-TELEGRAM (April 17, 2015, 7:32 PM), <http://www.star-telegram.com/news/local/community/fort-worth/article18819354.html>.

161. Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 492 (2007).

162. Symposium, II. *The Legitimate Objectives of Zoning, Developments in the Law—Zoning*, 91 HARV. L. REV. 1443, 1444 (1978).

powerless. To the contrary, most states have explicitly granted zoning authority to local governments.¹⁶³ The Constitution limits the federal government's authority to override state and local power to regulate land use.¹⁶⁴ The result is more of an overlay of laws—requiring compliance with whatever laws do exist on all levels—than a tiered system of them, invoking questions of preemption.¹⁶⁵ Thus, the framework for zoning authority can be summarized as follows: federal oversight is non-existent; state control is surrendered; and localities are king, free to carefully tailor their own space almost more as a matter of policy than of law. Or, as one scholar so aptly put it, “the terms ‘rules and tools,’ ‘discretionary judgment,’ and ‘thin law, thick policy’ characterize the land use regulatory system.”¹⁶⁶

The United States Supreme Court first addressed zoning as a modern phenomenon in *Village of Euclid v. Ambler Realty Co.*, a landmark case where the Court upheld states' authority to limit private property use so long as the state did so in furtherance of “the health, morals, safety, and general welfare of the community.”¹⁶⁷ The Court noted the need for new regulations to respond to the “increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization.”¹⁶⁸ The decision amounted to a Big Bang event in the history of land use law, which until that point had largely been confined by the relatively crude common law contours of nuisance and terminable ownership rights.¹⁶⁹ And thus NIMBY became an American institution.¹⁷⁰

The following decades saw explosive growth in the proliferation and diversity of land use limitations and regulations on everything from

163. *Id.*

164. *See, e.g.,* Petersburg Cellular P'ship v. Bd. of Sup'rs, 205 F.3d 688, 700 (4th Cir. 2000) (“Imposition of any federal standard on a state or local body's . . . [zoning] process, even if ‘relatively modest’ . . . has at least two substantial, detrimental effects on federalism. First, the very act of imposition . . . compromises state and local sovereignty [under the Tenth Amendment]. And second, regardless of the relative effects of the federal and local standard, the imposition of a federal standard on a local board confuses the electorate as to which governmental unit, federal or local, is to be accountable for a legislative decision made by the local board. These two effects alone threaten fundamental constitutional values.”).

165. Arnold, *supra* note 161, at 446-47; *see also* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985).

166. Arnold, *supra* note 161, at 492.

167. 272 U.S. 365, 391 (1926).

168. *Id.* at 392.

169. *Id.* at 387-88; *see* Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 849-50 (2013).

170. *See* Stern, *supra* note 169, at 849-50.

signage to lighting to sidewalks.¹⁷¹ The methods used to implement these standards are similarly varied, but usually they involve some sort of planning (this particular area will be used for X; that one for Y), permitting (any type of building that serves Y purpose must receive specific approval), and exactions (any projects of Z magnitude are allowed, but only if the landowner includes on the parcel a half-acre of public park space).¹⁷² The combination of these ever-more inventive, sophisticated schemes and their implementation through intensely local prerogatives has created a land use structure that today takes the form of a dizzying hodgepodge of uses, restrictions, and regulations. That is why, from a literal bird's-eye view, an otherwise inextricably interconnected landscape looks patch-worked, particularly in more urban areas. This system has empowered majorities to exclude unpopular land uses, whether a mosque from Manhattan¹⁷³ or gentlemen's club in Bridgeport.¹⁷⁴

B. *Or a Halfway House from the Hamptons*

Localities typically employ three exclusionary tactics to block would-be neighboring halfway houses.¹⁷⁵ The first, family-dwelling resident requirements, typically dictate that only a certain small number of individuals from different families may live under any one roof in residentially zoned areas.¹⁷⁶ Such restrictions have obvious ramifications for planned halfway houses, a model that financially cannot succeed without some appreciable scale.¹⁷⁷ The United States Supreme Court upheld family-membership residential zoning requirements in *Village of Belle Terre v. Boraas*, reasoning that local authorities have every

171. See Donald J. Kochan, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 4 MICH. J. ENV'T'L & ADMIN. L. 303, 308-09 (2015) ("While some forms of land use restrictions date back to before the founding of the United States, the complexity of land use regulation has grown as has the role for state-based legislative and regulatory controls on the uses of property beyond original common law limitations or the enforcement of private agreements.").

172. Arnold, *supra* note 161, at 505.

173. John Schwartz, *Zoning Law Aside, Mosque Projects Face Battles*, N.Y. TIMES (Sept. 3, 2010), http://www.nytimes.com/2010/09/04/us/politics/04build.html?_r=0.

174. Keila Torres, *Strip Club: 'Nude Dancing is Protected Free Speech'*, CONN. POST (Sept. 7, 2010, 8:11 AM), <http://www.ctpost.com/news/article/Strip-club-Nude-dancing-is-protected-speech-646910.php>.

175. See AM. PLAN. ASS'N, POLICY GUIDE ON COMMUNITY RESIDENCES 3-4 (1997) [hereinafter APA].

176. Daniel Lauber, *A Real Lulu: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. MARSHALL L. REV. 369, 387 (1996).

177. *Id.* ("Since most community residences need six or more residents to succeed therapeutically and financially, this restriction effectively blocked them from locating in the residential areas where they need to locate.").

reasonable right to limit the number of people in a household because “regimes of boarding houses, fraternity houses, and the like present urban problems.”¹⁷⁸

The second method of exclusion comes in the form of special-permit requirements.¹⁷⁹ These force certain types of facilities—often including halfway houses and other types of group homes—to apply for special permission to open in certain areas.¹⁸⁰ And in this context one can glimpse NIMBY in its most potent iteration because the application process is almost always conducted before a zoning authority and swayed by adversarial input.¹⁸¹ This hyper-local and hyper-adjudicative method of exclusion creates a system rife with the potential for discrimination. The United States Supreme Court addressed the issue in *City of Cleburne v. Cleburne Living Center*, a challenge to a Texas city’s denial of a special-use permit for a mental health facility that otherwise satisfied the permitting scheme’s requirements.¹⁸² The Court held that the city’s denial of the permit “rest[ed] on an irrational prejudice against the mentally retarded,” striking the ordinance as applied.¹⁸³ Notably, as Justice John Marshall complained in concurrence, the Court tacitly approved ordinances specifically aimed at one group—there the mentally challenged, deemed a non-protected class—by instead frowning upon only their discriminatory application.¹⁸⁴

Although at first blush a win for equal-housing proponents, *Cleburne*’s more sinister bottom line is that a locality may enact facially discriminatory housing restrictions so long as it has some thinly argued rational basis for excluding that particular group (unless, of course, the targeted group receives heightened protection under the Equal Protection Clause).¹⁸⁵ Perhaps it comes as no surprise that

178. 416 U.S. 1, 9 (1974).

179. APA, *supra* note 175, at 3.

180. Lippincott, *supra* note 14, at 770.

181. *See id.*

182. 473 U.S. 432 (1985).

183. *Id.* at 450.

184. *Id.* at 474-75 (Marshall, J., concurring in part, dissenting in part).

185. *See* Mark V. Wunder, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in City of Cleburne v. Cleburne Living Center*, 72 IOWA L. REV. 241, 243 (1986). Congress stepped in with the Fair Housing Amendments Act of 1988 by explicitly prohibiting housing discrimination based on mental disability. Pub. L. No. 100-430, 102 Stat. 1620 (codified as 42 U.S.C. § 3604 (2012)). Housing authorities are thus now required to make “reasonable accommodations” for the mentally challenged in their land-use schemes. 42 U.S.C. § 3604 (2012). The law, laudable as it was, has apparently failed to help the plight of the mentally disabled. *See* Arnold, *supra* note 161, at 492. Nor did the FHAA remedy discriminatory housing practices under single-family-use ordinances. *See* Stephen C. Hall, *City of Edmonds v. Oxford House, Inc.: A Comment on the Continuing Vitality of Single-Family Zoning*

such regulations—often targeting “group homes,” a catchall that certainly nets halfway houses—have multiplied across the country.¹⁸⁶

Another important lesson from *Cleburne* for the constitutionality of halfway house zoning restrictions comes in its categorizing the mentally disabled as an unprotected class, the same as returning convicts. That means that a challenge to a halfway house permit denial on constitutional grounds would legally fare no better or worse than one involving mental health group homes. In fact, that very scenario has unfolded in a courtroom. For example, in 1992 the Sixth Circuit Court of Appeals affirmed a trial court’s holding that a city ran afoul of the Constitution in denying a halfway house permit because, just as in *Cleburne*, the record showed that denial was “founded upon fear or negative attitudes ‘unsubstantiated by factors which are properly cognizable in a zoning proceeding.’”¹⁸⁷ It appears, however, that the Sixth Circuit’s decision that specifically addressed releasees’ rights was an outlier. *Cleburne* made it clear that zoning restrictions against non-protected classes shall receive only the lowest level of constitutional scrutiny—rational basis.¹⁸⁸ This standard is remarkably deferential to government actors, so much so that some scholars have criticized it as “an extraordinarily deferential standard by any measure” and one that in practice means that courts use it to “substitute[] their own validations and are thus no longer ‘review[ed]’ in any meaningful sense.”¹⁸⁹ Moreover, whatever protection rational basis might afford halfway houses is further undermined by a crucial distinction between the mentally infirm and the criminally inclined: a government might find it far easier to conjure some sort of reasoning for excluding convicts—safety, most obviously—and thus regulate within constitutional confines.

Restrictions, 71 NOTRE DAME L. REV. 829 (1996). In 1995’s *City of Edmonds v. Oxford House, Inc.*, the United States Supreme Court took an opportunity to decide whether the FHAA applied to those zoning restrictions. 514 U.S. 725, 728 (1995). “Many believed that a ruling by the Court in *City of Edmonds* that the . . . would herald the end of single-family zoning.” Hall, *supra* at 829. That did not result, meaning that today single-family zoning restrictions that just so happen to discriminate against the mentally disabled are legal so long as localities justify them as neighborhood-preservation measures. See Hall, *supra*. The FHAA’s reach does not extend to prison releasees, though it is likely it would not change this Article’s analysis if it did. *Edmonds*, 514 U.S. at 733-34.

186. See APA, *supra* note 175, at 4.

187. *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1363-64 (6th Cir. 1992).

188. 473 U.S. 432, 450 (1985).

189. Aaron Belzer, *Putting the “Review” Back in Rational Basis Review*, 41 W. ST. U.L. REV. 339, 340 (2014).

Such readymade arguments justifying a government act excluding mental patients are far less commonsensical, at least from the bench's vantage point. Unless a zoning regulation infringes on some other constitutional right—notably, free speech¹⁹⁰—halfway house advocates likely will exhaust their arsenal quickly.¹⁹¹ And, lest anyone forgets, released inmates have not fared well in challenges to non-geographically related erosion on their constitutional rights, particularly their right to cast ballots.¹⁹² Time and again, felons have suffered as society relegates them to “a subclass of citizenship, and the United States Constitution cannot be bothered to take notice.”¹⁹³ So, in terms of legal approaches to obtaining better locations for halfway houses, the constitutional and federal statutory routes have come to a dead end. The last, best hope therefore lies with the states.

C. *Local Land Use Controls Trumping Even State Efforts*

Land use regulation in the United States almost invariably occurs at the local level.¹⁹⁴ The absence of federal oversight seems appropriate enough. Federal officials in Washington, D.C., surely would lack the wherewithal to regulate every minute aspect of every square mile of real estate in one of the world's largest nations.¹⁹⁵ And states have retained only very limited authority to circumvent local control.¹⁹⁶ They have relinquished their authority to zone not for want of legal ability but instead for more political reasons—namely, elected officials'

190. As a fascinating side note, one Texas halfway house did succeed in invalidating a zoning ordinance based on First Amendment rights to freedom of religion. *Barr v. City of Sinton*, 295 S.W.3d 287, 307 (Tex. 2009) (“The City cites no studies or experiences with halfway houses to support its professed concerns. The City was not, of course, required to wait until disturbances occurred, possibly causing significant harm, before taking measures to prevent them, but neither could it assert a compelling interest in practically excluding a religious ministry from operating within the city limits based on nothing more than speculation.”). Novel and research-worthy as it may be, this argument is outside the scope of this article, which focuses primarily on publically funded halfway houses that presumably would have no religious affiliation.

191. For a discussion about the interplay of other constitutional rights and land-use law, see Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 80 (2013) (“In some instances, when a regulatory burden on property rights also burdens a fundamental constitutional right or denies to some landowner the equal protection of the laws, the regulation is subjected to heightened scrutiny. Of course, in such cases the regulation is scrutinized not as a burden on land use but rather as a burden on the other protected constitutional right at stake. Nevertheless, if the exercise of the protected constitutional right involves the use of land, the heightened scrutiny will benefit the claimant as a land user.”).

192. See *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

193. Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 88 (2005).

194. Arnold, *supra* note 161, at 487-88.

195. See *id.* at 486-88.

196. *Id.* at 487-88.

strong aversion to subverting local agendas and to becoming subject to the acerbic popular defense of property rights, perhaps one of America's most culturally sacred institutions.¹⁹⁷ States do, of course, impose some restrictions and obligations on local land use schemes, particularly when it comes to environmental policing.¹⁹⁸

When states themselves come under the scope of local zoning laws—e.g., state-run buildings, state parks, higher-education facilities, etc.—the effect of local oversight becomes somewhat more complicated and jurisdictionally split.¹⁹⁹ This nuance stems from states' eminent domain powers that broadly (for the most part, subject to certain constitutional limits) grant them the authority to take citizens' property.²⁰⁰ Traditionally, absent some statutory provision to the contrary, states enjoy almost blanket exemption from local land use controls.²⁰¹

As is often the case when prisoners become involved, the exemption of state statutory provisions from local land use controls changes when it comes to penal institutions. Many state courts have held that corrections facilities receive only partial exemption from local land use controls.²⁰² *City of Pittsburgh v. Commonwealth*²⁰³ and *People v. Renaissance Project, Inc.*²⁰⁴ offer a pair of choice examples. In *Pittsburgh*, the city sued the State's corrections department when it attempted to open a women's pre-release center without first obtaining any sort of zoning authorization.²⁰⁵ The city won.²⁰⁶ The Supreme Court of Pennsylvania reasoned

197. *Id.* at 488.

198. *Id.*

199. See PATRICIA E. SALKIN, 3 AM. LAW. ZONING § 18:35 (5th ed. 2015); see also *Rutgers v. Piluso*, 286 A.2d 697, 698 (N.J. 1972); *Town of Oronoco v. City of Rochester*, 197 N.W.2d 426, 429 (Minn. 1972).

200. See Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U.L. REV. 1, 6 (2005) ("The rather inchoate governmental power of eminent domain, fairly well established in English law by the late eighteenth century, was simply assumed.").

201. 101A C.J.S. Zoning and Land Planning § 104 (2015) ("[A] state, county, municipality, or other government body using property for governmental purposes ordinarily is not subject to zoning regulations where there is no legislative enactment to the contrary. The rule applies to prevent the application of local zoning ordinances to the state, to agencies of the state, to a county or municipality which enacted the particular zoning law.").

202. See, e.g., *City of Pittsburgh v. Commonwealth*, 360 A.2d 607, 613 (Penn. 1976), *overruled on other grounds by Commonwealth v. Ogontz Area Neighbors Ass'n*, 483 A.2d 448 (Penn. 1984); *People v. Renaissance Project, Inc.*, 324 N.E.2d 355, 357 (N.Y. 1975).

203. 360 A.2d at 613.

204. 324 N.E.2d at 357.

205. *Pittsburgh*, 360 A.2d at 608.

206. *Id.* at 209.

that the dispute concerned a conflict of two entities carrying out state-mandated directives: the corrections department opening a rehabilitation centers, as it was authorized to do by statute, and the City of Pittsburgh regulating itself through zoning, as it was authorized to do by statute.²⁰⁷ Noting that “in the absence of explicit language . . . whereby the Legislature evinces a clear intent to override local zoning regulations,” the court held that the authority to zone outweighed the authority to rehabilitate.²⁰⁸ Similarly, in *Renaissance Project* the Court of Appeals of New York held that excluding halfway houses from certain areas was permissible so long as other areas of the city could play home to them instead, a common result in the increasingly *en vogue* balancing approach to intergovernmental zoning conflicts that has replaced the blanket exemption afforded by eminent domain.²⁰⁹

In cases like *Pittsburgh* and *Renaissance Project*, halfway houses failed to overcome zoning laws simply because lawmakers failed to codify express statutory exemptions from local land use oversight. So, if states are going to embrace rehabilitation in a truly multidimensional way, they will need to affirmatively do so through the passage of new laws granting corrections agencies the full weight of zoning exemptions. This does not entail the exclusion of local input, which itself is an important component of any egalitarian environment, particularly in the acutely democratic sphere of local decision-making. Nothing should stop corrections officials from taking local input into account—just so long as the input mulled over comes from both rich and poor communities alike.

Yet, more is needed, too. Namely, in many states these new laws must follow the repeal of existing laws that expressly *strip* halfway house planners of eminent domain authority to circumvent local zoning. For example, states like Arizona,²¹⁰ Kentucky,²¹¹

207. *Id.* at 612.

208. *Id.* at 613.

209. 324 N.E.2d at 357.

210. ARIZ. REV. STAT. ANN. § 41-1604.12 (“The county, city or town and school district may contest establishment of a community correctional center by written objection filed with the department within thirty days after receiving notice, and may request a hearing to be conducted by the department pursuant to chapter 6, article 6 of this title.”).

211. KY. REV. STAT. ANN. § 439.590 (West 2016) (“The Department of Corrections may establish community residential correctional centers at locations approved by the legislative body of the area where located as places of confinement for convicted felons.”).

Pennsylvania,²¹² California,²¹³ Florida,²¹⁴ Michigan,²¹⁵ Maryland,²¹⁶ and Montana²¹⁷ have all written into their halfway house provisions that local individuals retain unchecked ability to veto proposed new homes for released inmates.

The State of Washington provides a stark example of one of the most harmful schemes for halfway house placement by empowering local reactionaries. State law there explicitly withdraws eminent domain power from state actors establishing halfway houses.²¹⁸ This is precisely the sort of statute that wrests corrections control from state-wide officials, precisely the policymaking authorities that *should* have the unfettered say in where halfway houses belong from a society-at-large perspective and vests it in the hands of locally oriented and monetarily-motivated landowners who do not necessarily have the proper education or incentive to heed the State's well-reasoned motivations. Statutes like these have simply got to go if the American justice system chooses to give halfway houses the latitude they need to then, in turn, similarly give society's weakest links their own chance to succeed.

States' continued failure to modify statutory frameworks to vest in policymakers more centralized control over halfway house placement

212. See 61 PA. CONS. STAT. ANN. § 4702.

213. CAL. PENAL CODE § 6250 (West 2016).

214. FLA. STAT. § 944.033 (“No facility shall be constructed, leased, or purchased in any county until public hearings have been held in that county. Such public hearings shall be held pursuant to uniform rules adopted by the department.”).

215. MICH. COMP. LAWS § 791.265f (“Beginning on the effective date of this section, for the purpose of housing prisoners, the department shall not open a facility in, or enter into a new contract for, a dwelling originally constructed and intended to be used to house 1 family.”).

216. MD. CODE ANN., CORR. SERVS. § 11-303 (West 2016) (“[T]o assure the public that the centers will be safe, the centers should, to the maximum extent practicable, be located and operated by the counties, consistent with statewide standards, and with State financial and technical support”).

217. MONT. CODE ANN. § 53-1-203 (“Rules adopted by the department pursuant to subsection (1)(a) may not amend or alter the statutory powers and duties of the state board of pardons and parole. The rules for the siting, establishment, and expansion of prerelease centers must state that the siting is subject to any existing conditions, covenants, restrictions of record, and zoning regulations. The rules must provide that a prerelease center may not be sited at any location without community support. The prerelease siting, establishment, and expansion must be subject to, and the rules must include, a reasonable mechanism for a determination of community support for or objection to the siting of a prerelease center in the area determined to be impacted.”).

218. WASH. REV. CODE § 35.82.285 (codifying that housing authorities establishing group and halfway homes “shall not be empowered to acquire property by eminent domain, and the facilities established shall comply with all zoning, building, fire, and health regulations and procedures applicable in the locality”).

will result in their continued marginalization at the hands of local NIMBY activists. As it now stands, halfway houses face onerous burdens before local zoning authorities. What form do these local ordinances take in practice? As is now quite clear, local zoning schemes come in innumerable forms, but a survey of those adopted by some of the largest cities in Texas, the state with by far one of the highest parolee populations, might offer a more or less reliable snapshot of how this all plays out on a local level.²¹⁹

Austin, the state's capital where halfway houses are defined as "transitional housing," prohibits placing these facilities in residential areas.²²⁰ Proposed halfway houses must find a location in business, commercial, or industrial districts, though for any location the city requires that halfway houses first obtain a special-use permit.²²¹

Like Austin, Dallas similarly requires a "specific use" permit for halfway houses.²²² Applicants must place these centers in either general retail, heavy or light commercial, or industrial zones.²²³ Residential placement is prohibited.²²⁴ These facilities may not come within one mile of another, nor may they house more than 50 residents.²²⁵

Houston flatly requires a permit for all "correctional facilities," a category that for zoning purposes is almost exclusively comprised of halfway houses.²²⁶ Houston bans halfway houses located within 750 feet of a church, community center, retirement home, day care, school, public park, or recreation facility.²²⁷ Capacity is restricted to no more than 75 residents, and applicants may not place a halfway home within 1,000 feet of another correctional facility.²²⁸

El Paso relegates non-permit halfway houses (also "transitional" housing) only to intense commercial and manufacturing districts, where they need no special permit.²²⁹ However, permits are required prior to placement in any multifamily (apartment) or commercial zones.²³⁰

219. In 2013, Texas was home to more than 508,000 probationers and parolees, second in number only to Georgia's 536,000. LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUST. STAT., NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2013, 11 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

220. AUSTIN, TEX., CODE § 25-2-491(C).

221. *Id.*

222. DALL., TEX., CODE § 51-4.204(5)(b).

223. §§ 51-4.100, 51-4.204(5)(b).

224. § (5)(e)(i).

225. § (5)(e)(ii).

226. HOUS, TEX., CODE OF ORDS. art. IV, § 28-152(a).

227. § (b)(1).

228. § (b)(2)-(9).

229. EL PASO, TEX., CODE § 20.08.030(c) (App. A 3.125[1]).

230. § (c).

Perhaps one of the state's most restrictive halfway-home schemes, San Antonio's zoning ordinances permit them in multifamily, commercial, and industrial districts with a specific use license.²³¹ Planning personnel may not issue a permit for halfway houses located within 1,000 feet of a public or private school, a day care facility, or a public park.²³² Notably, the city's code expressly declares a halfway home a public nuisance *per se* if police receive more than two disturbance calls within a 30-day period and if the issues underlying the complaints are not resolved within another 30 days.²³³ Alternatively, a halfway home becomes a public nuisance if police receive and verify at least six nuisance complaints within a six-month period.²³⁴

Note that all five of these large metropolitan cities require some sort of permit—i.e. local scrutiny—as a condition to approval of halfway houses in residential areas. For NIMBY groups, local review provides a potent avenue of bending local commissioners' ears. And, at least in San Antonio, opponents have in their back pockets the secondary option of barraging local police with supercilious nuisance complaints to further malign halfway houses that *do* clear zoning hurdles and end up down the street. Also note the general theme of placing halfway houses at least some distance away from schools, parks, churches, and recreation centers—the very pillars of social fabric and interaction that, if accessible, may significantly reduce the likelihood of recidivism.²³⁵ This all just goes to show that, once again, absent statutory remedies in statehouses, these local ordinances will continue neutering halfway houses' efficacy in reforming releasees.

Radical, such state lawmaking is not. A government taking proactive steps to prevent crime before it occurs is certainly nothing new. One might couch this sort of corrections model in what one criminal theorist calls the Risk Analysis Model of Prevention.²³⁶ The rehabilitative model borrows from a harm-prevention tactic first adopted by the highway safety community that socially engineers situations, opportunities, and behaviors that reduce risk rather than attempting to

231. SAN ANTONIO, TEX., CODE art. III, § 35-423.

232. art. III, § 35-390.

233. § 35-390(h)(1)-(2).

234. § 35-390(h)(3).

235. As one last aside, restrictions on placing halfway houses within 1,000 feet of each other invokes visions of the debunked Pennsylvania Model that treats inmates as "infected" with some criminal virus that, through too much inmate-to-inmate interaction, might spread through a criminal population. See HANSER, *supra* note 21, at 364.

236. ALBERT J. REISS, JR., CRIME PREVENTION IN THE URBAN COMMUNITY 7-8 (Miyazawa & Miyazawa eds. 1995).

alter individuals' behavior through, say, educational programs.²³⁷ And, in that vein, why not both? In theory at least, such an approach would attack recidivism on both ends, first by employing halfway houses in the first place to rehabilitate the prisoner while simultaneously attacking the temptation by removing the offender from the neighborhood without so far removing him or her that the community suffers.

Social engineering requires centralized oversight and will falter amidst a fragmented, inconsistent, and often venomous zoning labyrinth. A state corrections expert seeking to improve recidivism rates through innovative policy cannot do so without statutes exempting halfway house placement from local oversight. These well-minded rehabilitation gurus relying on developing criminological theories incorporating place, in other words, have neither sword nor shield.

VI. Conclusion

Robert F. Kennedy's 1968 assassination came just seven years after his initial call to make halfway houses a fulcrum of the United States corrections system.²³⁸ In that time he witnessed the nation heed his call and embrace the model as these facilities sprouted up across the country. But the 42-year-old's untimely murder meant that he would not be alive to watch the system fully take root, falter, arise again, and then once more stumble into its current status within the correctional system: marginal relevance and questionable efficacy. One can only speculate, but it seems safe to say that Kennedy would have found halfway housing's splash on recidivism disappointing, just as the scores of other scholars and researchers who—try as they might—have struggled to pinpoint how, exactly, this once-exalted model managed to make nary a ripple.

As this Article has shown, perhaps one reason the United States has yet to realize halfway houses' rehabilitative potential is the corrections system's neglect of the full multidimensional dynamics of a once-criminal mind's struggle to rejoin society. Time, the focus of so much legislating and academic debate, is indeed one important component in the form of sentence length. Place, too, plays its important part. A releasee reenters society during a yearlong period of extreme

237. *Id.* at 8.

238. See *Robert F. Kenney*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <http://www.jfklibrary.org/JFK/The-Kennedy-Family/Robert-F-Kennedy.aspx> (last visited Feb. 27, 2016).

criminogenic fragility—a period when the slightest temptation can land the individual back in custody, perpetuating the incarceration cycle—and it is incumbent on society as a whole to give these individuals every opportunity to help themselves. Simply discarding a released convict in a community's most troubled, socially instable, and impoverished district does these individuals and society a great disservice. No shortage of psychological science shows that spatial context matters for releasees walking the straight and narrow, and that is to say nothing of the ill effects on the already disadvantaged neighborhoods where halfway houses disproportionately do end up; local residents there do not need the disenfranchisement nor added social strain that returning inmates bring with them. But the current land use system has entrenched this relegation of halfway houses. So long as the legal community sits idly by, local interests and power-broking will continue to prevail. NIMBY is a powerful force that zoning laws leave unchecked and, even in many instances, promote. Without land use reform at the state level, newly released halfway house residents will continue to make it just that—only halfway home.