Appellate Division APL-2016-00067
Bronx County Index No. 2011-300305

Court of Appeals
of the
State of New York

❖

QUEENS VILLAGE COMMITTEE FOR MENTAL HEALTH FOR JAMAICA COMMUNITY ADOLESCENT PROGRAM, INC.,

Appellant,

For a Decision and Order of the Appellate Division of the Supreme Court, First Judicial Department in the County of Bronx, entered on December 3, 2015

— against —

ANTHONY ODDO,

Respondent.

AMICUS BRIEF IN SUPPORT OF APPELLANT QUEENS VILLAGE COMMITTEE FOR MENTAL HEALTH FOR JAMAICA COMMUNITY ADOLESCENT PROGRAM, INC.

DEBORAH J. LA FETRA
Pro Hac Vice pending
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

August 12, 2016

CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Pacific Legal Foundation states the following:

1. *Amicus* is a nonprofit corporation organized under 26 U.S.C. § 501(c)(3).
2. *Amicus* has neither parents nor subsidiaries.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Statutes

Miscellaneous

Page

Page

PRELIMINARY STATEMENT

Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc. (Queens Village), is a halfway house-type facility that serves as an alternative to incarceration under New York's Treatment Alternatives for Safer Communities (TASC)[1] program. *Oddo v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Prog., Inc.*, 135 A.D.3d 211, 212, 21 N.Y.S.3d 53 (2015). Queens Village residents are not confined; they may leave the facility at will. However, if they leave without permission they may lose the privilege of receiving an alternative to incarceration.[2] Moreover, Queens Village may discharge its residents at any time for rule violations.

On Saturday night, July 17, 2010, Queens Village resident Sean Velentzas was expelled from the facility's rehabilitation program, to which he had been referred by a criminal court, when he drank alcohol and pushed another resident to the ground. *Oddo,* 135 A.D.3d at 213, 21 N.Y.S.3d 53. Queens Village staff began to fill out paperwork to transfer Velentzas to Faith Mission Crisis Center, an intermediary

---

[1] Originally, the acronym TASC stood for "Treatment Alternatives to Street Crime." Since then, TASC has been used to reference: Treatment Assessment Screening Center; Treatment Accountability for Safer Communities; and Treatment Alternatives for Safer Communities, which is how it is used in New York State.

[2] *See People v. Garcia*, 92 N.Y.2d 726, 728 n.*, 708 N.E.2d 992, 685 N.Y.S.2d 919 (1999) ("Typically, if the offender completes the prescribed drug treatment program, the charges will be dismissed; failure to complete the program may result in sentencing as a second felony offender.").

location where he could reside until the TASC program could be notified on Monday morning. When Velentzas became enraged by his expulsion, Queens Village staff called the police, who escorted Velentzas off the premises and released him. *Id.* at 213-14, 21 N.Y.S.3d 53. Half an hour later, Velentzas went to his grandmother's house, where he punched and stabbed Anthony Oddo. *Id.* at 218-19, 21 N.Y.S.3d 53. Oddo sued Queens Village for negligence, arguing that it had a duty to protect third parties like Oddo from the criminal acts of its former residents. In a split decision, the Appellate Division of the New York Supreme Court held that Queens Village owed a duty to protect Oddo from Velentzas' assault because of the level of control that Queens Village had over Velentzas as a result of his referral from a criminal court. *Id.* at 215-16, 21 N.Y.S.3d 53. The dissenting judge would have held that "facilities cannot properly be saddled with a duty to protect the general public from a discharged resident on the theory that he may possibly become violent toward some unknown third party after leaving the facility." *Id.* at 218, 21 N.Y.S.3d 53 (Saxe, J., dissenting).

New York recognizes only a very limited tort duty to protect the general public: "In the ordinary circumstance, common law in the State of New York does not impose a duty to control the conduct of third persons to prevent them from causing injury to others . . . ." *Purdy v. Public Adm'r of County of Westchester*, 72 N.Y.2d 1, 8, 530 N.Y.S.2d 513, 526 N.E.2d 4 (1988). While the law recognizes a duty "when the defendant has authority to control the actions of such third persons," *id.*, public

policy dictates that this exception to the general rule be construed narrowly. A premises owner or operator should not have a duty based on its former "control" of occupants who have since left the premises in a manner authorized by law.

Moreover, public policy supports alternatives for incarceration under some circumstances. *See* N.Y. Exec. Law §§ 243, 261, 265, 266 (McKinney 2010) (establishing and funding TASC programs). If alternative treatment facilities can be liable to the general public for criminal actions of properly discharged former residents, the government will be able to afford fewer such facilities, contrary to New York's public policy. The decision below should be reversed.

INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuse of tort law in ways that harm businesses, burden entrepreneurship, and job creation.

Pursuant to this Project, PLF has participated as amicus in New York courts in cases involving the reach and scope of civil liability systems. *See, e.g.*, *Pink v. Ricci* (No. APL-2015-00073, pending); *In re NYC Asbestos Litigation*, 2016 WL 3495191, 2016 N.Y. slip op. 05063 (No. APL-2014-00209, June 28, 2016); *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 944 N.Y.S.2d 452, 967 N.E.2d 675 (2012); *Jamarillo v. Weyerhaeuser*, 12 N.Y.3d 181, 878 N.Y.S.2d 659, 906 N.E.2d 387 (2009).

ARGUMENT

I

THIS COURT SHOULD NOT EXPAND THE NARROW DUTY TO PROTECT THE GENERAL PUBLIC FROM CRIMINAL ACTS

A. Public Policy Governs the Scope of Tort Duties

New York law recognizes that defendants generally have no duty to control the actions of third persons unless the defendant has a special relationship with the third person with "sufficient authority and ability to control" the third person's conduct. *Purdy*, 72 N.Y.2d at 8, 530 N.Y.S.2d 513, 526 N.E.2d 4. As shown below, public policy counsels against permitting a plaintiff—a member of the general public—to overcome the general no-duty rule when a former halfway house resident, properly discharged from the program, attacks him. Many courts, including in New York, have rejected extending such a legal duty in analogous situations because, contrary to sound

public policy, a duty would impose liability on defendants who could not have acted any differently.

The plaintiff in this case seeks to expand this narrow exception to the no-duty rule. When plaintiffs seek to extend a theory of negligence into an area where there has been a presumption against liability, courts should strongly consider the policy implications of such an outcome. *See Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402, 492 N.Y.S.2d 555, 482 N.E.2d 34 (1985) (It is "the responsibility of courts, in fixing the orbit of duty, 'to limit the legal consequences of wrongs to a controllable degree,' and to protect against crushing exposure to liability. 'In fixing the bounds of that duty, not only logic and science, but policy play an important role.' ") (citations omitted); *Henry v. Bi District Bd. of Urban Ministry, Inc.*, 54 S.W.3d 287, 290 (Tenn. Ct. App. 2001) ("[T]he court must consider whether imposing a duty to take reasonable measures to protect patrons from the consequences of criminal acts of third persons would place an onerous burden—economic or otherwise—upon [the] defendants."). This is especially true when the decision to expand a duty of care involves complex policy decisions that are generally the province of the legislature, not the courts. *Cf. Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 592, 431 N.E.2d 278, 446 N.Y.S.2d 917 (1981) ("Public policy determined by the Legislature is not to be extended by a court by reason of its notion of what the public policy ought to be.") (citation omitted).

The existence of a duty is highly fact-dependent and driven by important considerations of policy. *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 679 N.E.2d 616, 657 N.Y.S.2d 377 (1997). Policy concerns are particularly important because tort law is, at bottom, "a means of apportioning risks and allocating the burden of loss." *Waters v. New York City Housing Auth.*, 69 N.Y.2d 225, 229, 505 N.E.2d 922, 513 N.Y.S.2d 356 (1987). The court is "bound to consider the larger social consequences of [its] decisions and to tailor [its] notion of duty so that 'the legal consequences of wrongs [are limited] to a controllable degree.' " *Id.* (quoting *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969)). Among the relevant public policies are "*moral* considerations arising from the view of society towards the relationship of the parties," including the social utility of the activity that caused the injury; "*preventative* considerations, which involve the ability of the defendant to adopt practical means of preventing injury," and whether there is general agreement "as to the proper course to be followed to prevent injury;" "*economic* considerations, which include the ability of the defendant to respond in damages; and *administrative* considerations, which concern the ability of the courts to cope with a flood of new litigation, the probability of feigned claims and the difficulties inherent in proving the plaintiff's case." (Emphasis added). *Donohue v. Copiague Union Free School District*, 64 A.D.2d 29, 33, 407 N.Y.S.2d 874 (1978); *see also Palka v. Servicemaster Mgmt. Services Corp.*, 83 N.Y.2d 579, 586, 611 N.Y.S.2d 817, 634 N.E.2d 189 (1994)

(courts "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability").

B. Custody and Control Are Key Elements of Duty

Negligence law requires that parties take responsibility for failing to discharge a duty of reasonable care, if that failure causes harm to another. A defendant's negligence liability is limited, however, by rules designed to cut off what might otherwise become an unbearable responsibility to ensure against every possible risk. *See* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982) ("The consequences of any act can be traced indefinitely, but tort law has never made a defendant pay for all harm caused by his tortious act, however remote. At some point, it is generally agreed that the defendant's act cannot fairly be singled out from the multitude of other events that combine to cause loss.").

Affirmative duties to act for the benefit of others are, therefore, "exceptional and abnormal, requiring more than a situation where positive action is necessary to protect others from an injurious situation not caused by the defendant himself." Michael D. Morrison & Gregory N. Woods, *An Examination of the Duty Concept: Has It Evolved in* Otis Engineering v. Clark*?*, 36 Baylor L. Rev. 375, 384 (1984).

Courts typically impose an affirmative duty only on a party who has control over another and can reasonably prevent harms, and such duties attach "only when absolutely necessary, and only to the extent necessary to afford the protection sound policy requires." *Id.* The potential for unlimited liability looms large if an organization owes a duty to the general public for crimes committed by former residents who were not on the organization's premises, that is, for the criminal actions of people over whom the organization has no custody or control. Courts have thus far declined to impose a duty in such circumstances.

In *Sheila C. v. Povich*, 11 A.D.3d 120, 781 N.Y.S.2d 342 (2004), an "out-of-control" teen scheduled to appear on The Maury Povich Show snuck out of the hotel where she was staying with her mother and grandmother for a rendevous with an employee connected with the show. The employee raped her and she sued the nationally syndicated program, various television studios, and various employees for failure to protect her from the assault. *Id.* at 122, 781 N.Y.S.2d 342. The court held that none of the defendants had any duty to prevent the teen, who had left the custody and premises of the show, from sneaking away from her relatives. The court noted that the defendants not only had no custody of the teen in her hotel room, but they "had no discernable right to be there." *Id.* at 128, 781 N.Y.S.2d 342. The scope of the proposed duty had no limiting principle: "Carried to its logical conclusion, the expanded orbit of duty urged by plaintiff would have required defendants to not only

return her safely to her guardians, but to then continue to monitor the adequacy of the supervision provided by her guardians and, perhaps, to provide round-the-clock surveillance." *Id*., 781 N.Y.S.2d 342.

In *Bates v. Constable*, 4 Misc.3d 810, 810-11, 781 N.Y.S.2d 861 (2004), the plaintiff was seriously injured when he was bitten by a Rottweiler dog given to him by his son the previous day. The son obtained the dog from the defendant, who never warned the father or the son of the dog's known vicious propensities, even though he knew the son intended to give the dog to his father as a pet. The father sued the dog's previous owner; the son was not a party to the lawsuit. The court rejected the father's claim, holding that while the previous owner may have owed a duty to the son, he owed no such duty to the father because no relationship existed between him and the father and he had relinquished all custody and control over the dog. *Id.* at 813, 781 N.Y.S.2d 861.

A similar case arose in *Browne v. Town of Hempstead*, 110 A.D.2d 102, 493 N.Y.S.2d 329 (1985), where the plaintiff was bitten by a dog in the parking lot of the municipal animal shelter from which the dog had just been adopted by someone else (Willie Williams). As in *Bates*, the shelter may well have owed a duty to warn Williams about any known dangerous propensities when he took custody of the dog and assumed responsibility for its conduct. Williams, however, was not a party to the lawsuit and the court held that the animal shelter "had no relationship with the town

other than as members of the general public." *Id.* at 108, 493 N.Y.S.2d 329. For this reason, the court refused to hold that a town that maintains an animal shelter for the purpose of taking in stray dogs and placing them for adoption, "is liable for monetary damages to a third person bitten by such a dog after custody of the dog has been surrendered to the adopting party even though the dog has not yet arrived at its new home, but is still in the parking lot of the pound." *Id.* at 109, 493 N.Y.S.2d 329.

These principles apply to dangerous people as well as to dangerous animals. In *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 352 S.E.2d 267 (1987), the North Carolina Court of Appeals considered whether an employer participating in the state's work-release program was liable when an inmate-employee assaulted a woman after he left the work site. The court held that the employer had no duty to prevent the assault because the employer had no "duty or responsibility to control or supervise the inmate employee when he is not on the job or at the job site." *Id.* at 184, 352 S.E.2d 267. The employer's sole obligation was to notify prison officials if there were changes in work schedule, if the inmate-employee is to leave the job site before the end of the shift, or if the inmate-employee is absent without authorization. *Id.* at 183-84, 352 S.E.2d 267. Because "the employee's criminal act did not occur while on the employer's premises or while the employee was using the employer's property," the court declined "to adopt a rule that requires employers of work-release inmates to

supervise and control the inmate-employees outside the scope of their work-release employment." *Id.* at 186-87, 352 S.E.2d 267.

Similarly, in *Bailor v. Salvation Army*, 51 F.3d 678 (7th Cir. 1995), a federal prisoner, William Holly, walked out of a halfway house run by the Salvation Army and assaulted Adela Bailor. She sued the Salvation Army. Applying Indiana law, the court noted that the Salvation Army would only owe a duty to prevent the harm to Bailor if "the Salvation Army had the legal right to control Holly, did actually control Holly, and had knowledge of his propensity for violence." *Id.* at 682. Similar to the policies employed by Queens Village in this case, the Salvation Army halfway house could not detain a resident who wished to leave. It could only report the fact of the resident's departure to the Bureau of Prisons, which was authorized to impose consequences. *Id.* at 683 ("The limitations on the authority of the halfway house are important and we believe a controlling factor in the relationship between the Salvation Army and Ms. Bailor. The Salvation Army had but limited authority to restrict the activity of Holly and, therefore no realistic opportunity to control Holly's activities with respect to Ms. Bailor."). Moreover, the Salvation Army had no "information gathering capabilities or investigative resources" to respond to any

danger that Holly posed after leaving its premises, particularly as time and distance increased. *Id.* at 684. As a result, the court held that there was no duty. *Id.*[3]

C. Analogous Employer Liability Cases Find No Duty for Tortious Acts of Off-Duty, Off-Premises Employees

An analogous situation to this case arises when an employee leaves an employer's premises and then commits a tort or crime. Courts routinely refuse to hold that employers have a duty to protect the general public from tortious or criminal acts of their employees, once those employees are off the premises—beyond the control—of the employers.

For example, in *Joseph v. City of Buffalo*, 83 N.Y.2d 141, 629 N.E.2d 1354 (1994), an off-duty officer returned home after a shift and negligently left his loaded police-issued revolver underneath his three-year-old son's mattress. *Id.* at 144. When the officer left the room, his son discovered the revolver and accidentally shot himself, causing severe injuries. *Id.* The child's mother attempted to recover from the city on the child's behalf, but this Court held that the officer was not acting in furtherance of

---

[3] Courts also refuse to impose a duty upon the state to warn the general public when inmates are released. *See Thompson v. County of Alameda*, 27 Cal. 3d 741, 167 Cal. Rptr. 70, 614 P.2d 728, 735 (1980) ("Notification to the public at large of the release of each offender who has a history of violence and who has made a generalized threat at some time during incarceration or while under supervision would, in our view, produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public."); *VanLuchene v. State*, 244 Mont. 397, 403, 797 P.2d 932 (1990) (recognizing the "futility of issuing a public warning regarding the release of every potentially violent offender.").

his employment when he negligently left the gun unattended. *Id.* at 146. This holding applies the basic premise that courts will not impute liability based simply on an existing legal relationship, when the tortious actions occur outside that relationship. *See also Loram Maintenance of Way, Inc. v. Ianni*, 210 S.W.3d 593, 597 (Tex. 2006) (an employer's knowledge of an employee's "agitated mental state" when he left work does not suffice to impose a duty to prevent the off-duty employee from shooting a third party an hour later); *Barclay v. Briscoe*, 427 Md. 270, 306-07, 47 A.3d 560 (2012) (employer owes no duty to general public to prevent sleep-deprived employee, returning home from a 22-hour shift, from causing a car accident).

In *D'Amico v. Christie*, 71 N.Y.2d 76, 81, 518 N.E.2d 896, 524 N.Y.S.2d 1 (1987), this Court held employers have no duty to prevent injuries to third parties caused by off-premises drunk driving by off-duty employees who had consumed alcohol at a company-sponsored function. This holding was consistent with precedent that "uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest." *Id.* at 85, 518 N.E.2d 896, 524 N.Y.S.2d 1 (citing previous cases). The Court declined to adopt the proposed expansive theory of negligence liability because it "cannot create a new legal duty that would require the [employer] to respond in damages, as an insurer, for plaintiff's injuries." *Id.* at 86, 518 N.E.2d 896, 524 N.Y.S.2d 1.

D'Amico and the cases it cited demonstrate appropriate skepticism towards expansion of negligence liability. Even though the employer in each case had created or permitted the environment that allowed the employee to drink excessively, the courts refused to impute the employees' actions to the employer. The alcohol cases are one step removed from general vicarious liability cases. The latter are attempts to impose liability almost solely on the basis of the employer-employee relationship, *see, e.g.*, *Joseph*, 83 N.Y.2d at 144 (negligently leaving police-issued revolver under a child's mattress), while the former are more directly related to what happens at a work-related function. Courts have showed the proper reluctance in these cases to hold employers responsible for what their employees do when those employees are outside of their control.

The decision below imposed a duty far beyond that allowed by existing precedent, in that it imposed a duty on Queens Village to control Velentzas' conduct *after* he was discharged from the program and left the premises accompanied by police. *See D'Amico*, 71 N.Y.2d at 85 (Landowners have a "duty to control the conduct of third persons on their premises when they have the *opportunity to control such persons* and are reasonably aware of the need for such control.") (Emphasis added). This same lack of control is present here: "A private drug treatment facility simply cannot control what the police do." *Oddo*, 135 A.D.3d at 220 (Saxe, J., dissenting). Queens Village was entitled to call 911 and ask the police to remove an

unruly individual from its premises after he violated "cardinal rules" and was terminated from the program. *See id.* Once the police arrived to escort Velentzes from the property, Queens Village had no more control over Velentzes, now a former resident, than an employer has control over an impaired employee who leaves company premises.[4]

II

NEW YORK'S PUBLIC POLICY FAVORS VIABLE ALTERNATIVES TO INCARCERATION

"The power to determine what the policy of the law shall be rests with the Legislature within constitutional limitations, and when it has expressed its will and established a new policy, courts are required to give effect to such policy." *F. A. Straus & Co., Inc., v. Canadian Pacific Ry. Co.*, 254 N.Y. 407, 413-14, 173 N.E. 564 (1930). *See also People v. Suarez*, 6 N.Y.3d 202, 219, 844 N.E.2d 721, 811 N.Y.S.2d 267 (2005) (Read, J., concurring) (noting that the Legislature must resolve significant public policy issues, even when that issue arises because of conflicting jurisprudence). In addition to the public policies related to establishment of a legal

[4] A case that combines these scenarios is *Litchfield v. Nelson*, 122 Idaho 416, 422, 835 P.2d 651 (1992), in which the court found no duty to the general public to prevent intoxicated inmate, released from custody to attend an alternative treatment program, from driving; "once the Bonner County Jail complied with the court-ordered release, its special relationship with Dawson, and its consequent duty to control him, had terminated."

duty, this Court also should consider how imposition of a duty in this case affects the state's public policies related to alternatives to incarceration.

Treatment Alternatives for Safer Communities was first developed in the 1970s "in response to the rising tide of substance-involved offenders revolving through the criminal justice system." History, National TASC.[5] Congress enacted the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. § 1101, to appropriate funds "for the creation of a federal TASC program on which state and local programs were to be based." *Developments in Law: Alternatives to Incarceration for Drug-Abusing Offenders*, 111 Harv. L. Rev. 1898, 1903 (1998). Under this federal rubric, "hundreds of [state] agencies were founded across the country to identify, evaluate[,] and refer drug-using offenders to community-based treatment as an alternative or supplement to criminal justice sanctions, to monitor offenders' progress in treatment[,] and to report compliance information to appropriate criminal justice authorities." Douglas Marlow, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 Vill. L. Rev. 989, 1008 (2002). The programs were aimed at rehabilitating drug-addicted offenders who commit property crimes in order to fund their addiction. *See Garcia,* 92 N.Y.2d at 728, 708 N.E.2d 992, 685 N.Y.S.2d 919 (TASC is "a program of drug treatment as an alternative to incarceration for nonviolent, drug-addicted offenders."). Through identifying and rehabilitating "drug diversion candidates most likely to

[5] National TASC, http://nationaltasc.org/about/history.

succeed," TASC programs are intended to "reduce crime, unclog the courts and jails, and enable all the stakeholders to benefit." Edward Perez, Christopher C. Shattuck, Taylor E. Anderson, *Substance Abuse in America: Then and Now*, 13 Mich. St. U. J. Med. & L. 365, 389 (2009). In sum, TASC programs are intended to direct public resources in a more cost-effective manner by diverting a subset of offenders away from the costly and ill-suited criminal justice system[6] and into rehabilitative treatment.

The public policies of the national TASC initiative are echoed in New York State's TASC Standards, which note "the importance of alternative to incarceration program services," *e.g.*, TASC programs, "in avoiding unnecessary reliance on incarceration . . . . The goal of TASC programs [remains] to provide a treatment intervention to stop the cycle of addiction, arrest, incarceration, and release." Robert M. Maccarone, Div. of Probation and Correctional Alternatives, *New York State TASC Standards* 2, 4 (2008);[7] N.Y. Exec. Law §§ 243, 261, 265, 266. With respect to alternative programs such as TASC, the original session law provided:

> Such programs simultaneously protect the community, foster law abiding behavior for offenders and represent an important component in the overall approach to the overcrowding problem. Such programs are

---

[6] "There were 55,355 inmates in state correctional facilities as of March 31, 2012." The Nelson A. Rockefeller Institute of Government, State University of New York, New York State Statistics, 2014 NEW YORK STATE STATISTICAL YEARBOOK, *Section H. Public Safety and Criminal Justice System*, at 379 (38th ed. 2012), http://www.rockinst.org/nys_statistics/2014/H/.

[7] http://www.criminaljustice.ny.gov/opca/pdfs/2008-5tascstandardsmay2008.pdf.

> integral to effective criminal justice planning and represent both sound penal and cost-effective fiscal policies.
>
> It is both in the interest and the policy of the state to foster coordination between the state and counties, and within each individual county, in joint effort to meet and work to remedy the problems of prison and jail overcrowding. To this end, the state should . . . assist counties in planning, developing and funding effective alternatives to detention and incarceration programs.

1984 N.Y. Laws ch. 907, § 1. The 2008 model statewide standards were adopted with the aim of "[achieving] substantial cost-savings and [advancing] the goals of public safety through the reduction of offender recidivism." Maccarone, *supra*, at 2.

New York TASC programs are approved, supervised, and substantially funded by the state Division of Probation and Correctional Alternatives (DPCA) as "eligible alcohol and substance abuse programs." N.Y. Exec. Law § 261(c) (McKinney 2010). The DPCA must set aside at least $14 million per year for funding of alternative to incarceration (ATI) programs, half of which is reserved for rural and suburban counties. N.Y. Exec. Law § 265 (McKinney 2010). Once DPCA approves of an ATI, DPCA contracts with the city or county municipality to undertake implementation of the plan; the municipality in turn contracts with private organizations (*e.g.*, Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.) to assist in implementation. *Id.* The law requires that the state and municipalities set aside money, up to a cap, to reimburse municipalities and private organizations for a portion of "approved expenditures" related to implementing

eligible alcohol and substance-abuse programs. N.Y. Exec. Law § 266 (McKinney 2010). TASC programs also rely on federal funding, but in recent years that funding has been in decline.[8] As government contributions recede, alternatives to incarceration face significant funding challenges. *See The Alternatives to Incarceration/Reentry Coalition Launches the Blueprint for Criminal Justice Reform*, The Osborne Association (May 25, 2016) (a coalition of ten Manhattan ATI programs urged the city council to increase its funding of the programs by a million dollars).[9]

ATI programs, particularly outside major cities, frequently scramble for a share of the scarce resources. Peter A. Mancuso, Comment, *Resentencing After the "Fall" of Rockefeller: The Failure of the Drug Law Reform Acts of 2004 and 2005 to Remedy the Injustices of New York's Rockefeller Drug Laws and the Compromise of 2009*, 73 Alb. L. Rev. 1535, 1563 (2010) (noting large geographical gaps in treatment availability statewide; some counties have one hundred providers, where others have only one) (citing N.Y. State Comm'n on Sentencing Reform, *The Future of*

---

[8] *See* Mary Shilton and Robert Aukerman, *TASC and Offender Management Systems: 2004 Agency Survey Report* 24 (2004), http://www.nationaltasc.org/ wp-content/uploads/2012/11/ TASC-and-Offender-Management-Systems-2004-Agency-Survey-Report.pdf ("As federal funding availability for TASC programs has diminished with the lack of any dedicated federal funding, most TASC programs have received state and local funding as well as funds from nonprofit and corporate sectors and fees from clients.").

[9] http://www.osborneny.org/post.cfm?postID=609.

Sentencing in New York State: A Preliminary Proposal for Reform 27 (2007)).[10] Despite struggling with funding, alternative programs are well-received by the public and New York considers them cost-effective. *See, e.g.*, Greg Berman and Robert V. Wolf, *Alternatives to Incarceration: The New York Story*, 16 NYSBA Gov't, L. and Policy J. 39 (2014) (concluding that, "[f]or states in search of a more effective approach to criminal justice that lowers costs and places fewer men and women behind bars without sacrificing public safety, the New York approach is one worth replicating.").[11]

The ATI statute does not require that the programs be insured by the state. It is highly unlikely that the contract between the state, municipality, and Queens Village provides that the government pay for tort liability arising from residents' torts—much less from ex-residents' torts—and tort damages generally would not be considered an "approved expenditure." Permitting Oddo's recovery against Queens Village, along with the prospect of future tort liability for crimes committed by released residents, would significantly reduce the ability of these organizations to offer their programs at the same level, undermining New York's legislatively-adopted policy to redirect some drug-addicted criminals to treatment rather than prison. *Cf.*

---

[10] https://apps.criminaljustice.ny.gov/legalservices/sentencingreform/2007prelimsentencingreformrpt.pdf.

[11] http://www.courtinnovation.org/sites/default/files/documents/Berman%2BWolfArticle%20(2).pdf

Bily v. Arthur Young & Co., 3 Cal. 4th 370, 398, 834 P.2d 745, 11 Cal. Rptr. 2d 51 (1992) (noting "increased expense and decreased availability" of professional services if the court were to impose a duty on professional services firms to prevent economic injury to third parties).

CONCLUSION

The decision below should be reversed.

DATED: August 12, 2016.

Respectfully submitted,

/s/ Deborah J. La Fetra
DEBORAH J. LA FETRA
Pro Hac Vice pending
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on August ____, 2016, I electronically filed the foregoing with the Clerk of the Court for the New York State Court of Appeals by using the Court-PASS system.

I certify that all participants in the case are registered Court-PASS users and that service will be accomplished by the Court-PASS system.

s/ Deborah J. La Fetra
DEBORAH J. LA FETRA