



## NEW JERSEY LAW REVISION COMMISSION

### Tentative Report Regarding

### Harassment N.J.S. 2C:33-4

**November 21, 2019**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **February 12, 2020**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Introduction

This project began in response to *State v. Burkert*.<sup>1</sup> The issue in the case was whether the creation of lewd flyers that seriously annoyed the subject they portrayed was constitutionally protected free speech, or criminal harassment under N.J.S. 2C:33-4(c).<sup>2</sup> That statutory section provides that “a person commits a petty disorderly persons offense if, with purpose to harass another, he: ... c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.”<sup>3</sup> The Supreme Court in *Burkert* considered the context of the phrases in issue,<sup>4</sup> and explained that the Court “must construe a statute that criminalizes expressive activity narrowly to avoid any conflict with the constitutional right to free speech.”<sup>5</sup> The Court also referred to the Model Penal Code (MPC) and examined the manner in which courts in other jurisdictions had addressed similar statutes to determine the level of precision required.<sup>6</sup>

## Analysis

The *Burkert* Court found that “the vaguely and broadly worded standard in N.J.S. 2C:33–4(c) does not put a reasonable person on sufficient notice of the kinds of speech that the statute proscribes”<sup>7</sup> and that its vagueness created undue discretion for “prosecuting authorities ... to bring charges related to permissive expressive activities.”<sup>8</sup> Though N.J.S. 2C:33–4(c) allows “conviction of a person who acts with the purpose to ‘seriously annoy’ another person, under the corresponding MPC provision a conviction may be premised only on ‘alarming conduct.’ Unlike its MPC counterpart, N.J.S.A. 2C:33–4(c) is not restricted to conduct that serves ‘no legitimate purpose of the actor.’”<sup>9</sup>

Speech cannot, however, be made criminal “merely because it annoys, disturbs, or arouses contempt.”<sup>10</sup> Unlike other jurisdictions that “struck down overly broad and vague harassment

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<sup>1</sup> *State v. Burkert*, 231 N.J. 257 (2017).

<sup>2</sup> *Id.* at 271.

<sup>3</sup> N.J.S. 2C:33–4(c).

<sup>4</sup> *Id.* at 271 (“[W]e do not read [statutory words] in a vacuum, but rather ‘in context with related provisions so as to give sense to the legislation as a whole.’” (quoting *DiProspero v. Penn*, 183 N.J. 477, 492 (2005)).); *See also State v. Crawley*, 187 N.J. 440, 452 (2006).

<sup>5</sup> *Burkert*, 231 N.J. at 277.

<sup>6</sup> *Id.* at 278.

<sup>7</sup> *Id.* at 280.

<sup>8</sup> *Id.*; *See also id.* noting “[t]he circularity of the language of N.J.S.A. 2C:33–4, moreover, does not place limits on the statute.”

<sup>9</sup> *Id.* at 280; citing N.J.S.A. 2C:33–4(c).

<sup>10</sup> *Id.* at 281; *See Houston v. Hill*, 482 U.S. 451, 461 (1987) (stating that speech cannot be punished unless it is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest” (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)); *cf. Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (“There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”).

statutes,”<sup>11</sup> the *Burkert* Court attempted to “conform subsection (c) of N.J.S.A. 2C:33–4 ‘to the Constitution in a way that the Legislature would have intended.’”<sup>12</sup> Finding the legislative intent was to “address harassment by action rather than communication,”<sup>13</sup> the Court attempted to construe the statute as constitutional by “[n]arrowly reading the terms alarm and annoy.”<sup>14</sup>

To conform the statute to Constitutional free speech protections, the Court “construe[d] the terms ‘any other course of alarming conduct’ and ‘acts with purpose to alarm or seriously annoy’ as repeated communications directed at a person that reasonably put that person in fear for his safety or security or that intolerably interfere with that person’s reasonable expectation of privacy.”<sup>15</sup> Determining that “[s]ubsection (c) was never intended to protect against the common stresses, shocks, and insults of life that come from exposure to crude remarks and offensive expressions, teasing and rumor mongering, and general inappropriate behavior,”<sup>16</sup> the Court found that “[a]lthough Burkert displayed appalling insensitivity, he did not engage in repeated unwanted communications with Halton that intolerably interfered with his reasonable expectation of privacy.”<sup>17</sup>

*State v. Burkert* was not the first case to address issues posed by N.J.S. 2C:33-4. Although the provisions of the section defining the substantive offense of harassment survived constitutional attack in *State v. Hoffman*, the phrase, “or in any other manner” caused the Court difficulty in that case.<sup>18</sup> The *Hoffman* Court found that catchall phrase to include only modes of communication that intrude into an individual’s legitimate expectations of privacy, preventing the statute from constitutional attack as overbroad.<sup>19</sup>

New Jersey Courts have emphasized that many protected forms of speech are intended to annoy the persons to whom they are directed.<sup>20</sup> Courts in these cases have focused on the requirement of a purpose to harass as protecting the statute from constitutional attack on vagueness rather than overbreadth grounds. The court in *State v. Finance American Corp.* suggested strongly that there may well be cases in which the offense cannot be prosecuted in a manner consistent with the First Amendment, but that those situations should be dealt with on a case-by-case basis.<sup>21</sup>

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<sup>11</sup> *Burkert*, 231 N.J. at 284.

<sup>12</sup> *Id.*, citing *State v. Natale*, 184 N.J. 458, 485–86 (2005).

<sup>13</sup> *Id.* at 284. See MPC § 250.4 cmt. 6.

<sup>14</sup> *Burkert*, 231 N.J. at 285. See *Cesare v. Cesare*, 154 N.J. 394, 404 (stating that “provision in N.J.S.A. 2C:33–4(a) prohibiting conduct communicated in any manner likely to cause annoyance or alarm encompasses, for constitutional reasons, only those modes of communicative harassment that ‘are also invasive of the recipient’s privacy’ ” (quoting *State v. Hoffman*, 149 N.J. 564, 583 (1997))).

<sup>15</sup> *Burkert*, 231 N.J. at 284–285.

<sup>16</sup> *Id.* at 286.

<sup>17</sup> *Id.* at 287.

<sup>18</sup> See generally *State v. Hoffman*, 149 N.J. 564 (1997).

<sup>19</sup> *Id.* at 583.

<sup>20</sup> See also *State v. B.H.*, 290 N.J. Super. 588, 594–595 (App. Div. 1996), *aff’d* and *rev’d in part sub nom.*; *State v. Hoffman*, 149 N.J. 564 (1997); *State v. Finance American Corp.*, 182 N.J. Super. 33 (App. Div. 1981).

<sup>21</sup> *State v. Finance American Corp.*, 182 N.J. Super. 33, 38 (1981).

There are cases in which the Court used the requirement of a “purpose to harass” in order to limit the statutory section. In *R.G. v. R.G.*, for example, the defendant sent many coarsely worded text messages in a dispute between brothers over the proper care of their parents.<sup>22</sup> Since there was a legitimate purpose for the messages, the Court determined that an intent to harass was not established.<sup>23</sup> However, the facts in the case could have been interpreted differently; the defendant could have been found to have intended to harass, but for a legitimate purpose. Similarly, in *J.D. v. M.D.F.*, the Court determined that if the defendant's purpose in taking photographs of the plaintiff's house late at night was to collect evidence for a custody action, he was not guilty of harassment even though the plaintiff was both annoyed and alarmed.<sup>24</sup>

The problem identified in *State v. Burkert* concerning subsection (c) is only part of the difficulty presented by the statute in question. Other parts of the statute have caused problems, including those of constitutional dimension. Courts have used various limiting techniques to avoid these issues. The accumulation of hard cases supports the adage: “bad law makes hard cases.” The solution lies in a substantial rewriting of the statute. The current language of the statute is as follows:

#### **2C:33-4. HARASSMENT.**

Except as provided in subsection e., a person commits a petty disorderly persons offense if, with purpose to harass another, he:

- a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;
- b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
- c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received.

d. (Deleted by amendment, P.L. 2001, c. 443).

e. A person commits a crime of the fourth degree if, in committing an offense under this section, he was serving a term of imprisonment or was on parole or probation as the result of a conviction of any indictable offense under the laws of this State, any other state or the United States.

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<sup>22</sup> *R.G. v. R.G.*, 449 N.J. Super. 208 (App. Div. 2017).

<sup>23</sup> *Id.*

<sup>24</sup> *J.D. v. M.D.F.*, 207 N.J. at 481, 485. *See also State v. L.C.*, 283 N.J. Super. 441, 448-451 (App. Div. 1995), *certif. den.*, 143 N.J. 325 (1996) (reversing a conviction where a wife used vulgar language while yelling at her husband about his girlfriend).

The rewritten statute must still forbid activities that are pure harassment, but allow activities that serve a legitimate purpose or are constitutionally protected. The statute must be neither unconstitutionally broad nor unconstitutionally restrictive of speech. After research regarding the manner in which other states structure similar harassment laws, and numerous discussions regarding potential language, the Commission proposes the revision of the statute as shown in the Appendix on the following page.

## Appendix

The revisions proposed by the Commission are as follows:

### 2C:33-4. Harassment.

a. Except as provided in subsection e. c., a person commits a petty disorderly persons offense if, with ~~purpose intent to harass~~ harm or seriously alarm another, either without other legitimate purpose or in a manner clearly excessive in light of any legitimate purpose, he the individual:

(1) threatens to inflict injury or physical harm to any person or the property of any person,

~~a.(2) Makes, or causes to be made, a communication or series of communications anonymously or at extremely inconvenient hours, or in offensively course language in a any other manner likely to cause annoyance~~ intimidate, or alarm;

~~b Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or~~

~~e.(3) Engages in any other course of alarming conduct or of repeatedly committed acts with purpose likely to intimidate, alarm or seriously annoy such other~~ harm a person.

b. A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received.

d. (Deleted by amendment, P.L.2001, c. 443)

e.c. A person commits a crime of the fourth degree if, in committing an offense under this section, he was serving a term of imprisonment or was on parole or probation as the result of a conviction of any indictable offense under the laws of this State, any other state or the United States.

### COMMENT

The opening language of subsection (a) that any offense of harassment must include an intent to harm or seriously alarm the victim. The substitution of the word “intent” for “purpose” avoids repeating the word “purpose”. The addition to the opening language is derived from the Model Penal Code where it appears in the equivalent of subsections (a) and (c). This change solves the problem where the defendant intended to harass the victim but for a legitimate purpose. *R.G. v. R.G.* (the dispute about care of parents) and *State v. Finance American Corp.* (debt collection) may be such situations.

Subsection (a)(1) is modeled after the New Jersey Cyber-Harassment statute, adopted by L.2013 c. 272. That statute is a more recent expression of legislative intent than 2C:33-4. It uses more carefully crafted language to criminalize intended injury but avoid including less culpable behavior. That section (excerpted) is:

#### 2C:33-4.1 CRIME OF CYBER-HARASSMENT.

1. a. A person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person:

- (1) threatens to inflict injury or physical harm to any person or the property of any person;
- (2) knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person; or
- (3) threatens to commit any crime against the person or the person's property.

Subsection (a)(2) is derived from the current statute but deletes the reference to inconvenient hours and offensively course language. It also explicitly includes a series of communications as well as a single communication. Most important, the communication must be likely to intimidate, alarm or harm the victim. That objective standard supplements the intent requirement in the opening language of the subsection. Thus, for conviction, it must be shown that the actor intended harm or alarm and that the communications were those likely to cause intimidation or alarm.

Subsection (a)(3), the general provision, is structures similarly to subsection (a)(2). Again, it incorporates the purpose requirement from the opening language and its own requirement that, in addition, the conduct be of a kind that would likely to intimidate, alarm or harm a person.