



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report Regarding the Terms “Public” and “Tumultuous” as used in the New Jersey Code of Criminal Justice – N.J.S. 2C:33-2 et seq.**

**December 19, 2019**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes to determine the law of the State.

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“How all my brain was in tumult, and all my heart in insurrection!  
Yet in what darkness, what dense ignorance, was the mental battle fought!”  
— Charlotte Brontë, *Jane Eyre*

## Executive Summary

In *State v. Finnemen*,<sup>1</sup> the Appellate Division considered whether the defendant engaged in “tumultuous” behavior as required for a conviction under N.J.S. 2C:33-2(a)(1), as well as whether the definition of “public” as described in N.J.S. 2C:33-2(b) applied to the entire statute.

In this unpublished opinion, the Appellate Division found the defendant’s behavior to be tumultuous.<sup>2</sup> The Court reasoned that the “defendant’s conduct caused public inconvenience, annoyance or alarm and constituted overwhelming turbulence or upheaval ... and a violent agitation of mind and feelings.”<sup>3</sup> The Court went on to find that “for the present purposes,” the word “public,” as defined in N.J.S. 2C:33-2(b), also applied to subsection a. of N.J.S. 2C:33-2(a).<sup>4</sup>

The Commission recommends removal of the term “annoyance” and “tumultuous” from the disorderly conduct statute to eliminate the ambiguity surrounding these subjective and undefined terms. In addition, the Commission suggests that language prohibiting “excessive noise” be added to this statute. Finally, the Commission recommends that the unconstitutional, “offensive language” subsection be stricken from the statute.

## Background

In *State v. Finnemen*, the defendant created a disturbance inside a Walgreens, then continued to yell obscenities and make obscene hand gestures toward Walgreens employees after being asked to leave the store.<sup>5</sup> The responding police officers observed the defendant at a bus stop directly across the street from the store.<sup>6</sup> These officers described the defendant’s affect as “irate” and noted that, at the time, he was angrily gesturing with his hands.<sup>7</sup> After being asked to leave the area, the defendant proceeded in the direction of another bus stop.<sup>8</sup> In a final confrontation with the responding officers the defendant “continued to yell and cause a scene” and entered a nail salon after being told by the officers not to so.<sup>9</sup>

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<sup>1</sup> *State v. Finnemen*, 2017 WL 4448541 (App. Div. Oct. 6, 2017).

<sup>2</sup> *Id.* at \*5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at \*4-5.

<sup>5</sup> *Id.* at \*1.

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

<sup>7</sup> *Id.* at \*2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*1-2.

After being found guilty of both disorderly conduct<sup>10</sup> and resisting arrest<sup>11</sup> the defendant appealed his conviction to the Superior Court, Law Division.<sup>12</sup> Following his conviction after a trial *de novo*, the defendant appealed to the Superior Court, Appellate Division. The defendant contested, among other issues, that his convictions should be reversed because his behavior did not rise to the level of “tumultuous” as set forth in N.J.S. 2C:33-2(a)(1).<sup>13</sup>

### Analysis

In *State v. Finneman*, the defendant was charged with disorderly conduct under N.J.S. 2C:33-2(a)(1).<sup>14</sup> The State, therefore, was required to prove that the defendant “acted with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[,] ... [e]ngaged in fighting or threatening, or in violent tumultuous behavior.”<sup>15</sup> The defendant argued that he had not engaged in tumultuous behavior within the meaning of the statute.<sup>16</sup> After engaging an analysis of the statute, the defendant’s convictions were ultimately affirmed.<sup>17</sup>

#### • *Public*

The Appellate Division commenced its analysis with an examination of the “Disorderly Conduct” statute. In its current form, N.J.S. 2C:33-2 provides:

**a. Improper behavior.** A person is guilty of a petty disorderly persons offense, if with purpose to cause **public** inconvenience, annoyance or alarm, or recklessly creating a risk thereof he

- (1) Engages in fighting or threatening, or in violent or **tumultuous** behavior; or
- (2) Creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.

**b. Offensive language.** A person is guilty of a petty disorderly persons offense if, in a **public** place, and with purpose to offend the sensibilities of a hearer or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language, given the circumstances of the person present and the setting of the utterance, to any person present. (Emphasis added).

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<sup>10</sup> N.J.S. 2C:33-2.

<sup>11</sup> N.J.S. 2C:29-2(a).

<sup>12</sup> *State v. Finnemen*, 2017 WL 4448541 at \*1.

<sup>13</sup> *Id.* at \*1-2, \*4.

<sup>14</sup> *Id.*

<sup>15</sup> N.J.S. 2C:33-2(a)(1).

<sup>16</sup> *State v. Finnemen*, 2017 WL 4448541 at \*4.

<sup>17</sup> *Id.* at 5.

Absent from subsection a. is a definition for “public” or “tumultuous.” In attempting to ascertain a definition of the word “public” the Court did not have to look further than just beneath section b., of the same statute.

N.J.S. 2C:33-2(b) of the Disorderly Conduct statute is entitled “Offensive Language.” Directly beneath section b., in a separate un-lettered paragraph, is a definition of the word “public.” The term public as means: “... affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.”<sup>18</sup> The location of this definition within the statute, however, gave the Appellate Court pause to consider whether it applied solely to subsection b. or whether it applied to subsection a. as well.

The Court found that it was “...not clear whether the Legislature intended [subsection (b)] definition to apply to [the] use of the word ‘public’ in subsection [(a)]....”<sup>19</sup> The Court determined that the definition of public that immediately follows subsection b. also applies to subsection a. The Court’s explanation for this finding was “...for present purposes we assume a consistency of meaning.”<sup>20</sup> The Court’s use of “present purpose,” however, does not provide a definitive basis for this conclusion.

- *The Model Penal Code*

New Jersey’s Disorderly Conduct statute is based upon the language contained in the Model Penal Code. A comparison of New Jersey’s Disorderly Conduct Statute with the Model Penal Code (MPC) statute of the same name provides the basis for applying the definition of the term “public” to both subsections of the New Jersey statute. The New Jersey definition of “public” is identical to the definition of the word in the Model Penal Code.<sup>21</sup> The only distinction between the two sections deals with placement, rather than substance.

In §250.2, of the MPC the disorderly conduct statute consists of two sections.<sup>22</sup> Subsection 1. of the MPC is entitled “Offenses Defined” and the “grading” of the offense is set forth in subsection 2. The word “public” is defined in subsection 1. and directly follows the subsections (a) - (c) that enumerate the type of behavior that is considered disorderly conduct. It is clear that in the context of the MPC the term “public” is meant to apply to each of the enumerated behaviors.

By contrast, New Jersey’s disorderly conduct statute, which is based on MPC §250.2, was bifurcated into subsections. The first subsection, a. Improper Behavior, incorporates MPC

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<sup>18</sup> N.J.S. 2C:33-2 *et seq.*

<sup>19</sup> *Id.* (quoting *State v. Stamphone*, 341 N.J. Super. 247, 254 (App. Div. 2001)).

<sup>20</sup> *Id.*

<sup>21</sup> MODEL PENAL CODE §250.2 Disorderly Conduct (Proposed Official Draft 1962).

<sup>22</sup> *Id.*

§250.2(1)(a) and (c). The second subsection, b. Offensive Language, is predicated upon 250.2(1)(a). The appearance of the definition of “public” immediately following subsection b. when viewed in connection with the original language of the MPC is indicia that the term applies to both provisions of the New Jersey statute.

To the extent that the structure of New Jersey’s disorderly conduct statute forms the basis of any ambiguity, clarifying it could eliminate future confusion.<sup>23</sup>

- *Tumultuous*

The second issue addressed by the Appellate Division in *State v. Finneman* concerned the meaning of the word “tumultuous.” The relevant portion of N.J.S. 2C:33-2(a) states the following:

A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he

(1) Engages in fighting or threatening, or in violent or **tumultuous**<sup>24</sup> behavior ...

The term tumultuous is not frequently used in common parlance, nor is it defined in the New Jersey Code of Criminal Justice. The Court, therefore, chose to examine extrinsic sources to ascertain a definition of the term tumultuous.

The *Finneman* Court examined the Webster’s New Collegiate Dictionary definition of this term as it appeared in 1978, the year N.J.S. 2C:33-2 was enacted.<sup>25</sup> At the time, “tumultuous” was defined as “marked by tumult,” “tending or disposed to cause to excite a tumult,” and “marked by violent or overwhelming turbulence or upheaval.”<sup>26</sup> The Court then turned its attention to the limited case law in this area to find a definition for the word “tumultuous.”

In the context of examining the municipal ordinances affecting the rental of summer properties, the Appellate Division in *United Property Owners Association of Belmar v. Borough*

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<sup>23</sup> See proposed language set forth in the Appendix.

<sup>24</sup> Emphasis added.

<sup>25</sup> *Id.* at \*5.

<sup>26</sup> *State v. Finneman*, 2017 WL 4448541 at \*5 citing Webster’s New Collegiate Dictionary 1258 (1977). See *Tumultuous*, Random House Webster’s Unabridged Dictionary (2d. ed. 2001) (“highly agitated, as the mind or emotions”); *Tumultuous*, The American Heritage Dictionary of the English Language, <https://ahdictionary.com/word/search.html?q=tumultuous> (last visited Nov. 15, 2017) (“[c]haracterized by mental or emotional agitation”); *Tumultuous*, The American Heritage Dictionary (Second College Ed. 1982) (“[c]onfusedly or violently agitated”); see also *Hunter v. Allen*, 422 F.2d 1158, 1164 n.14A (5th Cir. 1970) (Godbold, J., dissenting) (citing The Random House Dictionary of the English Language (1966) to define “tumult” as “[h]ighly distressing agitation of mind or feeling; turbulent mental or emotional disturbance”), *rev’d on other grounds, Embry v. Allen*, 401 U.S. 989, 91 S.Ct. 1237, 28 L.Ed.2d 528 (1971); *State v. Lund*, 144 Vt. 171, 475 A.2d 1055, 1060 (1984) (citing Webster’s New International Dictionary (1961) to define “tumult” as a “violent outburst”).

of *Belmar*<sup>27</sup>, had occasion to pass upon the term tumult. The Court determined that, “[a]lthough excessive noise does not qualify as disorderly conduct under N.J.S.A. 2C:33-2b, unless it consists of coarse or abusive language, it falls within the rubric of tumultuous.”<sup>28</sup> The Court defined tumult as “...either “uproar” or “violent agitation of mind or feelings.”<sup>29</sup> Excessive noise, the Court reasoned, “...could qualify as an uproar or a violent agitation to the victim.”<sup>30</sup> N.J.S. 2C:33-2 does not currently include statutory language pertaining to excessive or unreasonable noises.

The Criminal Law Revision Commission (CLRC) included “unreasonable noise” in its definition of disorderly conduct.<sup>31</sup> The CLRC coupled this term with the phrase “offensively coarse utterance.”<sup>32</sup> The term “unreasonable noise”, however, was lost when the New Jersey Legislature redrafted the provision entitled “offensive language.”<sup>33</sup>

Inherently, the category of offense defined by this statute raises some problems. While it is appropriate to forbid breaches of the peace that affect the rights of others, if drawn too broadly the statute may be used to forbid conduct that should otherwise be tolerated. These problems will likely be exacerbated by the inclusion of a noise provision. The use of the word “annoyance” in the phrase, “public inconvenience, annoyance or alarm” may have the unintended consequence of criminalizing a wide range of legitimate behavior. Arguably, the word does not add anything to “public inconvenience or alarm.”

The word “inconvenience” is also susceptible to overly broad interpretation. To limit the meaning of the term some jurisdictions have added the word “physical” before the word “inconvenience.”<sup>34</sup> While the word “alarm” alone may be too narrow, the inclusion of the phrase “physical inconvenience” provides sufficient statutory protection without the subjectivity of “annoyance” or the vagueness of “inconvenience” when used alone.

To the extent that this omission of the term “unreasonable noise” from New Jersey’s body of statutes was not intentional, amending the disorderly conduct statute to include the term “unreasonable noise” instead of the term “tumultuous” could eliminate confusion.<sup>35</sup>

- *50 State Survey of “Tumultuous”*

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<sup>27</sup> *United Prop. Owners Ass’n of Belmar v. Borough of Belmar*, 343 N.J. Super. 1, 67 (App. Div. 2001).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* quoting Webster’s New American Dictionary 555 (Smithmark 1995).

<sup>30</sup> *Id.*

<sup>31</sup> FINAL REPORT OF THE CRIMINAL LAW REVISION COMMISSION, Volume I \*111 (1971).

<sup>32</sup> *Id.*

<sup>33</sup> See generally N.J.S. 2C:33-2 *et seq.*

<sup>34</sup> *State v. Teale*, 139 Hawai’i 351 (S.Ct. Feb. 2017).

<sup>35</sup> See proposed language set forth in the Appendix.

New Jersey is not the only state in the country to use the term “tumultuous” in its criminal statutes; rather, it is one of 24 states that use the term tumultuous in its body of law.<sup>36</sup> The majority of states, however, do not use the term “tumultuous” in their disorderly conduct statutes.<sup>37</sup>

**Fig. 1.**

#	STATES WHOSE DISORDERLY CONDUCT STATUTES USE THE TERM TUMULT	STATES WHOSE DISORDERLY CONDUCT STATUTES DO NOT USE THE TERM TUMULT
1	Alabama (§ 13A-11-7. Disorderly conduct.)	Alaska (§ 11.61.110. Disorderly conduct)
2	Arkansas (§ 5-71-207. Disorderly conduct)	Arizona (§ 13-2904. Disorderly conduct; classification)
3	Connecticut (§ 53a-182. Disorderly conduct...)	California (§ 415. Fighting; noise; offensive words)
4	Delaware (§ 1301. Disorderly conduct; unclassified misd.)	Colorado (§ 18-9-106. Disorderly conduct)
5	Georgia (§ 16-11-39. Disorderly conduct)	District of Columbia (§ 22-1322. Rioting or inciting to riot.)
6	Hawaii (§ 711-1101. Disorderly conduct)	Florida (877.03. Breach of the peace; disorderly conduct)
7	Idaho (§ 18-6409. Disturbing the peace)	Illinois (5/11-5-3. Intoxication; fighting; disorderly conduct)
8	Indiana (35-31.5-2-338 “Tumultuous conduct”)	Iowa (723.4. Disorderly conduct)
9	Kentucky (525.055 Disorderly conduct in the first degree)	Kansas (21-6203. Disorderly conduct)
10	Louisiana (§ 103. Disturbing the peace)	Maine (§ 501-A. Disorderly conduct)
11	Massachusetts (§8. Destr. of or damage to prop. by persons riotously assembled; liability of town)	Maryland (§ 10-201. Disturbing the public peace and disorderly conduct)
12	Mississippi (§ 97-35-9. Disturb. by tumultuous or offensive conduct)	Michigan (750.167. “Disorderly person” defined...)
13	Nevada (203.010. Breach of peace)	Minnesota (609.72. Disorderly conduct)
14	New Hampshire (644:2 Disorderly Conduct.)	Missouri (574.010. Peace disturbance--penalty)
15	New Jersey (2C:33-2. Disorderly conduct)	Montana (45-8-101. Disorderly conduct)
16	New York (§ 240.20 Disorderly conduct)	Nebraska (17-129. Disorderly conduct; power to prevent)
17	North Dakota (§ 12.1-31-01. Disorderly conduct)	New Mexico (§ 30-20-1. Disorderly conduct)
18	Oregon (166.025. Disorderly conduct in the second degree)	North Carolina (§ 14-288.4. Disorderly conduct)
19	Pennsylvania (§ 5503. Disorderly conduct)	Ohio (2917.11 Disorderly conduct)
20	Rhode Island (§ 11-45-1. Disorderly conduct)	Oklahoma (725:30-4-17. Disorderly conduct)
21	Texas (§ 38.13. Hindering Proc. by Disorderly Conduct)	South Carolina (§ 16-17-530. Public disorderly conduct.)
22	Utah (§ 76-9-102. Disorderly conduct)	South Dakota (22-18-35. Disorderly conduct--Misdemeanor)
23	Vermont (§ 1026. Disorderly conduct)	Tennessee (§ 39-17-305. Disorderly conduct)
24	Washington (9A.84.030. Disorderly conduct)	Virginia (§ 18.2-415. Disorderly conduct in public places)
25		West Virginia (§ 61-6 1b. Disorderly conduct; penalty)
26		Wisconsin (947.01. Disorderly conduct)
27		Wyoming (§ 6-6-102. Breach of the peace; penalties)

At this time, Indiana is the only state in the country that supplies a statutory definition for the term “tumultuous.”<sup>38</sup> Indiana’s criminal code prohibits tumultuous conduct pursuant to IC 35-

<sup>36</sup> Ala. (§ 13A-11-7. Dis. con.); Ark. (§ 5-71-207. Dis. con.); Conn. (§ 53a-182. Dis. con.); Del. (§ 1301. Dis. con.; unclassified misd.); Ga. (§ 16-11-39. Dis. con.); Haw. (§ 711-1101. Dis. con.); Idaho (§ 18-6409. Dist. the peace); Ind. (35-31.5-2-338 Tumultuous cond.); Ky. (525.055 Dis. con. in the first degree); La. (§ 103. Disturbing the peace); Mass. (§8. Destr. of or damage to prop. by persons riotously assembled; liability of town); Miss. (§ 97-35-9. Disturb. by tumultuous or offensive cond.); Nev. (203.010. Breach of peace); N.H. (644:2 Dis. con.); N.J. (2C:33-2. Dis. con.); N.Y. (§ 240.20 Dis. con.); N.D. (§ 12.1-31-01. Dis. con.); Or. (166.025. Dis. con. in the second degree); Pa. (§ 5503. Dis. con.); R.I. (§ 11-45-1. Dis. con.); Tex. (§ 38.13. Hindering Proc. by Dis. con.); Utah (§ 76-9-102. Dis. con.); Vt. (§ 1026. Dis. con.); Wash. (9A.84.030. Dis. con.). *See* Fig. 1.

<sup>37</sup> Alaska (§ 11.61.110. Dis. con.); Ariz. (§ 13-2904. Dis. con.; classification); Cal. (§ 415. Fighting; noise; offensive words); Colo. (§ 18-9-106. Dis. con.); D.C. (§ 22-1322. Rioting or inciting to riot.); Fla. (877.03. Breach of the peace; Dis. con.); Ill. (5/11-5-3. Intox.; fighting; Dis. con.); Iowa (723.4. Dis. con.); Kan. (21-6203. Dis. con.); Me. (§ 501-A. Dis. con.); Md. (§ 10-201. Dist. the public peace and Dis. con.); Mich. (750.167. “Disorderly person” defined.); Minn. (609.72. Dis. con.); Mo. (574.010. Peace disturbance--penalty); Mont. (45-8-101. Dis. con.); Neb. (17-129. Dis. con.; power to prevent); N.M. (§ 30-20-1. Dis. con.); N.C. (§ 14-288.4. Dis. con.); Ohio (2917.11 Dis. con.); Okla. (725:30-4-17. Dis. con.); S.C. (§ 16-17-530. Public Dis. con.); S.D. (22-18-35. Dis. con. - Misdemeanor); Tenn. (§ 39-17-305. Dis. con.); Va. (§ 18.2-415. Dis. con. in public places); W.Va. (§ 61-6 1b. Dis. con.; penalty); Wis. (947.01. Dis. con.); Wyo. (§ 6-6-102. Breach of the peace; penalties). *See* Fig. 1.

<sup>38</sup> IC 35-45-1 defines “Tumultuous Conduct.”

45-1-3 *et seq.* A person who recklessly, knowingly, or intentionally engages in fighting or in tumultuous conduct commits disorderly conduct.<sup>39</sup>

Tumultuous conduct is defined in the Code in IC 35-45-1-1 as “conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property.”<sup>40</sup> The Indiana definition of the term tumultuous, however, cannot be imported into the New Jersey Statutes.

The term “serious bodily injury” is defined in New Jersey’s Code of Criminal Conduct.<sup>41</sup> In N.J.S. 2C:11-1(b), this term is defined as “bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” As used in New Jersey, the use of the term “serious bodily injury” in the disorderly conduct statute would exceed the scope of the statute.

- *Offensive Language*<sup>42</sup>

Enacted in 1978, subsection b. of New Jersey’s disorderly conduct statute prohibits the public use of coarse or abusive language that is uttered with the purpose of offending the sensibilities of a hearer, or in reckless disregard of the probability of so doing.<sup>43</sup> The current version of New Jersey’s disorderly conduct statute was enacted after the decisions of both the United States and the New Jersey Supreme Court invalidated convictions for the use of public and offensive language.<sup>44</sup> The constitutionality of the current statute, however, would remain unquestioned for almost a decade.

In 1985, a juvenile was adjudicated delinquent for conduct which would cause him to be classified as a disorderly person under N.J.S. 2C:33-2(b).<sup>45</sup> The punishable conduct, according to the trial court judge, was the juvenile’s use of “...profane language, the purpose of which was to offend the officer, in effect, to exact verbal vengeance for his arrest.”<sup>46</sup>

The Appellate Division reviewed the language of the statute in the context of the constitutional parameters set forth by the decisions of the United States Supreme Court and the

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<sup>39</sup> IC 35-45-1-3(a)(1).

<sup>40</sup> IC 35-45-1-1 Sec. 1.

<sup>41</sup> See N.J.S. 2C:11-1(b).

<sup>42</sup> NEW JERSEY LAW REVISION COMMISSION (2018) ‘Definition of Marital Status’. *Minutes of NJLRC meeting 20 December 2018*, Newark, New Jersey. The Commission discussed the constitutionality of N.J.S. 2C:33-2(b). To answer questions raised by the Commission at this meeting, Staff conducted an examination of this section of the statute.

<sup>43</sup> N.J.S. 2C:33-2(b).

<sup>44</sup> *In the Interest of H.D.*, 206 N.J. Super. 58 (App. Div. 1985), citing *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971); and, *State v. Rosenfeld*, 62 N.J. 594 (1973) (recognizing that the disorderly conduct statute, N.J.S. 2A:170-29(1) may not be utilized to punish speech which is offensive to the sensibilities of the hearer).

<sup>45</sup> *State in the Interest of H.D.*, 206 N.J. Super. at 59.

<sup>46</sup> *Id.* citing *State in the Interest of H.D.*, 184 N.J. Super. 299 (J&D.R.Ct. 1982).



New Jersey Supreme Court.<sup>47</sup> In addition, the Court juxtaposed N.J.S. 170-29(1) and N.J.S. 2C:33-2(b) and found that the defect fatal to the validity of the former inheres to the latter.<sup>48</sup> In reversing H.D.’s adjudication of delinquency the Court held that, “...there is no valid statutory authority for prosecutions based upon the public use of coarse or abusive language which [do] not go beyond offending the sensibilities of the listener.”<sup>49</sup>

The elimination of subsection b. from New Jersey’s disorderly conduct statute would be consistent with jurisprudence from both the United States Supreme Court and the New Jersey Supreme Court.

- *Pending Legislation – A1324*

Assembly Bill 1324 was introduced on January 9, 2018 and referred to the Assembly Law and Public Safety Committee. This legislation seeks to “enhance[] the penalties for engaging in the petty disorderly person’s offense of improper behavior while in a place of public accommodation.”<sup>50</sup> This legislation, however, does not address the ambiguity raised in *Finneman* regarding the term tumultuous. Rather, this bill leaves the current language of the statute unchanged, and adds a new subsection wherein a person engaging in the behavior described in subsection a. of the current statute, which includes “tumultuous” behavior, in a place of public accommodation “shall be sentenced to a term of imprisonment of not less than one day or more than 30 days; shall be ordered to perform 50 hours of community service; shall be ordered to pay a fine of \$500 in addition to any restitution ordered; and shall be banned by judicial order from frequenting the place of public accommodation for not less than one year or more than two years.”<sup>51</sup>

If this proposed legislation is enacted, the penalties for “tumultuous” behavior in a “public” place would include imprisonment, as well as fines. Given the possibility of incarceration for those found guilty of disorderly conduct, it may be beneficial to define or eliminate the word “tumultuous” and clarify whether the definition of “public” applies to both subsections a. and b. of N.J.S. 2C:33-2.

## Outreach

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These stakeholders included: the Attorney General of New Jersey;

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<sup>47</sup> See n.41 *supra*.

<sup>48</sup> *State in the Interest of H.D.*, 206 N.J. Super. at 61.

<sup>49</sup> *Id.* See also *State v. Skott*, 2014 WL 6634684 f.2 (Nov. 25, 2014) (Prosecutor in the Law Division dismissed the disorderly conduct charge against the defendant *citing State in the interest of H.D.*, 206 N.J. Super. 58, 61 (App. Div. 1985)).

<sup>50</sup> A1324, 2018 Leg., 218<sup>th</sup> Leg., 1<sup>st</sup> Sess. (N.J. 2018).

<sup>51</sup> *Id.*

the Appellate Section of the Attorney General’s Office; the Legislative Liaisons at the Office of the Attorney General; the New Jersey Administrative Office of the Courts; the New Jersey State Municipal Prosecutor’s Association; each of the twenty-one County Prosecutors; the New Jersey County Prosecutor’s Association; the New Jersey Office of the Public Defender; the New Jersey Association of Criminal Defense Lawyers; the leadership of the Criminal Practice Section of the New Jersey State Bar Association; several criminal defense attorneys; the New Jersey State League of Municipalities; the New Jersey Association of Counties; the New Jersey State Association of Chiefs of Police; the New Jersey Police Traffic Officers Association.

The entities that responded demonstrated an overall support for the recommendations set forth in this Report.

- *Mercer County Prosecutor’s Office*

The Mercer County Prosecutor’s Office agreed that “...clarifying the structure of the statute could eliminate the confusion noted by the Appellate Division in *Finneman*.”<sup>52</sup> The Prosecutor also noted that, “[d]isorderly conduct remains one of the most frequently investigated and charged offenses in New Jersey.”<sup>53</sup> In 2016, “there were 13,021 arrests [in New Jersey] for disorderly conduct...”<sup>54</sup> Thus, there is an overall interest in “...ensuring that the offense of disorderly conduct is clearly defined, with the overall goal that actual unlawful behavior is being deterred and law enforcement are lawfully doing so.”<sup>55</sup>

- *Monmouth County Prosecutor’s Office*

In analyzing the Commission’s proposed modifications to New Jersey’s Disorderly Conduct statute, the Monmouth County Prosecutor’s Office was sensitive to the necessity of amending the current statute.<sup>56</sup> In addition, the Prosecutor noted that, “replacing the term ‘tumultuous’ with ‘other violence’ and the new offence of ‘excessive and unreasonable noise’ would allow the same conduct to be prosecuted under the statute while using more readily understandable words.”<sup>57</sup> In addition, the Prosecutor’s Office noted that, “[t]he proposal to clarify that the definition of the word ‘public’ applies everywhere... removes any potential ambiguity.”<sup>58</sup> Further, the deletion of the current “offensive language” section in the statute “...would be helpful

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<sup>52</sup> See letter from Angelo Onofri, Prosecutor, Mercer County Prosecutor’s Office \*3 to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Jul. 08, 2019) (on file with the NJLRC).

<sup>53</sup> *Id.* at \*3.

<sup>54</sup> *Id.* citing the *Uniform Crime Report, State of New Jersey* \*75 (2016).

<sup>55</sup> *Id.* at \*3.

<sup>56</sup> See Memorandum from Carey J. Huff, Assistant Prosecutor to Christopher Gramiccioni, Prosecutor \*2 sent via electronic mail to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (June 28, 2019) (on file with the NJLRC).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

as its plain language was determined to be unconstitutional in 1985, and the constitutional infirmity has not yet been corrected.”<sup>59</sup> Finally, the Prosecutor has suggested that word “annoyance” not be removed from the disorderly conduct statute.<sup>60</sup>

### **Conclusion**

A review of New Jersey’s disorderly conduct statute, and similar statutes throughout the United States, suggests that N.J.S. 2C:33-2 may benefit from revision to provide for: gender neutral language; the modification or elimination of the term tumultuous; the elimination of the subsection criminalizing offensive language; and, clarification that the term “public” applies to the entire statute rather than to only one subsection.

The Appendix on the following pages proposes modifications to the New Jersey statute that which seeks to discourage individuals from acting in a disorderly manner in public. The proposed modifications are derived from the language and principles contained in similar statutes and the case law.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

## Appendix

The proposed modifications (shown with *italics* underlining and ~~strikethrough~~), are as follows:

### **2C:33-2. Disorderly conduct**

a. Improper behavior. A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, ~~annoyance~~ or alarm; or ~~recklessly~~ with purpose to cause or recklessly causing ~~creating~~ a risk thereof he or she

(1) ~~Threatens or Engages~~ engages in fighting or ~~threatening~~, or in other violent or ~~tumultuous~~ behavior; or

(2) Creates excessive and unreasonable noise; or

~~(2)~~ (3) Creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.

~~b. Offensive language. A person is guilty of a petty disorderly persons offense if, in a public place, and with purpose to offend the sensibilities of a hearer or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language, given the circumstances of the person present and the setting of the utterance, to any person present.~~

b. “Public,” as used in this section, means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

#### Comment

The term “annoyance” has been struck from this statute because of the ambiguity surrounding the definition of this subjective term. Language has been added to section a. to render the statute gender neutral. The term tumultuous has been stricken from (a)(1) and language concerning excessive noise has been added to the statute as (a)(2). The previously designated section (a)(2) has been renumbered (a)(3).

To ensure that the statute is consistent with the holding in *State in the Interest of H.D.* 206 N.J. Super. 58 (App. Div. 1985), subsection b. has been eliminated from the statute. *See* discussion of offensive language *supra* at 8. *See also State v. Skott*, 2014 WL 6634684 f.2 (Nov. 25, 2014) (Prosecutor in the Law Division dismissed the disorderly conduct charge against the defendant *citing State in the interest of H.D.*, 206 N.J. Super. 58, 61 (App. Div. 1985)). *See also* CANNEL, CRIMINAL CODE ANNOTATED, Comment 3 to N.J.S. 2C:33-2(b), (*Gann*), for a thoughtful discussion on the issue of the unconstitutionality of this portion of the statute.

The previously undesignated paragraph that appeared immediately below the now stricken section b. has been designated as subsection b. In addition, language has been added to this paragraph to clarify the definition of the word “public” as used in this statute.