

To: New Jersey Law Revision Commission
From: Rachael Segal, John Cannel
Re: Harassment - N.J.S. 2C:33-4
Date: February 11, 2019

MEMORANDUM

This project began in response to *State v. Burkert*.¹ 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).² 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.”³

The Supreme Court in *Burkert* considered the context of the phrases in issue,⁴ 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.”⁵ 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.⁶

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”⁷ and that its vagueness created undue discretion for “prosecuting authorities ... to bring charges related to permissive expressive activities.”⁸

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.’”⁹

Speech cannot, however, be made criminal “merely because it annoys, disturbs, or

¹ *State v. Burkert*, 231 N.J. 257 (2017).

² *Id.* at 271.

³ N.J.S. 2C:33–4(c).

⁴ *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).

⁵ *Burkert*, 231 N.J. at 277.

⁶ *Id.* at 278.

⁷ *Id.* at 280.

⁸ *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.”

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

arouses contempt.”¹⁰ Unlike other jurisdictions that “struck down overly broad and vague harassment statutes,”¹¹ 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.’”¹² Finding the legislative intent was to “address harassment by action rather than communication,”¹³ the Court attempted to construe the statute as constitutional by “[n]arrowly reading the terms alarm and annoy.”¹⁴

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.”¹⁵ 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,”¹⁶ 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.”¹⁷

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.¹⁸ 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.¹⁹

¹⁰ *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.”).

¹¹ *Burkert*, 231 N.J. at 284.

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

¹³ *Id.* at 284. *See* MPC § 250.4 cmt. 6.

¹⁴ *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))).

¹⁵ *Burkert*, 231 N.J. at 284-285.

¹⁶ *Id.* at 286.

¹⁷ *Id.* at 287.

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

¹⁹ *Id.* at 583.

New Jersey Courts have emphasized that many protected forms of speech are intended to annoy the persons to whom they are directed.²⁰ 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.²¹

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.²² Since there was a legitimate purpose for the messages, the Court determined that an intent to harass was not established.²³ 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.²⁴

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 may lie in 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

²⁰ 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).

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

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

²³ *Id.*

²⁴ *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).

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.

After research regarding the manner in which other states structure similar harassment laws, and numerous discussions regarding potential language, Staff proposes the following potential option for the revision of the statute:

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~~ and without other legitimate purpose, the person:

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~~ intended to distress, intimidate, or alarm;

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

c. ~~Engages~~ Threatens to inflict injury or physical harm to any person or the property of any person, or engages in any other course of alarming conduct or of repeatedly committed acts with purpose to ~~alarm or seriously annoy such other person~~ cause emotional harm or place a person in fear of physical or emotional harm.

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.

COMMENT

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.

The changes to subsection (c) are modeled from 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.