



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Final Report**

#### **Addressing the Use of the Term**

#### **“Misdemeanor” in the New Jersey Statutes**

**February 11, 2019**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.  
Please consult the New Jersey statutes in order to determine the law of the State.

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**MISDEMEANOR, n. An infraction of the law having less dignity than a felony and constituting no claim to admittance into the best criminal society.<sup>1</sup>**

**- Ambrose Bierce.**

### **Executive Summary**

This project originated after Staff undertook a review of the Model Entity Transaction Act<sup>2</sup> (META) to determine whether it would be useful to incorporate provisions of the Act into existing New Jersey law. As part of the META project, Staff read each of the New Jersey statutes on the subject of partnerships and trade names.<sup>3</sup> It is presently a “misdemeanor” for a partnership to conduct business in New Jersey if the members of this entity have not filed the required paperwork with the County Clerk’s Office.<sup>4</sup>

An in-depth search of the New Jersey statutes confirmed the prevalence of the term misdemeanor outside of the Code of Criminal Justice (the “Code”).<sup>5</sup> For individuals unfamiliar with the Code, references to “misdemeanors” and “high misdemeanors” in non-Code statutes serve only to complicate the law contained in each statutory title.

The Commission recommends a revision of the Code to eliminate virtually all references to the term “misdemeanor” and replace it, in most instances, with its contemporary, Code-based equivalent. In addition, the Commission recommends the elimination of statutes containing the word misdemeanor that duplicate a crime enumerated in the Code or are archaic by virtue of the subject matter expressed therein. Finally, the Commission recognizes that certain references to the term misdemeanor, such as those discussing out-of-state criminal activity, are necessary and should therefore remain part of the Code.

### **The New Jersey Code of Criminal Justice**

The Code was enacted in New Jersey “[t]o forbid, prevent and condemn conduct that unjustifiably and inexcusably inflicts or threatens serious harm to individual or public interests....”<sup>6</sup> The safety and welfare of the community as defined in the statutory proscription has been held to be of paramount importance.<sup>7</sup> Further, the statutes that comprise the Code are specifically designed to embody the constitutional precepts of fundamental fairness and due process for the protection of the accused.<sup>8</sup> Accordingly, the Code, “...give[s] fair warning [to the citizenry] of the nature of the conduct proscribed and the sentences authorized upon conviction....”<sup>9</sup> Where the Code clearly defines an offense, neither a due process argument based

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<sup>1</sup> Ambrose Bierce, *The Devil’s Dictionary* 219 (The World Publishing Co. 1911).

<sup>2</sup> MODEL ENTITY TRANSACTIONS ACT (META) SUMMARY, Uniform Law.

<sup>3</sup> N.J.S. 56:1-1 to 56:1-7.

<sup>4</sup> N.J.S. 56-1-4.

<sup>5</sup> See Appendix at 1.

<sup>6</sup> N.J.S. 2C:1-2(a)(1).

<sup>7</sup> *State v. McCague*, 314 N.J. Super. 254, 265 (App. Div.), *certif. den.* 157 N.J. 542 (1998).

<sup>8</sup> CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:1-2 (*Gann*).

<sup>9</sup> N.J.S. 2C:1-2(a)(4).

on a lack of notice nor the defense of laches is appropriate.<sup>10</sup> The Code, however, emphasizes both fault and culpability.<sup>11</sup>

The Code also specifically sets forth the general purposes of the provisions governing the sentencing of an offender.<sup>12</sup> One of the general purposes governing the sentencing of an offender is, “to give fair warning [to the citizenry] of the nature of the sentences that may be imposed on conviction of an offense.”<sup>13</sup>

The Code classifies a crime, for the purpose of sentence, into one of four degrees.<sup>14</sup> The statute, N.J.S. 2C:43-1(a), grades crimes as those of the first degree, second degree, third degree, and fourth degree.<sup>15</sup> Crimes defined by the Code are no longer classified as misdemeanors or high misdemeanors. An individual who has been convicted of a crime set forth in the Code may be sentenced to imprisonment in accordance with the statutory scheme set forth in the Code<sup>16</sup>, for a term ranging from eighteen months<sup>17</sup> to life imprisonment.<sup>18</sup> The Code, however, is not the only statutory title in New Jersey that contains and defines criminal offenses.

The Code recognizes that other statutory titles define criminal activity<sup>19, 20</sup> and that crimes set forth in other statutes may not follow the scheme set forth in N.J.S. 2C:43-1(a).<sup>21</sup> Nevertheless, the Code, is responsible for enumerating the penalties and sentences for criminal behavior set forth in other statutes.<sup>22</sup>

To understand the potential sentence for a non-Code offense one must first identify the non-Code statute. Next, the definitions and sentencing provisions must be reviewed. In order to ascertain the sentence to be imposed, a person must also have the wherewithal to cross-reference the contents of the statute with the applicable sections of the Code. Frequently, three statutory sections must be read together, 2C:1-4(c), 2C:1-5(b), and, 2C:43-1(b).<sup>23</sup>

Pursuant to N.J.S. 2C:1-4(c), an offense defined by any statute of this State, other than the Code of Criminal Justice, will be classified according to this Code section or section 2C:43-1.<sup>24</sup> The general provisions of the Code, set forth in subtitle one, are applicable to offenses defined by other statutes.<sup>25</sup> The maximum penalty for non-Code offenses is that which is

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<sup>10</sup> *Id.*

<sup>11</sup> *State v. Pena*, 178 N.J. 297, 315 n.4 (2004).

<sup>12</sup> N.J.S. 2C:1-2(b).

<sup>13</sup> N.J.S. 2C:1-2(b).

<sup>14</sup> N.J.S. 2C:43-1(a).

<sup>15</sup> *Id.*

<sup>16</sup> N.J.S. 2C:43-6 *et seq.*

<sup>17</sup> N.J.S. 2C:43-6(a)(4).

<sup>18</sup> N.J.S. 2C:11-3.

<sup>19</sup> N.J.S. 2C:43-1(b).

<sup>20</sup> References to criminal activity that are set forth in statutory titles, other than the New Jersey Code of Criminal Justice are commonly referred to as “non-Code” offenses.

<sup>21</sup> *Id.*

<sup>22</sup> See N.J.S. 2C:1-4(c), 2C:1-5(b), and, 2C:43-1(b).

<sup>23</sup> CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:43-1 (*Gann*).

<sup>24</sup> N.J.S. 2C:1-4(c).

<sup>25</sup> N.J.S. 2C:1-5(b).

provided in the statute defining the offense.<sup>26</sup> If, however, the non-Code offense is classified as a misdemeanor and has a maximum penalty of more than eighteen months imprisonment, then the provisions of section 2C:43-1(b) apply and the offense shall be considered a fourth degree offense.<sup>27</sup> These sections address the non-Code punishments that do not conform to the sentencing parameters set forth in the Code – such as those associated with misdemeanors and high misdemeanors.

### **Misdemeanors and High Misdemeanors**

Prior to the enactment of the Code, non-Code criminal offenses were classified as either a “high misdemeanor” or as a “misdemeanor.”<sup>28</sup> The Code, in Subtitle 3, Chapter 43, Section 1, subsection b. provides, in relevant part, that “...a crime defined by any statute of this State other than this code and designated as a high misdemeanor shall constitute for the purpose of sentence a crime of the third degree.”

The Code goes on to address non-Code statutory references to “misdemeanors.” Regarding misdemeanors, subsection b. provides, in relevant part, that “[e]xcept as provided in sections 2C:1-4(c) and 2C:1-5(b) and notwithstanding any other provision of law, a crime defined by any statute of this State other than this code and designated as a misdemeanor shall constitute for purpose of sentence, a crime of the fourth degree.”

The sentence imposed for a third or fourth degree offense, as set forth in the Code, can be significant. Persons found guilty of a high misdemeanor, are subject to a three to a five-year state prison term.<sup>29</sup> A judge may also impose a fine of up to \$15,000 upon those individuals who are convicted of a high misdemeanor<sup>30</sup> if no sentence is set forth in the statute.<sup>31</sup> Those who violate a statute that employs the term “misdemeanor” are subject to punishment as if they committed a crime of the fourth degree.<sup>32</sup> They may be committed to the custody of the Commissioner of the Department of Corrections for a maximum term of eighteen months.<sup>33</sup> Further, they could be ordered to pay a fine of up to \$10,000<sup>34</sup> if no sentence is set forth in the statute.<sup>35</sup>

The existence of non-Code criminal offenses that reference misdemeanors and high misdemeanors may lead a person to several conclusions that are not accurate. The unwary researcher may believe that these terms accurately describe the criminal penalties associated with these non-Code offenses. In addition, the presence of these anachronistic terms may lead unsuspecting individuals to believe that they may only be prosecuted for the crime set forth in the non-Code statutes. Also, the term “misdemeanor” is generally defined as: “[o]ffenses; lower than felonies and generally those punishable by a fine or imprisonment otherwise than in [a]

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> N.J.S. 2C:43-1(b).

<sup>29</sup> N.J.S. 2C:43-6(3).

<sup>30</sup> N.J.S. 2C:43-3(b)(1).

<sup>31</sup> See CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:43-1(b), (Gann 2017).

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

<sup>33</sup> N.J.S. 2C:43-6(4).

<sup>34</sup> N.J.S. 2C:43-3(b)(2).

<sup>35</sup> See CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:43-1(b), (Gann 2017).

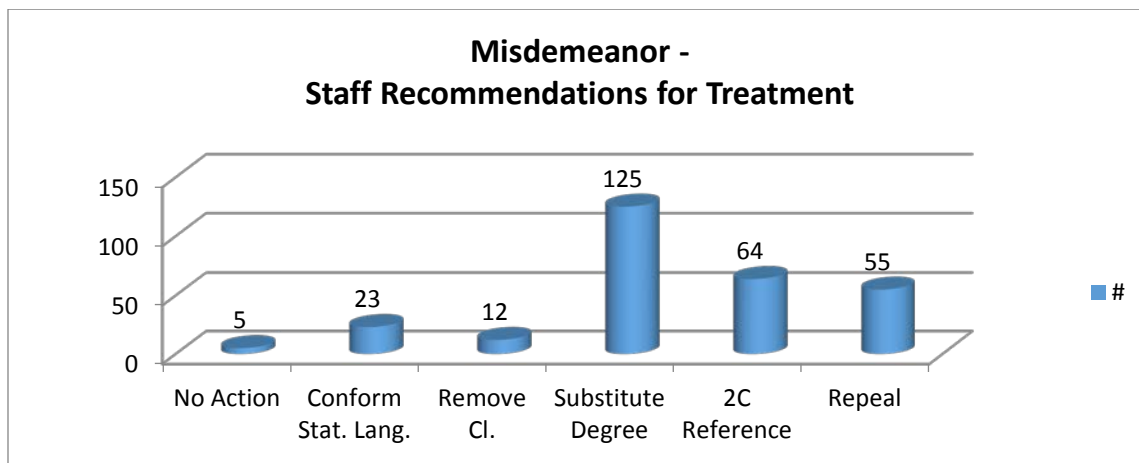
penitentiary.”<sup>36</sup> Both misdemeanors and high misdemeanors in this State, however, may subject a defendant to a state prison term. Given the potential for confusion by laypersons and professionals, removing these outdated terms from the body of statutes when possible appears to be a useful course of action.

### Analysis

Presently, the New Jersey Statutes contain five titular and twenty-eight statutory references to the term “high misdemeanors” that span eighteen titles. Individuals alleged to have violated a statute that references a high misdemeanor are subject to punishment for a crime of the third degree.<sup>37</sup> Separate and apart from these references, there are currently 256 New Jersey statutes that contain the term “misdemeanor.”<sup>38</sup> These references extend across thirty-eight titles and one appendix.<sup>39</sup> In total, forty-four New Jersey titles and one appendix contain statutes that employ either the term misdemeanor or high misdemeanor.<sup>40</sup> Included in these titles are 284 statutes that reference these terms.<sup>41</sup>

The New Jersey Statutes that contain a reference to the term misdemeanor can be divided into six categories.<sup>42</sup> For purposes of this report the each statute was placed in one of the following categories: No Action; Conform Statutory Language; Remove Classification; Substitute Degree; Reference a Statute in the Code; and, Repeal the Statute.<sup>43</sup> The number of statutes in each category are shown in Figure 1 below.

**Figure 1.**



<sup>36</sup> Black’s Law Dictionary 901 (5<sup>th</sup> ed. 1979).

<sup>37</sup> N.J.S. 2C:43-1(b).

<sup>38</sup> See Appendix.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> For purposes of placing the statutes in one of the six categories Staff did not differentiate between the term misdemeanor and high misdemeanor. Once each statute was categorized, deference was given to the distinction set forth in the Code.

<sup>43</sup> Staff recognizes that these are not the only possible categories, or descriptors, that can be used. The categories were selected based on commonality of substance and ease of reference.

- *No Action*

Certain statutory references to the term misdemeanor or high misdemeanor, those that reference out-of-state criminal activity, for example, are necessary. No action has been recommended to change these statutes.<sup>44</sup>

- *Conform Statutory Language*

Next, there are several statutes whose use of the term misdemeanor is anachronistic, yet a reference to the criminal activity is necessary. In these cases, the language in these statutes should be conformed to reflect that contained in the Code.<sup>45</sup> Staff suggests that the use of the terms misdemeanor and high misdemeanor be eliminated and replaced with terms such as “indictable offense” or “crime” where appropriate.

- *Remove Classification of Misdemeanor or High Misdemeanor*

There are certain non-Code offenses that may be ameliorated with monetary penalties or injunctive relief, or may be declaratory or advisory in nature. These statutes could be amended to remove the term misdemeanor or high misdemeanor and any reference to the penalties associated therewith.<sup>46</sup>

- *Replace Misdemeanor with the Degree of the Offense*

Several statutory references to the term misdemeanor properly reside in titles outside of the Code. Nevertheless, the criminal penalties associated with these offenses should be updated to reflect the terminology presently used by the Code. These statutes should be amended to eliminate the term misdemeanor and set forth the degree of the crime as provided for in the Code.<sup>47</sup>

- *Reference Applicable Code Statutes*

Numerous non-Code statutes contain similar, or identical, elements of offenses that are also set forth in the Code. While it is not necessary to repeal these statutes, each one should reference the appropriate crime as set forth in the Code.<sup>48</sup> The non-Code statutes that have statutory counterparts in the Code are set forth in Figure 2.

- *Repeal*

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<sup>44</sup> See *infra* Appendix.

<sup>45</sup> *Id.*

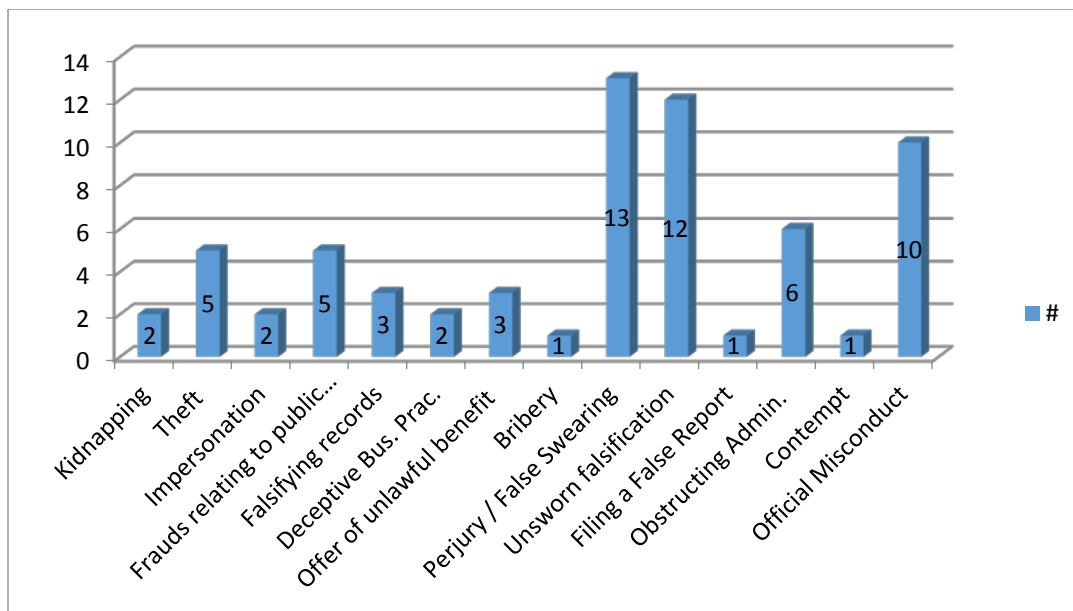
<sup>46</sup> *Id.*

<sup>47</sup> See *infra* Appendix.

<sup>48</sup> *Id.* See also Figure 2.

Finally, there are several non-Code statutes that are anachronistic, duplicative, or have been superseded by statutes contained in the Code. To avoid confusion in their application, these statutes should be repealed.<sup>49</sup>

**Figure 2.**



## Outreach

In connection with this Report, Staff sought comments from a number of knowledgeable individuals and organizations. These included: The Office of the Attorney General; the New Jersey Department of Corrections; the Division of Elections; the New Jersey Municipal Prosecutor’s Association; the Association of Criminal Defense Lawyers; the leadership of the Criminal Practice Section of the New Jersey State Bar Association; the Office of the Public Defender; each of the twenty-one County Prosecutor; several criminal defense attorneys; The New Jersey Department of Agriculture; the New Jersey Agricultural Society; the Department of Community Affairs; the New Jersey Racing Commission; the Division of State Lottery; the Department of Transportation; the American Civil Liberties Union of New Jersey; the New Jersey Sports and Exposition Authority; the New Jersey Pinelands Commission; the New Jersey Department of Banking and Insurance; the Department of Education; the New Jersey Education Association; the Division of Law, Education and Higher Education Section; the Election Law Enforcement Commission; Community Affairs and Elections Section in the Department of Law; the New Jersey Election Commission; the Division of Fish and Wildlife; the Department of Health; the Division of Alcoholic Beverage Control in the Department of Law and Public Safety; the Department of Labor and Workforce Development; the Department of Military and Veterans’ Affairs; the New Jersey Motor Vehicle Commission; the New Jersey League of Municipalities;

<sup>49</sup> See *infra* Appendix.

the New Jersey Association of Counties; the Department of the Treasury; the Board of Dentistry; the New Jersey State Society of Auctioneers; the New Jersey State Police; Private Investigator Education; National Pawnbrokers Association; the Corrections and State Police Section of the Division of Law; and the Office of Weights and Measures.

The responses to the Tentative Report provided invaluable feedback from stakeholders with in interest in this subject matter and are divided by category below.

- *Objection*

The Commission received an objection from the League of Municipalities (the “League”) to the modification of three New Jersey statutes set forth in the Appendix.<sup>50</sup> The concern expressed by the League is that the Commission’s recommendations “go beyond a mere administrative change and are instead a substantive change in law.”<sup>51</sup> This Report is designed to eliminate the potentially confusing usage of an anachronistic term that is prevalent in the New Jersey statutes. This Report also seeks to bring uniformity to the statutes to ensure that criminal behavior – regardless of its place in New Jersey statutory law - is treated consistently.<sup>52</sup>

- *No Comment*

The New Jersey Department of Transportation and the New Jersey Department of Corrections offered “no comment” on the Commission’s Report.

- *No Objection*

The New Jersey Sports and Exposition Authority advised Staff that the Hackensack Meadowlands Development Commission (HMDC), as set forth in N.J.S. 13:17-5, is “defunct.” Given the response, Staff recommends the repeal of this statute. The proposed repeal of this statute is set forth in the amended Appendix.

- *Support*

The Department of Community Affairs, the Director of Fire Safety, and a member of the criminal defense bar replied with support for this project. The New Jersey Division of Fish and Wildlife supported the modifications to N.J.S. 23:4-41; N.J.S. 23:3-15; and, N.J.S. 23:10-19.<sup>53</sup> In addition, the Division offered the Commission suggestions on two other proposed modifications.

### *Adopted Recommendations*

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<sup>50</sup> N.J.S. 45:17-4 (Licensing of nonresidents to auction jewelry or silverware; fee; penalty); N.J.S. 52:27BB-51 (Duty of local officers); N.J.S. 40:37-95.8 (Adverse interest of officer or employee; misdemeanor).

<sup>51</sup> Electronic mail received from the League of Municipalities is on file with the New Jersey Law Revision Commission.

<sup>52</sup> See n.50, *supra*.

<sup>53</sup> Electronic mail received from the Division of Fish and Wildlife is on file with the New Jersey Law Revision Commission.



The Division of Fish and Wildlife opposed the modification N.J.S. 23:3-18 and N.J.S. 23:3-18. The Division explained to Staff that Title 23 does not contain criminal charges. The charges contained in this title are quasi-criminal in nature. Unlike criminal cases, the burden of proof for the quasi-criminal statutes in Title 23 is the “preponderance of the evidence” standard. In addition, under the quasi-criminal statutes the State does not have to demonstrate “intent”. Finally, Conservation Officers are permitted to issue citations or tickets rather than summonses or warrants. Staff considered the information provided by the Division and is of the opinion that the statutes would benefit from these recommendations.

The Division of Alcoholic Beverage Control requested that certain statutes be spared from repeal or modification.<sup>54</sup> Staff considered the information provided and is of the opinion that, with two exceptions, the statutes would benefit from Division’s recommendations as set forth in the Appendix.<sup>55</sup>

### **Conclusion**

The classification of an offense, for sentencing purposes, as a misdemeanor or a high misdemeanor is anachronistic and pre-dates the enactment of the New Jersey Code of Criminal Justice. The removal of potentially confusing statutory references would both clarify and simplify the law by working toward a common reference for all criminal behavior.

The Appendix proposes the elimination of the term misdemeanor from virtually all the New Jersey statutes. The removal of these references, the substitution of the appropriate degree of crime proscribed by the Code or a direct reference to the Code is consistent with the proscribed intent of the Legislature to “...give[s] fair warning [to the citizenry] of the nature of the conduct proscribed and the sentences authorized upon conviction...”<sup>56</sup> and is consistent with constitutional notions of fundamental fairness and due process.

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<sup>54</sup> N.J.S. 33:1-49; N.J.S. 33:1-50; N.J.S. 33:1-51; N.J.S. 33:1-64; N.J.S. 33:1-65; N.J.S. 33:1-78 and N.J.S. 33:1-71.

<sup>55</sup> N.J.S. 33:3-9 (Manufacture, sale etc. of poisoned liquors; penalty); and, N.J.S. 33:3-10 (Sale, etc. of poisoned liquors causing serious injury or death; penalty; certain laws unaffected).

<sup>56</sup> N.J.S. 2C:1-2(a)(4).