ON THE PATH TOWARD PRECISION: RESPONDING TO THE NEED FOR CLEAR STATUTES IN THE CRIMINAL LAW

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I. Introduction

A statute may be unclear in a number of different ways: it may be vague, it may be anachronistic, it may be inconsistent, to name just a few.

Statutes inform individuals of their rights and responsibilities. Clarity of language is crucial to the transmission of this information. Nowhere is this more significant than in criminal statutes. In *Grayned v.*

City of Rockford,[1] the United States Supreme Court said that "[v]ague laws offend several important values."[2]

The Court explained that because it assumed that "man is free to steer between lawful and unlawful conduct" it is essential that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[3] "Vague laws may trap the innocent by not providing fair warning."[4]

The *Grayned* Court further noted that to prevent "arbitrary and discriminatory enforcement . . . laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[5]

The New Jersey Supreme Court cited the *Grayned* case in support of the doctrine that penal statutes must be strictly construed.[6] That doctrine "has at its heart the requirement of due process. No one shall be punished for a crime unless both that crime and its punishment are clearly set forth in positive laws."[7] Further, penal statutes "must be sufficiently definite so that ordinary people can understand what conduct is prohibited."[8]

In addition to the failure to provide adequate guidance for ordinary citizens, unclear laws also cause interpretive difficulties for the courts bound to apply them. The decisions in those challenging cases are one

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[1] Grayned v. City of Rockford, 408 U.S. 104 (1972).

[2] *Id.* at 108.

[3] *Id.*

[4] *Id.*

[5] *Id.*at 108-09.

[6] State v. Valentin, 105 N.J. 14, 17 (1987).

[7] *Id.* at 17-18 (quoting In re Suspension of DeMarco, 83 N.J. 25, 36 (1980)).

[8] *Id*. at 18 (citing Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983)).

source of projects for the New Jersey Law Revision Commission ("the Commission").

The Commission is charged, by statute, with the responsibility for conducting a continuous review of the general and permanent statutes of the State, and the judicial decisions construing those statutes, to discover defects and anachronisms.[9] In addition, the statute calls for the Commission to prepare and submit to the Legislature bills that are designed to remedy the defects, reconcile conflicting provisions of the law, clarify confusing language, and excise redundancies.[10] The statute also directs the Commission to maintain the statutes in a revised, consolidated, and simplified form.[11]

In January of 2020, at the end of the second year of New Jersey's 2018 Legislative session, the New Jersey Legislature passed, and the Governor signed into law, L.2019, c.474, which changes the law pertaining to sexual assault.[12] A2767 and S2924, the bills giving rise to the statutory modifications, were based on a Report issued by the Commission in 2014.[13] That Report recommended changes to the statute concerning sexual assault to better reflect the modern reality of New Jersey's sexual offense prosecutions, making the statutory text consistent with the decisions of New Jersey's courts, and with the instructions delivered to jurors during criminal proceedings.[14]

The changes to the law removed the outdated "physical force" requirement from the crime of sexual assault, and incorporated language used by the New Jersey Supreme Court in *State in the Interest of M.T.S.*,[15] and in *State v. Triestman*.[16] In those cases, the court held that the element of physical force is satisfied when the defendant engages in any act of sexual penetration without the affirmative and freely-given permission of the victim to the specific act of penetration.[17] New Jersey

9 See, N.J. STAT. ANN. § 1:12A-8 (2020).

10 *Id.*

11 *Id.*

12 N.J. STAT. ANN. § 2C:14-2 (2020). New Jersey State Legislature, 2018-2019 Session, A.B. 2767/S.B. 2924, Senate Law and Public Safety Committee Statement with Committee Amendments; https://www.njleg.state.nj.us/2018/Bills/A3000/2767_S2.PDF (last visited March 24, 2021).

13 *Id.*

14 N.J. LAW REVISION COMM'N, Final Report Relating to Title 2C – Sexual Offenses (Dec. 8, 2014), https://www.njlrc.org/projects/2020/2/5/title-2c-sexual-offenses?rq=title%202c%20-%20sexual%20 (last visited Mar. 21, 2021) [hereinafter NJLRC, Dec. 2014 Final Report].

15 State in the Interest of M.T.S., 129 N.J. 422, 424-25 (1992).

16 State v. Triestman, 416 N.J. Super. 195, 210 (App. Div. 2010).

17 NJLRC, Dec. 2014 Final Report, *supra* note 14.

jurors are likewise instructed that physical force is an act of sexual penetration that occurs without a victim's freely and affirmatively given permission.[18]

In addition, the law now incorporates the standard set forth in *State v. Olivio*,[19] and included in the current jury instructions, that a person shall be considered to have a mental disease or defect if they are incapable of understanding or exercising the right to refuse to engage in sexual conduct.[20]

The law was also updated to make it gender neutral, make it consistent with the New Jersey Supreme Court's interpretation of the phrase "on another" in *State v. Rangel*,[21] and to add the crime of carjacking as an aggravating offense for sexual assault in response to the New Jersey Supreme Court's refusal to deem it so without a specific statutory basis in *State v. Drury*.[22]

That Report is just one example of the Commission's work in the criminal law area. The five additional projects discussed in this Article provide a brief look at New Jersey's criminal law, and the Commission's recent work in the area.

II. Commission Projects Responding to the Need for Clarity in the Criminal Law

A. MENS REA FOR DISORDERLY PERSONS OFFENSES

In New Jersey, when a statute does not prescribe a culpable mental state for the commission of an offense, the mens rea of "knowingly" shall be applied.[23] The authority to incorporate this mental state is found in New Jersey's Code of Criminal Justice ("CCJ"), specifically, N.J.S. 2C:2-2, commonly referred to as the "gap filler" statute.[24] The Commission's examination of the CCJ confirmed that numerous disorderly persons offenses do not set forth a requisite mental state, requiring courts to gap-fill this essential element.[25]

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18 *Id*.

19 State v. Olivio, 123 N.J. 550 (1991).

20 *Id.*

21 State v. Rangel, 213 N.J. 500 (2013).

22 *Id.*; State v. Drury, 190 N.J. 197 (2007).

23 N.J. LAW REVISION COMM'N, Final Report Relating to Mens Rea for Disorderly Persons Offenses (Dec. 20, 2018), www.njlrc.org (last visited March 19, 2021) [hereinafter NJLRC Dec. 2018 Final Report].

24 *Id.*

25 *Id.*

In December of 2018, after a review of all the disorderly persons offenses enumerated within the CCJ, the Commission released a Final Report recommending inclusion of the appropriate mental element where applicable.[26] The Final Report clarified that where a statute does not prescribe a culpable mental state for the commission of a specified disorderly persons offense, pursuant to N.J.S. 2C:2-2 a mens rea of "knowingly" shall be applied.[27] Thus, courts would not have to fill in the required mental element for disorderly persons offenses lacking explicit statutory wording, as the Appellate Division did in *State v. Bessey*,[28] the case that gave rise to this project.

In *Bessey*, the Appellate Division examined N.J.S. 2C:33-7, which codifies the disorderly persons offense of obstructing highways and other public passages.[29] The plaintiff, an animal rights advocate, was distributing leaflets outside an arena in Trenton that was hosting a circus performance.[30] When the plaintiff stepped into a crosswalk to distribute a pamphlet to a motorist, a police officer admonished her for what he considered dangerous conduct.[31] The plaintiff then crossed the street, moving to an area with heavy pedestrian and vehicular traffic, and started distributing the literature there.[32] The same police officer concluded that her activities were contributing to, and possibly worsening, traffic congestion on that side, and instructed her to move away from the crosswalk and the sidewalk area between the crosswalks.[33] After a verbal exchange between the two, plaintiff was arrested and subsequently convicted for violating N.J.S. 2C:33-7b(1).[34]

New Jersey's statute regarding the obstruction of highways and other public passages provides, in relevant part:

> a. A person, who having no legal privilege to do so, purposely or recklessly obstructs any highway or other public passage whether alone or with others, commits a petty disorderly persons offense . . .

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26 N.J. LAW REVISION COMM'N, *Minutes of NJLRC Meeting*, Dec. 20, 2018, www.njlrc.org (last visited Mar. 19, 2021).

27 NJLRC Dec. 2018 Final Report, *supra* note 23.

28 State v. Bessey, 2014 WL 9928205 (App. Div. 2015).

29 *Id.* at *1.

30 *Id*.

31 *Id.* at *3.

32 *Id.* at *4.

33 *Id.* at *5.

34 *Bessey*, 2014 WL 9928205 at *5.

> b. A person in a gathering commits a petty disorderly persons offense if he refuses to obey a reasonable official request or order to move:
>
> (1) To prevent obstruction of a highway or other public passage; or
>
> (2) To maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard . . ..[35]

Affirming the trial court's ruling, the Appellate Division focused on the intent required for the offense of "obstruct[ing] highways and other public passages" since the statute is silent in this regard.[36] The court explained that despite both parties' argument that "knowingly" is the correct mens rea, their reliance on the gap filler of N.J.S. 2C:2-2c(3) was misplaced, as that provision applies only to a crime, and the case at bar involved a petty disorderly persons *offense*.[37] The court noted that the terms "offense" and "crime" are used distinctly in N.J.S. 2C:2-2c(3), indicating that different levels of culpability should be considered based on the nature of the charge.[38]

After considering the definition of "refuses" in both its plain and legal uses, the court concluded that the term "refuses to obey a reasonable official request or order to move" means an individual who willfully and knowingly defies a reasonable command from a law enforcement officer which, in this case, was to prevent obstruction of a highway or other public passage.[39] While the court's interpretation did comport with the default standard contained in N.J.S. 2C:2-2c(3), it was careful to explain that the default only applies to crimes, and cannot be read into disorderly persons offenses.[40]

The Commission's research in this area was intended to clarify the statute, to avoid the additional legal analysis required of a court in the absence of a statutory mens rea. The Commission also recognized that establishing an explicit mens rea could prevent potential overcriminalization. The problem of overcriminalization, the overuse or misuse of criminal law, has been recognized across the spectrum of political and philosophical beliefs.[41] Overcriminalization may occur

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35 N.J. STAT. ANN. § 2C:33-7 (2020).

36 *Bessey*, 2014 WL 9928205 at *6.

37 *Id.* at *7.

38 *Id.*

39 *Id.* at *8.

40 *Id.* at *7.

41 *See*, *e.g.*, THE HERITAGE FOUNDATION, A Judicial Cure for the Disease of Overcriminalization, https://www.heritage.org/courts/report/judicial-cure-the-

through "(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations."[42] One way to address aspects of this problem is to identify criminal laws that lack a mens rea requirement.[43]

While overcriminalization is caused in part by the proliferation of criminal laws enacted by legislatures, courts also play a role when they choose to construe ambiguous criminal statutes broadly.[44] As noted by the United States Supreme Court, to punish an individual based on acts alone, without a culpable mental state, is "inconsistent with our philosophy of criminal law."[45] An explicit mens rea requirement is therefore "an essential safeguard against unjust convictions and disproportionate punishment."[46]

The Commission's proposed modification to N.J.S. 2C:2-2(c)(3) is consistent with the language of the court's opinion in *Bessey*, and it recommends that any reference to a crime should instead refer to an offense.[47] Absent a clear legislative intent to impose strict liability, any statutory definition of an offense shall be construed based on the culpability defined in N.J.S. 2C:2-2(b)(2).[48] The proposed modifications were sent to stakeholders and no objection was received to the proposed statutory changes.[49]

This project, and others like it, reflects the Commission's dedication to improving the form and function of the criminal laws in the state.

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disease-overcriminalization (last visited March 19, 2021). *See also* SALON, America's Over-criminalization Epidemic: How the Prosecution of Atlanta Teachers Exposes a Broken System, https://www.salon.com/2015/04/16/americas_over_criminalization_epidemic_how_the_prosecution_of_atlanta_teachers_exposes_a_broken_system/ (last visited March 19, 2021).

42 Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

43 Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, CRIM. JUST., Spring 2013, at 4.

44 Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 568 (2012).

45 Morissette v. U.S., 342 U.S. 246, 250 (1952).

46 Smith, *supra* note 44, at 569.

47 NJLRC Dec. 2018 Final Report, *supra* note 23.

48 The proposed statutory language is as follows: *** A statute defining ~~a crime~~ an offense, unless ~~clearly~~ ~~indicating~~ a legislative intent to impose strict liability plainly appears, should be construed as defining ~~a crime~~ an offense with the culpability defined in paragraph b.(2) of this section. This provision applies to ~~offenses~~ crimes defined both within and outside of this code and to offenses within this code.

49 NJLRC Dec. 2018 Final Report, *supra* note 23.

B. "TUMULTUOUS" IN THE DISORDERLY PERSONS CONTEXT

Though the term "tumultuous" is antiquated, it has been employed in New Jersey's CCJ without a definition to describe the conduct of a disorderly person.[50] In September of 2018, the Commission considered the question of what constitutes "tumultuous" behavior pursuant to New Jersey's Disorderly Conduct statute, N.J.S. 2C:33-2.[51] The absence of a statutory definition, and the significance of the penalties an individual may face because of "tumultuous" behavior in public, necessitated an examination of this statute.[52]

The Commission released a Final Report proposing several statutory modifications in December 2019.[53] The Commission's Report recommends the removal of vague and undefined terms such as "annoyance" and "tumultuous"; inserts a prohibition on "excessive noise"; eliminates the unconstitutional "offensive language" subsection; and adds a definition for the term "public" to bring clarity to the statute.[54]

The court's decision in *State v. Finnemen*,[55] in which the Appellate Division considered the definition of the words "tumultuous" and "public" in New Jersey's Disorderly Conduct statute, N.J.S. 2C:33-2(b), drew the Commission's attention to this area of the law.[56]

In that case, after being asked to leave a local drug store, the defendant yelled obscenities and made obscene gestures toward the store employees.[57] A police officer observed the defendant's behavior and characterized it as "irate and angr[y]."[58] The defendant then entered a nail salon and continued to "yell and cause a scene."[59] The defendant was apprehended and convicted of disorderly conduct and resisting arrest by both the municipal court and then by the Law

50 N.J. STAT. ANN. § 2C:33-2 (West 2020).

51 *See* Memorandum from Wendy Llewellyn, former Legislative Law Clerk on Meaning of "Tumultuous" and "Public" – N.J.S. 2C:33-2 to the New Jersey Law Revision Commission (Sept. 10, 2018) (on file with the Commission).

52 *See* N.J. LAW REVISION COMM'N, *'Definition of Tumultuous'*, *Minutes of NJLRC Meeting*, Sept. 20, 2018, Newark, N.J., www.njlrc.org (last visited Mar. 19, 2021).

53 N.J. LAW REVISION COMM'N, 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. (Dec. 19, 2019), https://static1.squarespace.com/static/596f60f4eb bd1a322db09e45/ t/5e14ade0 690a736404884e5c/1 578413537950/tumul tFR121919.pdf (last visited Mar. 20, 2021) [hereinafter NJLRC Dec. 2019 Final Report].

54 *Id.*

55 State v. Finnemen, 2017 WL 4448541 (App. Div. Oct. 6, 2017).

56 *Id.*; NJLRC Dec. 2019 Final Report, *supra* note 53.

57 *Finnemen*, 2017 WL 4448541 at *1.

58 *Id.* at *2.

59 *Id*. at *1-2.

Division judge in a trial de novo.[60] On appeal, the defendant contended that, among other issues, his behavior did not rise to the level of "tumultuous" as set forth in N.J.S. 2C:33-2(a) (1).[61]

Since "tumultuous" is not defined in the statute, the Appellate Division consulted various dictionaries, as well as the limited case law in this area, to determine whether the defendant's conduct fell within the ambit of the statute.[62] The court also considered whether the definition of "public," found in subsection (b) of the statute, applied to the entire statute.[63]

Ultimately, the Appellate Division affirmed the lower court's decision and found the defendant's behavior to be tumultuous.[64] It reasoned that the "defendant's conduct caused public inconvenience, annoyance or alarm and constituted overwhelming turbulence or upheaval."[65] The court further noted that "for the present purposes," the word "public," as defined below subsection b. of N.J.S. 2C:33-2(b), also applied to subsection a.[66]

The Commission's examination of the Model Penal Code ("MPC"), specifically §250.2, confirmed that New Jersey's Disorderly Conduct statute was modeled on the statue set forth in the MPC.[67] The New Jersey statute's definition of the term "public" is identical to the one found in the MPC section concerning disorderly conduct, and the definition is applicable to all the specified behaviors in the disorderly conduct statute of the MPC.[68] A closer examination indicated no substantive differences, only a structural difference, between MPC § 250.2 and N.J.S. 2C:33-2.[69] To address the ambiguity, and following the

60 *Id.*

61 *Finnemen*, 2017 WL 4448541 at *1-2, *4.

62 *Id.* at *4-5. The dictionaries were of little assistance to the court as it defined tumultuous as "marked by tumult"; "tending or disposed or cause to excite a tumult"; and "marked by violent or overwhelming turbulence or upheaval." The court examined the word "tumult" in the context of municipal ordinances affecting the rental of summer properties and defined it as either an "uproar" or "violent" agitation of mind or feelings." In addition, the court found that excessive noise could be an uproar or violent agitation from the perspective of the victim. *See* United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 67 (App. Div. 2001).

63 *Finnemen*, 2017 WL4448541 at *4-5.

64 *Id*. at *5.

65 *Id*.

66 *Id.* at *4-5.

67 MODEL PENAL CODE §250.2 Disorderly Conduct (Proposed Official Draft 1962).

68 *Id.*

69 *Id.*

guidance of the MPC, the Commission proposed structural and language changes to bring clarity to the statute.[70]

A survey of each state's disorderly conduct statute revealed that twenty-four states use the term "tumultuous" in their statutes, while the remaining states do not.[71] Indiana is currently the only state that provides a statutory definition for the term "tumultuous."[72] Its statute defines "tumultuous" as "conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property."[73] This definition could not be incorporated into New Jersey's statutes because the term "serious bodily injury" is already a defined term in New Jersey's CCJ, so a different modification was necessary.[74]

In addition to the issues surrounding "tumultuous," the "offensive language" subsection of the New Jersey disorderly conduct statute was previously determined to be unconstitutional.[75] In *State in the Interest of H.D.*,[76] the Appellate Division considered the case of a juvenile who appealed an adjudication of juvenile delinquency resulting from his use of "profane language" toward a police officer.[77] The court stated that the predecessor statute to N.J.S. 2C:33-2(b), N.J.S.A. 2A:170-29(1), was found to be overbroad, and that both the Supreme Court of the United States and the New Jersey Supreme Court have "invalidat[ed] convictions for the public use of offensive language."[78] The Appellate Division reasoned that the standards in both the statutes were "practically identical" and that the defect of overbreadth found fatal in the earlier statute inheres in the latter.[79]

The Commission's proposed modifications to N.J.S. 2C:33-2 also use gender neutral language.[80] In addition, the Report proposes striking

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70 NJLRC Dec. 2019 Final Report, *supra* note 53.

71 NJLRC Dec. 2019 Final Report, *supra* note 53, at 7.

72 NJLRC Dec. 2019 Final Report, *supra* note 53, at 8.

73 IND. CODE ANN. § 35-45-1-1.

74 *See* N.J. STAT. ANN. § 2C:11-1(b) where "serious bodily injury" 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."

75 State in the Interest of H.D., 206 N.J. Super. 58 (App. Div. 1985).

76 *Id.*

77 *Id.*

78 *Id.* at 60. N.J.S. 2A:170–29(1) prohibited the public from using "loud and offensive or profane or indecent language." *Id.* (citing Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); State v. Rosenfeld, 62 N.J. 594 (1973) (recognizing that the disorderly conduct statute, N.J. STAT ANN. § 2A:170-29(1) may not be utilized to punish speech which is offensive to the sensibilities of the hearer)).

79 *Id.* at 61.

80 *See* NJLRC Dec. 2019 Final Report, *supra* note 5353, at 11. *See also*

the term "annoyance" in subsection a. because of the term's subjective nature.[81] The Commission also proposed eliminating the word "tumultuous" from a(1) and, instead, adding language concerning excessive and unreasonable noise to the statute as a(2).[82] Further, subsection b.'s prohibition against offensive language was proposed for elimination pursuant to the holding of *State in the Interest of H.D*.[83] The Commission's suggested structural modifications to the statute include renumbering subsection a.(2) as a.(3) to accommodate the newly-proposed subsection concerning noise, and the newly-proposed subsection b. makes clear that "public" applies to the entire section.[84]

In response to the Commission's outreach, both the Mercer and Monmouth County Prosecutor's Offices offered favorable comments and support for the proposed modification to the Disorderly Conduct statute.[85] Each acknowledged that clarifying and updating the statute would be beneficial to remove ambiguity found in the statute's current form.[86]

C. HARASSMENT IN THE CRIMINAL LAW

There is a fine line between constitutionally protected speech and criminal harassment under New Jersey's CCJ. Identification of that line

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[81] *See* NJLRC Dec. 2019 Final Report, *supra* note 53, at 11.

[82] *See* NJLRC Dec. 2019 Final Report, *supra* note 53, at 2. *See also* United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 67 (App. Div. 2001) ("Although 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."). *See also* NJLRC Dec. 2019 Final Report *supra* note 53, at 8.

[83] *See supra* notes 75-79 and accompanying discussion.

[84] *See* NJLRC Dec. 2019 Final Report, *supra* note 53, at 12.

[85] *See* Letter from Mercer County Prosecutor's Office *3 to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Jul. 8, 2019) (on file with the NJLRC). *See also* Memorandum from the Monmouth County Prosecutor's Office *2 sent via electronic mail to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (June 28, 2019) (on file with the NJLRC).

[86] *Id.* The other individuals and organizations from whom comments were sought by the Commission included: the Attorney General of New Jersey; 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.

was the challenge that faced the New Jersey Supreme Court in *State v. Burkert*,[87] and the Commission.

In March of 2020, the Commission released a Final Report intended to clarify the distinction between activities that are considered pure harassment, and those that serve a legitimate purpose or are constitutionally protected.[88]

In *Burkert*, the relationship of two coworkers, Burkert and Halton, deteriorated when Burkert read online comments about himself and his family that had been posted by Halton's wife.[89] In retaliation, Burkert wrote "degrading and vile dialogue" on copies of the Haltons' wedding photograph, which were later found on company property.[90] In response, Halton filed three complaints charging Burkert with harassment under N.J.S. 2C:33–4(c).[91] Burkert was found guilty by a municipal court judge and a Law Division judge after a trial de novo.[92] The Appellate Division vacated the conviction, finding that the defaced copies of the photographs did not amount to criminal harassment, but rather were a form of constitutionally protected expression.[93]

The New Jersey Supreme Court considered the constitutionality of the harassment statute's subsection (c) and determined that the phrases "any other course of alarming conduct" and "acts with purpose to alarm or seriously annoy" should be construed "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" when applied to cases based on "pure expressive activity."[94]

The court also explained that courts must narrowly construe statutes that criminalize expressive activity to avoid conflict with the

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

88 N.J. LAW REVISION COMM'N, Final Report Regarding Harassment N.J.S. 2C:33-4 et seq. (Mar. 19, 2020), www.njlrc.org (last visited Mar. 19, 2021) [hereinafter NJLRC Mar. 2020 Final Report]; *see also* N.J. LAW REVISION COMM'N, Draft Tentative Report Regarding Harassment N.J.S. 2C:33-4 (Apr. 8, 2019), www.njlrc.org (last visited Mar. 19, 2021).

89 Burkert, 231 N.J. at 262-63.

90 *Id.* at 262-63 (Copies were found "in the employee parking garage and locker room.").

91 *Id.* at 263.

92 *Id.* (Defendant found guilty on two complaints.).

93 *Id.* at 269, 283 (agreeing that the defaced photographs were nonetheless "unprofessional, puerile, and inappropriate for the workplace").

94 N.J. STAT. ANN. § 2C:33–4(c) (2021); Burkert, 231 N.J. at 283-85 (noting that "the Legislature may decide to amend subsection (c) with other language that conforms to the requirements of our free-speech clauses").

constitutional right to free speech.[95] The New Jersey Supreme Court found that "the vaguely and broadly worded standard…does not put a reasonable person on sufficient notice" of speech that is proscribed, and that its vagueness created undue discretion for "prosecuting authorities…to bring charges related to permissive expressive activities."[96]

The court said that the statute allows the "conviction of a person who acts with the purpose to 'seriously annoy' another person," unlike the corresponding MPC provision, which is premised on "alarming conduct" and is restricted to conduct that serves "no legitimate purpose[.]"[97] Speech cannot be made criminal "merely because it annoys, disturbs, or arouses contempt[.]"[98] Determining that the legislative intent was to "address harassment by action rather than communication," the court attempted to read the statute as constitutional in its construction of the terms at issue.[99] The court found that Burkert displayed insensitivity, but "did not engage in repeated unwanted communications" "that intolerably interfered with…[Halton's]…reasonable expectation of privacy" and therefore the harassment complaint must fail.[100]

In addition to the issues raised in *Burkert*, the court in the earlier case of *State v. Hoffman*[101] was concerned with the statutory phrase "or any other manner."[102] The *Hoffman* court found that this catchall phrase included only modes of communication that intrude into legitimate expectations of privacy, which protected the statute from constitutional attack as overbroad.[103]

New Jersey courts have emphasized that many protected forms of speech are intended to annoy, and have used the requirement of a "purpose to harass" to limit the statutory section.[104]

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95 *Burkert*, 231 N.J. at 269, 277-78 (The Court also referred to the Model Penal Code (MPC) and examined how other courts addressed similar statutes to determine the level of precision required in its analysis.).

96 *Id.* at 280 (noting "[t]he circularity of the language of N.J.S.A. 2C:33–4, moreover, does not place limits on the statute").

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

98 *Id.* at 281; *see* Houston v. Hill, 482 U.S. 451, 461 (1987) (citations omitted).

99 *Burkert*, 231 N.J. at 284-85; *see* Cesare v. Cesare, 154 N.J. 394, 404 (1998) (further citations omitted); *ibid*. (Unlike other jurisdictions that struck down overbroad and vague statutes).

100 *Burkert*, 231 N.J. at 286-87.

101 *See*, *e.g.*, State v. Hoffman, 149 N.J. 564 (1997).

102 *Id.* at 582.

103 *Id.* at 583.

104 *Id.* at 583-584 (1997) ("Many forms of speech, oral or written, are intended to annoy. Letters to the editor of a newspaper are sometimes intended to annoy their

The Commission also examined the MPC, New Jersey's Cyber-Harassment, Stalking, and Assault statutes, and the statutes of other states, for additional guidance.[105] Although no one statute provided a definitive model that could replace the current New Jersey harassment statute, several suggested approaches that were helpful.[106] This research formed the basis of the Commission's consideration of issues such as: whether "seriously distressed" included both mental and physical harm; the requisite level of harm; mental and physical "harm" versus "health"; "distress" versus "alarm"; "distress" versus "intimidate"; whether "alarm" is synonymous with "threat"; and the fact that most statutes do not use the terms "alarm" and "mental health[.]"[107]

In keeping with its practice, the Commission distributed its Report to, and sought comments from, knowledgeable individuals and organizations.[108] No objections were received in response to the recommended modifications.[109]

subjects. We do not criminalize such speech, even if intended to annoy, because the manner of speech is non-intrusive."). See also, R.G. v. R.G., 449 N.J. Super. 208 (App. Div. 2017) (in which defendant sent many coarsely-worded text messages in a dispute between brothers over the proper care of their parents, but the legitimate purpose for the messages supported the court's finding that there was no intent to harass); *see also* J.D. v. M.D.F., 207 N.J. at 481, 485 (determining 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); *see also* State v. L.C., 283 N.J. Super. 441, 448-451 (App. Div. 1995) (court reversed a guilty conviction where a wife used vulgar language while yelling at her husband about his girlfriend).

105 NJLRC Mar. 2020 Final Report, *supra* note 88; *see* MODEL PENAL CODE § 250.4 cmt. 6; *see also* Memorandum from John Cannel and Samuel Silver to N.J. Law Revision Comm'n. (Jun. 10, 2019), www.njlrc.org (last visited Mar. 19, 2021) (including statutes from sixteen other states) [hereinafter Cannel & Silver Jun. 2019 Memorandum]; *see also* N.J.S. 2C:33-4.1 (Crime of Cyber-Harassment), N.J.S. 2C:12-10 (Definitions; Stalking Designated a Crime; Degrees), and N.J.S. 2C:12-1 (Assault).

106 *See* Cannel & Silver Jun. 2019 Memorandum, *supra* note 105. Harassment statutes in other states frequently serve as the basis for civil orders to protect vulnerable citizens from domestic violence, which highlights the necessity of having a statute broad enough to protect domestic violence victims but which is not so vague or overbroad that it unjustly affects the liberty of persons against whom those claims have been made. *See also* 2C:25-19.

107 N.J. LAW REVISION COMM'N, *Minutes of NJLRC Meeting*, Jun. 20, 2019, www.njlrc.org (last visited Mar. 19, 2021) [hereinafter *Minutes* from Jun. 2019 NJLRC Meeting].

108 NJLRC Mar. 2020 Final Report, *supra* note 88.

109 NJLRC Mar. 2020 Final Report, *supra* note 88. Individuals and organizations from whom comments were sought by the Commission included: the New Jersey Association of Counties; New Jersey State Association of Chiefs of Police; New Jersey State League of Municipalities; Office of the Attorney General; Office of the Public Defender; New Jersey State Municipal Prosecutors' Association; the Chief of Law Enforcement of Sussex County; New Jersey Police Traffic Officers Association; and numerous County Prosecutor's Offices.

The Commission's proposed revisions to the statute begin with the opening language of the statute, adding language indicating that the harassment must be "in a manner clearly excessive in light of any legitimate justification[.]"[110] This language was derived from the MPC to address situations in which a defendant intended to harass the victim, but for a legitimate purpose.[111] The Commission proposed removal of gendered language throughout. In addition, the proposal replaced the vague term "harass" with the suggested language "harm or seriously distress" in order to retain the current purpose requirement[112] and replaced "purpose" with "intent."[113]

In subsection (a), the Commission proposed the deletion of the difficult-to-apply standard "offensively coarse language," and the substitution of "manner intended to distress or alarm" for "manner likely to cause annoyance or alarm."[114]

The proposed language in subsection (c) was modeled on the New Jersey Cyber-Harassment statute.[115] The Commission also proposed that "engages" be replaced with the more specific "[t]hreatens to inflict injury or physical harm to any person or the property of any person, or engages in" and that "alarm or seriously annoy such other person" be replaced with "cause emotional harm or place a person in fear of physical or emotional harm."[116] The Commission incorporated the phrase "without legitimate purpose" from the cyber-harassment statute

110 NJLRC Mar. 2020 Final Report, *supra* note 88; (R.G. v. R.G. (involving a dispute about care of parents) and State v. Finance American Corp. (regarding debt collection) may be such situations); Memorandum from John Cannel and Samuel Silver to N.J. Law Revision Comm'n (Feb. 11, 2019), www.njlrc.org (last visited Mar. 20., 2021) (The first change reads "and without other legitimate purpose, the person.") [hereinafter Cannel & Silver Feb. 2019 Memo].

111 Cannel & Silver Feb. 2019 Memorandum, *supra* note 110 (Added "and without other legitimate purpose.").

112 Cannel & Silver Jun. 2019 Memorandum, *supra* note 105 (This is more limited than alternatives such as annoy, bother, or disturb.); *see also* NJLRC Mar. 2020 Final Report, *supra* note 88.

113 N.J. LAW REVISION COMM'N, *Minutes of NJLRC Meeting*, Mar. 19, 2020, www.njlrc.org (last visited Mar. 20, 2021) (During the March 2020 meeting, the Commission reviewed the proposed modifications and discussed whether the word "properly" or "purposely" should be used in the place of "intent." The Commission unanimously voted to release the completed work as a Final Report.).

114 Cannel & Silver Jun. 2019 Memorandum, *supra* note 105; N.J. LAW REVISION COMM'N, Revised Draft Tentative Report Regarding Harassment N.J.S. 2C:33-4 (Nov. 8, 2019), www.njlrc.org (last visited Mar. 20, 2021) (Staff also retained language tentatively approved by the Commission, fixed capitalization, replaced "the person" with "the individual" and "or any other manner" with "in a manner.").

115 Adopted by L.2013, c. 272. That statute is a more recent expression of legislative intent than 2C:33-4.

116 Cannel & Silver Feb. 2019 Memorandum, *supra* note 110.

to clarify that the mens rea element of the statute focuses on "core conduct," intent, and not speech.[117] The proposal changed the "purpose" requirement from "alarm or seriously annoy" to "harm" to assure that the activities included in the "other course of alarming conduct or of repeatedly committed acts" are serious enough to merit criminal sanctions.[118] Finally, the Commission's proposal streamlined and restructured the statute to incorporate the proposed revisions.

D. AGGRAVATED ASSAULT BY MEANS OF BODILY FLUIDS

In *State v. Majewski*,[119] the Appellate Division considered whether N.J.S. 2C:12-13, which prohibits the throwing of bodily fluids at law enforcement officers, requires the State to prove that the defendant intended to hit the officer with bodily fluid, or whether intent was irrelevant under the doctrine of transferred intent.[120] The *Majewski* court considered a situation in which, during a routine move of an inmate at the county jail, the defendant spat in the face of one of the corrections officers.[121] The defendant and other inmate witnesses told the investigating sheriff's officer that the defendant's target was an inmate, not the officer.[122] The defendant was charged with "throw[ing] bodily fluids at [the corrections officer] . . . [while the] said officer . . . was acting in the performance of her duties while in uniform or exhibiting evidence of her authority, contrary to N.J.S. 2C:12-13."[123]

The defendant moved to dismiss the indictment, arguing that the statute required the State to prove that the defendant "intended to hit [the officer] with bodily fluid."[124] The defendant argued that even if it was an offense, "spitting at someone" should not be elevated into aggravated assault simply because the fluid accidentally hit an officer.[125]

The State acknowledged the statute's ambiguity regarding the requisite mental state.[126] "Nevertheless, it argued the [s]tatute explicitly incorporated the doctrine of transferred intent because it criminalized not only the throwing of a bodily fluid at an officer, but also conduct that 'otherwise purposely subjected [the officer] to contact with a bodily

117 *Minutes* from Jun. 2019 NJLRC Meeting, *supra* note 107.
118 Cannel & Silver Jun. 2019 Memorandum, *supra* note 105.
119 *State v. Majewski*, 450 N.J. Super. 353, 360 (App. Div. 2017).
120 *Id*. at 359-60.
121 *Id.* at 358.
122 *Id.* at 358-359.
123 *Id.* at 359.
124 *Id*.
125 *Majewski*, 450 N.J. Super. at 359.
126 *Id.*

fluid.'"[127] The Appellate Division indicated that the statute lacked clarity regarding "whether the Legislature intended the same culpable mental state—'purposely'—that expressly applies to 'subject[ing] [an officer] to contact with a bodily fluid'" to also apply to '"throw[ing] a bodily fluid at' such an officer."[128]

The Appellate Division determined that for a defendant to be found guilty of aggravated assault pursuant to N.J.S. 2C:12-13, the State must prove that: (1) the defendant acted purposely in throwing bodily fluid or otherwise purposely subjected the victim to contact with a bodily fluid; (2) the victim was, beyond a reasonable doubt, an employee of one of the law enforcement agencies set forth in the statute; and, (3) the victim was, beyond a reasonable doubt, engaged in the performance of the duties of his or her office at the time of the offense.[129] The court held that the doctrine of transferred intent did not apply because a defendant does not violate the statute unless the conduct was purposeful and the result was within his or her design.[130]

The Commission initiated a project to consider the modification of N.J.S. 2C:12-13 as a result of the Appellate Division's decision in *State v. Majewski*.[131] To ameliorate the statutory ambiguity identified by the *Majewski* court, the Commission sought comments from knowledgeable individuals and organizations and received feedback from the Cape May County Prosecutor's Office, the Appellate Section of the Office of the Public Defender, and the County Prosecutors Association of New Jersey.[132]

In addition to amending N.J.S. 2C:12-13 to reflect the purposeful mental state as discussed in *Majewski*, the Cape May County Prosecutor's Office recommended additional modifications based on the legislative history of the statute and the mental element included in other similar statutes.[133] Although the legislation at the time of enactment was specifically intended to protect corrections and parole

127 *Id.*

128 *Id.* at 361 (citing N.J.S.A. § 2C:12-12).

129 *Id.* at 361-63 (citing *Model Jury Charge (Criminal)*, "Aggravated Assault (Throwing Bodily Fluid at a Corrections Employee) (N.J.S.A. 2C:12–13)," n.1-2, (June 10, 2002)).

130 *Id.* at 363.

131 *See* N.J. LAW REVISION COMM'N, *Final Report Regarding the Intent Necessary for the Aggravated Assault Upon an Officer under N.J.S. 2C:12-13*, at 2 (July 30, 2020), www.njlrc.org [hereinafter NJLRC July 2020 Final Report]; *see also* N.J. LAW REVISION COMM'N, *Minutes of NJLRC Meeting*, July 30, 2020, at 1, www.njlrc.org (last visited Feb. 21, 2021).

132 NJLRC July 2020 Final Report, *supra* note 131.

133 NJLRC July 2020 Final Report, *supra* note 131, at 6 n. 30 (citing Letter from Ed Shim, Senior Assistant Prosecutor, Cape May County, to the New Jersey Law Revision Commission (July 08, 2020) (on file with the NJLRC)).

officers, it has been broadened since enactment so that other officers may seek its protections.[134] The Cape May County Prosecutor's Office expressed concern that an assault with bodily fluids from an intoxicated individual, and a purposeful assault on one officer with incidental exposure to another might not be covered by the statute under the holding in *Majewski*, despite involving the same harm.[135] The Commission's drafting addressed this concern.

The Office of the Public Defender did not object to modifications to N.J.S. 2C:12-13 that would make "the requirements of a higher mental state for all elements more explicit in the statutory text" but did express concern that the Commission's proposed modifications "would invite unwarranted prosecutions and would stigmatize severe respiratory illness during a pandemic."[136] The Commission's drafting addressed this concern as well.

The proposed revisions to the assault statute incorporate a definition of reasonable fear as suggested by the County Prosecutors Association of New Jersey ("CPANJ").[137] The revisions also replace the term "intentionally" in 2C:12-1(a)(4) with the word "purposely" to "serve the legislature's intent to promote the clarity of definitions of specific crimes and dispel obscurity with which the culpability requirement is often treated when concepts such as 'general criminal intent '. . . 'presumed intent, '. . . and the like are used."[138] Finally, the Commission's proposal replaces the phrase "placing [protected individuals] in contact with bodily fluid" with more limited language requiring that an actor "subject[ ] the individual to contact with bodily fluid or otherwise hav[e] physical contact with the individual, for no lawful purpose," as recommended by the CPANJ.[139]

During the course of its work in this area, the Commission considered the impact of the Coronavirus Disease 2019 ("COVID-19") on its project. COVID-19 is a contagious, and potentially fatal, respiratory disease caused by the SARS-CoV-2 virus.[140] On March 9,

134 A. 1598, 1996 Leg. Sess. (N.J. Feb. 29, 1996) (Statement of Assemblyman Zisa); NJLRC July 2020 Final Report, *supra* note 131, at 6 n. 31-32.

135 NJLRC July 2020 Final Report, *supra* note 131 (citing Letter from Ed Shim, Senior Assistant Prosecutor, Cape May County, to the New Jersey Law Revision Commission, 2–3 (July 08, 2020) (on file with the NJLRC)).

136 NJLRC July 2020 Final Report, *supra* note 131, at 7 (citing Letter from the Joseph J. Russo, Deputy Public Defender, Appellate Section, to the New Jersey Law Revision Commission, 1 (July 10, 2020) (on file with the NJLRC)).

137 NJLRC July 2020 Final Report, *supra* note 131, at 9.

138 NJLRC July 2020 Final Report, *supra* note 131, at 9.

139 NJLRC July 2020 Final Report, *supra* note 131, at 9.

140 Exec. Order No. 103, Governor Murphy, (Mar. 9, 2020).

2020, as part of New Jersey's coordinated response to address COVID-19, Governor Phil Murphy declared a State of Emergency and a Public Health Emergency.[141] The issuance of Executive Order No. 103 declared that New Jersey was in a state of emergency as a result of the public health crisis across all 21 counties in New Jersey.[142]

In March 2020, an individual was charged with a felony for coughing at a supermarket employee and claiming to be infected with COVID-19.[143] Other individuals, in separate instances, were arrested and charged with aggravated assault for throwing bodily fluid on police officers.[144] Each of the individuals claimed to be infected with COVID-19, and coughed on responding police officers.[145]

Due to the COVID-19 pandemic, the Commission broadened the scope of its work to address whether a defendant who deliberately coughs or sneezes at another person with the intent of causing that person to believe that they would be infected with a virus can be charged with aggravated assault or simple assault under N.J.S. 2C:12-13 or N.J.S. 2C:12-1.

The Final Report released on July 30, 2020, recommended significant amendments to N.J.S. 2C:12-13, including the addition of language codifying the purposeful mens rea and expanding the list of protected law enforcement officers to include county corrections employees, parole officers, members of the Parole Board, and Adult Diagnostic and Treatment Center employees.[146] The Commission also recommended the addition of a subsection to N.J.S. 2C:12-1 that would recognize the act of attempting to place someone in reasonable fear of contracting a contagious disease by purposely coughing, sneezing,

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141 *Id. See* Press Release, Office of the Governor, Governor Murphy Declares State of Emergency, Public Health Emergency to Strengthen State Preparedness to Contain the Spread of COVID-19 (Mar. 09, 2020) (https://nj.gov/governor/news/news/562020/approved/20200309b.shtml) (last visited Mar. 20, 2021).

142 *Id.*

143 New York Times, *A Man Coughed on a Wegmans Employee. Now He's Charged With a Felony*, March 25, 2020, https://www.nytimes.com/2020/03/25/us/coronavirus-terrorism-nj.html (last visited March 26, 2021).

144 Press Release, Office of the Attorney General, AG Grewal: If You Threaten a Cop with COVID-19, You will Face the Maximum Criminal Charges (Apr. 1, 2020) (https://www.nj.gov/oag/newsreleases20/pr20200401a.html) (last visited Mar. 19, 2021). The additional charges filed against each of these individuals are more fully presented in the Attorney General's Press Release.

145 *Id.*

146 *See generally* NJLRC July 2020 Final Report, *supra* note 131.

spitting, or subjecting to contact with bodily fluid, or otherwise having physical contact with the person, as a simple assault.[147]

E. KIDNAPPING AND THE UNHARMED RELEASE PROVISION

The "unharmed release" provision of New Jersey's kidnapping statute, N.J.S. 2C:13-1(c)(1), does not set forth the type of harm contemplated by the Legislature to find a defendant guilty of first-degree kidnapping.[148] This provision has been the subject of litigation; first, in *State v. Sherman*[149] and most recently in *State v. Nunez-Mosquea*.[150] After the Appellate Division's decision in *Sherman*, the model jury charge for kidnapping was modified on two separate occasions to address this issue.[151] In December of 2020, the Commission released a Final Report proposing modifications to the statute to clarify that the "harm" component of New Jersey's kidnapping statute should include physical, emotional, or psychological harm.[152]

In *Nunez-Mosquea*, the court considered a case in which a woman was kidnapped at gunpoint and forced into a van by the defendant.[153] The defendant gagged, kicked, suffocated, and sexually assaulted the victim.[154] After being released, the victim assisted the police in locating the defendant.[155] The defendant was arrested and charged with first-degree kidnapping.[156]

The defendant requested a modification of the model jury charge for first-degree kidnapping at a charge conference.[157] The jury, he argued, should have been advised that "minimal or insubstantial injuries are insufficient to establish physical harm."[158] The defendant argued that *Sherman* acknowledged a difference between emotional and

147 NJLRC July 2020 Final Report, *supra* note 131.

148 N.J. LAW REVISION COMM'N, Final Report Regarding Proposed Changes to New Jersey's Kidnapping Statute to Clarify that the "Harm" Component Includes Physical, Emotional, or Psychological Harm, N.J.S. 2C:13-1(c)(1) (Dec. 17, 2020), www.njlrc.org (last visited Mar. 19, 2021) [hereinafter NJLRC Dec. 2020 Final Report].

149 State v. Sherman, 367 N.J. Super. 324 (App. Div.), *cert. denied*, 180 N.J. 356 (2004) *overruled in part on other grounds*, State v. Dalziel, 182 N.J. 494, 504 (2005).

150 *State v. Nunez-Mosquea*, 2017 WL 3623378 (App. Div. Aug. 24, 2017).

151 NJLRC Dec. 2020 Final Report, *supra* note 148.

152 *See* N.J. LAW REVISION COMM'N, *'Kidnapping', Minutes of NJLRC Meeting*, Dec. 17, 2020, Newark, New Jersey (held virtually) www.njlrc.org (last visited Feb. 21, 2021); NJLRC Dec. 2020 Final Report, *supra* note 148.

153 *Nunez-Mosquea,* 2017 WL 3623378 at *1.

154 *Id.* at *1-2.

155 *Id.* at *2.

156 *Id.* at *3.

157 *Id.* Defendant relied on State v. Sherman, 267 N.J. Super. 324.

158 *Id.*

psychological harm sufficient to satisfy the statute and "the type of harm inherent in every kidnapping."[159] That distinction, defendant maintained, should apply to all harm and not merely psychological harm.[160] The court denied the defendant's request.[161]

The court convicted the defendant and sentenced him to twenty-five years in state prison for first-degree kidnapping.[162] On appeal, he contended that the trial court "failed to properly instruct the jury on the harm element of the first-degree kidnapping charge, [thereby depriving him] of his rights to a fair trial and due process."[163] New Jersey's kidnapping statute contains a grading provision that provides that "kidnapping is a crime of the first degree… [but i]f the actor released the victim *unharmed* and in a safe place prior to apprehension, it is a crime of the second degree."[164]

The Appellate Division in *Nunez-Mosquea* observed that "[n]o New Jersey case of which we are aware has ever suggested that there is a difference between the physical harm sufficient to satisfy the released unharmed provision of the statute and 'the type of harm inherent in every kidnapping.'"[165] The court recognized that while "[i]t may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which [the Legislature] had in mind…,"[166] those inflicted upon the victim in this case were "plainly not of that trifling character."[167]

The question of harm raised by the defendant in *Nunez-Mosquea* was examined by the court in *State v. Sherman* fifteen years earlier.[168] In *Sherman*, the defendant abducted a child and held her for ransom for approximately twenty-four hours.[169] During that time, he built her a "fort" from couch cushions and fed her snacks, before deciding to return the child to her parents without receiving a ransom.[170] The defendant left the victim at a shopping mall and instructed her "to run to the first

159 *Nunez-Mosquea,* 2017 WL 3623378 at *8.

160 *Id.*

161 *Id.*

162 *Id.* at *12.

163 *Id.* at *13.

164 N.J. STAT. ANN. § 2C:13-1(c)(1) (2020) (emphasis added).

165 *Nunez-Mosquea*, 2017 WL 3623378 at *19.

166 *Id.* at *19-20 (citing Robinson v. United States, 324 U.S. 282, 285 (1945)).

167 *Id.* at *20.

168 State v. Sherman, 367 N.J. Super. 324 (App. Div.) *cert. denied,* 180 N.J. 356 (2004), overruled in part on other grounds, State v. Dalziel, 182 N.J. 494, 504 (2005).

169 *Id.*

170 *Id.* at 332.

adults she saw and tell them the police were looking for her."[171] Although the victim appeared to be in "good condition, with no signs of physical injury or emotional distress" and said that "the man that took her treated her nicely," she was subsequently "diagnosed with post-traumatic stress disorder."[172]

In *Sherman*, the Appellate Division specifically rejected the defendant's argument that the victim's anxiety, nightmares, and fear constituted only minimal emotional or psychological harm insufficient to support the charge of first-degree kidnapping.[173] The court held that "harm in the released unharmed provision of N.J.S.A. 2C:13-1(c) includes emotional or psychological harm suffered by the victim."[174] The court went on to hold that the State is required to "prove that a defendant 'knowingly' harmed or 'knowingly' released the victim in an unsafe place."[175] The focus of the harm component of the unharmed release provision in the kidnapping statute is on the "conduct of the kidnapper during the purposeful removal and holding or confining of the victim."[176]

In 2007, the Model Jury Charge for Kidnapping was amended in response to *Sherman* to provide that the State must prove the defendant "knowingly harmed" or "knowingly did not release" the victim in a safe place prior to apprehension.[177] The Charge clarified that the harm component can include physical, emotional, or psychological harm.[178]

In 2014, the Model Jury Charge for kidnapping was revised once again to provide that: "[i]f the State is contending that the victim suffered emotional or psychological harm, it must prove that the victim suffered emotional or psychological harm beyond that inherent in a kidnapping. That is, the State must prove that the victim suffered substantial or enduring emotional or psychological harm."[179]

As is its practice, the Commission reached out to knowledgeable individuals and organizations for comments on its work during the

171 *Id.* at 333.

172 *Id.* at 333-24.

173 *Id.* at 330-31, 342.

174 *Sherman*, 367 N.J. Super. at 330.

175 *Id.*

176 *Id.*

177 *Nunez-Mosquea*, 2017 WL 3623378 at *6.

178 *Id. See Model Jury Charge (Criminal)*, "Kidnapping – Permanent Deprivation of Custody" (revised Mar 5, 2007).

179 *See generally Model Jury Charge (Criminal)*, "Kidnapping" (revised Oct. 6, 2014); *Nunez-Mosquea*, 2017 WL 3623378 at *7 (quoting *Model Jury Charge (Criminal)*, "Kidnapping" (revised Oct. 6, 2014)).

course of this project.[180] The Division of Criminal Justice ("DCJ") indicated that the proposed revisions captured the guidance proposed by the case law and modified the statute in a way that will provide greater comprehension and clarity.[181]

The mental element, "knowing", is well established by the existing case law but is absent from the statute. The DCJ supported the Commission's proposal to incorporate the knowledge standard into the text of the statute.[182] The DCJ also concurred with the Commission's recommendation to revise and consolidate the "removal" element of the statute, clarifying the statute without substantially altering its meaning.[183] The language of this proposed modification "will reduce disputes over textual ambiguities and provided well-defined parameters for defendants, counsel, jurors and jurists alike."[184]

As discussed in *Nunez-Mosquea*, proposed modifications to subsection b.(1) reflect that to demonstrate that a kidnapper is guilty of first-degree kidnapping, the State must prove beyond a reasonable doubt that the kidnapper "knowingly" caused harm to the victim.[185] In addition, the court held that "disproving unharmed release is a material element of the crime of first-degree kidnapping, requiring the State to prove that a defendant 'knowingly' harmed or 'knowingly' released the victim in an unsafe place."[186] That language has been incorporated into the text of the proposed statutory revisions, in subsections b.(1)-(2).[187]

The Commission also proposed a definition for "harm" in subsection (f.). The inclusion of this definition "… in the text of the statute itself is an important expansion that will reduce

180 NJLRC Dec. 2020 Final Report *supra* note 148, at 5.

181 NJLRC Dec. 2020 Final Report, *supra* note 148, at 5-6; Comments from the Division of Criminal Justice to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission *1 (Nov. 19, 2020) (on file with the NJLRC) [hereinafter DCJ Comments Nov. 2020]. The other individuals and organizations from whom comments were sought included: the New Jersey Administrative Office of the Courts; the New Jersey Municipal Prosecutor's Association; Association of Criminal Defense Lawyers; the Office of the Public Defender; the Criminal Law Section of the New Jersey State Bar Association; the New Jersey County Prosecutor's Association and each of the County Prosecutors; private criminal defense attorneys; the New Jersey State League of Municipalities; the New Jersey Association of Counties; New Jersey State Association of Chiefs of Police; and the New Jersey Police Traffic Officers Association.

182 *Id.* at 6.

183 *Id.*

184 *Id.*

185 *Nunez-Mosquea*, 2017 WL 3623378 at *6.

186 *Id.* (citing State v. Sherman, 367 N.J. Super. 324, 330 (2004)).

187 NJLRC Dec. 2020 Final Report, *supra* note 148, at 9.

misinterpretations of an essential element of the offense."[188] Without the proposed language, "prosecutions with facts similar to *Sherman*, where the victim is released prior to apprehension without any physical injuries, could potentially be overlooked by prosecutors who fail to comprehend the very serious mental toll inflicted by such incidents."[189] Such a result would trivialize the very real trauma experienced by this class of victim and undermine public safety.[190]

In the context of a kidnapping, the victim may experience psychological or emotional harm, or both.[191] The DCJ recommended a single clause that provides, "… (2) substantial or enduring emotional or psychological harm, or both."[192] This recommendation is reflected in the draft statutory language that the Commission proposed to the Legislature.

III. Conclusion

The courts agree that no one should "be punished for a crime unless both that crime and its punishment are clearly set forth in positive laws."[193] They also agree that penal statutes "must be sufficiently definite so that ordinary people can understand what conduct is prohibited."[194]

The New Jersey Law Revision Commission, in keeping with its statutory mandate, continues to bring to the attention of the Legislature areas of New Jersey's CCJ that could be made clearer, and to support the Legislature in its efforts to improve New Jersey's law "in response to the existing and emerging needs of its citizens."[195]

188 NJLRC Dec. 2020 Final Report, *supra* note 148, at 6-7, 11. DCJ Comments Nov. 2020, *supra* note 181, at *1. *See* discussion, *supra* notes 168-176, of State v. Sherman, 367 N.J. Super. 324 (App. Div. 2004).

189 *Id.*

190 *Id.*

191 *Id.* at *2.

192 *Id.*

193 State v. Valentin, 105 N.J. 14, 17-18 (1987) (quoting In re Suspension of DeMarco, 83 N.J. at 36).

194 *Id.* (citing Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983)).

195 N.J. LAW REVISION COMM'N, THIRTY-FOURTH ANNUAL REPORT (2020) 3, www.njlrc.org (last visited Mar. 26, 2021).