

OP-ED

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On Oct. 11, the borough of Raritan adopted an ordinance prohibiting, among other things, "noisy, rude or indecent behavior," "profane, vulgar or indecent language," "insulting remarks or comments" and "unnecessary congregating in groups ... to the annoyance of other persons." Violators of the ordinance may be fined up to \$500 and/or sentenced up to 90 days in jail.

In past years, the New Jersey courts have declared similar laws unconstitutional. Although the use of such language is objectionable in most instances, a review of the case law demonstrates that Raritan Borough's ordinance is unlikely to pass constitutional scrutiny.

The New Jersey Legislature has, in the past, attempted to regulate the use of offensive, course, profane and/or indecent language (collectively "offensive language"). However, the New Jersey courts have declared such laws unconstitutional.

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Before 1978, the New Jersey statute proscribing the use of offensive language provided in pertinent part as follows:

Any person who utters loud and offensive or profane or indecent language in any public street or other public place, public conveyance, or place to which the public is invited ... is a disorderly person. *N.J.S.A. 2A:170-29(1)*, reprinted in *N.J.S.A. 2A Appendix* at 607.

The Profaci Alternatives

The New Jersey Supreme Court read the foregoing statute to regulate two alternative types of language: (1) "fighting words" and (2) offensive language. In *State v. Profaci*, 56 N.J. 346 (1970), the defendant, while on a public street, stated in a loud voice to a police officer, "What the f--- are you bothering me for." The defendant was convicted for using loud and profane language in violation of the statute.

In the Supreme Court of New Jersey, the defendant argued that the statute was unconstitutional because it was vague and indefinite. Specifically, he argued that the statute did not

define the words "loud or offensive or profane or indecent," nor did it state under what circumstances the language was prohibited.

OPINION AND COMMENTARY

The Legislature has in the past tried to regulate the use of offensive, course, profane and indecent language. And the courts have intervened.

After examining several federal authorities, the Supreme Court stated:

although not expressly articulated, the implicit constitutional purpose of *N.J.S.A. 2A:170-29(1)* is twofold, *i.e.*, to preserve the peace and to protect the sensibilities of those persons within hearing of the person uttering the language. For a defendant to be guilty under

N.J.S.A. 2:170-29(1) the words must be spoken loudly, in a public place, and must be of such a nature as to be likely to incite the hearer to an immediate breach of the peace, or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer. The words must be spoken with the intent to have the above effect or with a reckless disregard for the probability of the consequences.

Profaci, 56 N.J. at 353.

Notwithstanding the foregoing, the Supreme Court reversed the conviction, explicitly finding that "the language used under the circumstances was [not] likely to incite a breach of the peace or to offend the sensibilities of the listener."

The Supreme Court concluded that the statute served two purposes: (1) to preserve the peace by prohibiting the use of language which was likely to incite the hearer to violence, *i.e.*, "fighting words," and (2) to protect the sensibilities of people within hearing of the language. See also

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State v. Reed, 56 N.J. 354 (1970) (decided on the same day as *Profaci*).

Several years later, the Supreme Court determined that the second alternative in *Profaci* was unconstitutional. In *State v. Rosenfeld*, 62 N.J. 594 (1973), the defendant was charged with violating the statute when he used loud and indecent language while making a speech at a public meeting. Specifically, the defendant used the phrase "mother f---ing" four times. The Supreme Court noted that "there was some cheering and applause ... [and] the meeting proceeded in regular fashion and without disturbance."

The Supreme Court further noted that the trial court "did not find that the words in their context were 'likely to incite the hearer to an immediate breach of the peace' within the first alternative set forth in *Profaci*...." And the Court noted that "[t]he words were not addressed face to face to any individual nor did they refer to any individual.... [Therefore,] under the circumstances and in context they were not likely to and did not incite any breach of the peace. They were not rendered 'fighting words'" as contemplated by U.S. Supreme Court case law.

The trial court, however, "invoking the second alternative in *Profaci* ... found that the language was of such nature "that it would likely, in the light of the gender and age of the people present, the women that were present, affect the sensibilities of the hearers." The Appellate Division subsequently reversed the defendant's conviction and "expressly found that the second alternative in *Profaci* sweeps 'too broadly' and renders [the statute] unconstitutionally overbroad" as set forth in two recent decisions by the U.S. Supreme Court.

The Appellate Division, therefore, held that the second alternative of *Profaci* was unconstitutional. That is, the statute did not constitutionally prohibit words which were likely to offend the sensibilities of the listener.

The county prosecutor, on behalf of the state, appealed to the New Jersey Supreme Court. Further, the attorney general of New Jersey appeared as amicus curiae. Interestingly, both the

county prosecutor and the attorney general conceded that the second alternative in *Profaci* was no longer viable in light of recent U.S. Supreme Court decisions. The Supreme Court noted that the attorney general "acknowledges that [the statute] 'may not be utilized to punish speech which solely is offensive to the sensibilities of the hearer'" and that the county prosecutor "acknowledges that the views expressed by the [U.S. Supreme Court] dictate the conclusion that so much in *Profaci* as denies the First Amendment protection to language which 'affects one's sensibilities' is no longer valid."

The Legislature has not been able to enact a statute that both proscribes offensive language and respects a person's right to free speech.

With respect to the first alternative in *Profaci*, the Supreme Court noted that the recent U.S. Supreme Court decisions "clearly recognize that the states may still proscribe the use in public places of words likely to cause breaches of the peace and we are satisfied that *Profaci*'s first alternative does no more, is adequately informative to the populace, and is narrowly limited in sufficient compliance with [current] First Amendment concepts...."

In conclusion, the New Jersey Supreme Court held:

[The statute] may stand to the extent that it prohibits indecent language which is spoken loudly in a public place and is of such nature as to be likely to incite the hearer to an immediate breach of the peace. While this simply restates and continues the first alternative in *Profaci*, the second alternative [in *Profaci*] may now be considered excised.

Therefore, that part of the statute which proscribed language which would offend the sensibilities of a listener was declared unconstitutional. See also *State v. Brown*, 62 N.J. 588 (1973) (decided on the same date as *Rosenfeld*).

The Revised Statute

In *Rosenfeld*, the attorney general suggested that the Supreme Court "restructure" the second alternative of *Profaci* rather than abandon it entirely. However, the Supreme Court stated that doing so "would implicate currently troublesome policy considerations which should in the first instance be dealt with by our Legislature rather than this Court...."

In 1978, the Legislature did enact a new statute. It reads as follows:

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

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

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

"Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusements, or any neighborhood.

N.J.S.A. 2C:33-2. A person guilty of a petty disorderly persons offense may receive a fine up to \$500 and/or a sentence up to 30 days. See N.J.S.A. 2C:43-3(d) & :43-8.

Subpart (a) of the statute "embodies the *Rosenfeld* 'fighting words' test while subpart (b) proscribes offensive language...." *State in the Interest of H.D.*, 184 N.J. Super. 499, 502 (J. & D.R. Ct. 1982).

Portion Declared Unconstitutional

Some time after the enactment of the revised statute, the Appellate Division declared that the statute's attempt to regulate "offensive language" was unconstitutional. In *State in the Interest of H.D.*, the juvenile defendant shouted the phrases "f---ing jerk off" and "I'm going to kick the s--- out of you" to a police officer at a police station. The trial court noted that "the only issue is whether the prohibition of unreasonably loud and offensively course or abusive language uttered with intent to offend a hearer's sensibilities violates the First Amendment's guarantee of freedom of expression." Further, the trial court recognized that "[t]he issue [was] one of first impression after judicial and legislative reaction to the controversy surrounding the predecessor to this statute. N.J.S.A. 2A:170-20(1) "

The trial court analyzed the revised statute as follows:

The proscription of the revised statute extends only to unreasonably loud and offensively course or abusive language, and only when the speaker's intent is to offend the hearer or where he recklessly disregards the likelihood of such offending. The language alone is no longer enough to support a conviction merely because it is vulgar or unpopular. In fact, the Legislature engrafted an additional element to the offense: the nature and content of the language must be evaluated consistently with the circumstances with the person present and the setting of the utterance, thus removing any possibility that language alone could support a finding of guilt or that protectable speech could be punished.

State in the Interest of H.D.

Using the foregoing test, the trial court found that the defendant intended to offend the police officer by using offensive language over a period of at least 90 minutes. The court also considered the age of the defendant, the lateness of the hour and the defendant's continued deliberate harassment of the police officer. Based on the foregoing, the trial court held that the defendant's language was not protected by the constitution and upheld the defendant's conviction under the revised statute.

On appeal, the Appellate Division summarized the New Jersey Supreme Court's holdings in *Profaci* and *Rosenfeld* and then compared the language of the predecessor statute with the language of the revised statute. Judge Melvin Antell, writing for the Appellate Division, stated:

In our view, the two standards are practically identical and we conclude that the defect of overbreadth found fatal to the validity of the predecessor statute, *N.J.S.A. 2A:170-29(1)*, inheres in *N.J.S.A. 2C:33-2(b)*. It follows, therefore, that there is no valid statutory authority for prosecutions based upon the public use of course or abusive language which does not go beyond offending the sensibilities of a listener.

State in the Interest of H.D. With that, the Appellate Division reversed the conviction of the defendant.

Finally, in *Matter of Vincenti*, 114 N.J. 275, 277 (1989), the New Jersey Supreme Court noted that the "respondent's convictions were based on violations of *N.J.S.A. 2C:33-2(b)*, which was subsequently declared unconstitutional...."

Accordingly, it is clear that the New Jersey Legislature has not been able to enact a statute that proscribes offensive language and at the same time respects a person's right to free speech under the First Amendment. Notwithstanding the foregoing, the author is aware of instances in which persons have been charged with violating the revised statute prohibiting the use of offensive language despite that part of the statute being declared unconstitutional. In any event, it should be noted that the Raritan Borough ordinance, seeking to regulate "offensive language" uses language virtually identical to the language in the foregoing statutes which have been declared unconstitutional due to their vagueness and overbreadth. Based on the foregoing case law, it should be reasonably clear to the reader whether Raritan Borough's ordinance will pass constitutional scrutiny.