

**To: New Jersey Law Revision Commission**  
**From: Samuel M. Silver, Deputy Director**  
**Re.: Citizen's Arrest**  
**Date: September 04, 2020**

## MEMORANDUM

### Executive Summary

New Jersey has recognized the doctrine of “citizen’s arrest” since before the turn of the twentieth century. Under certain circumstances, this doctrine authorizes a private person to detain another without warrant or process, and bring them before a statutorily designated member of the judiciary.<sup>1</sup>

During the past century, the institution of official police forces has become the norm and the necessity for the “citizen’s arrest” doctrine has waned. Utilizing a statute enacted over a century ago also raises questions regarding the length of detention that is legally permitted and the appropriate amount of force one may use to effectuate the arrest.<sup>2</sup>

An examination of the New Jersey’s three remaining statutes authorizing the arrest of another by a private citizen follows.

### Analysis

#### • *Administration of Civil and Criminal Justice*

New Jersey’s statute authorizing the arrest of disorderly persons dates back to 1898.<sup>3</sup> By 1910, the compiled statutes provided that, “it shall be... lawful for any other person, to apprehend, without warrant or process, any disorderly person....”<sup>4</sup> Over the next one hundred and twenty-two years, the substance of the statute authorizing a citizen’s arrest would remain virtually unchanged.

The sole, remaining provision in Title 2A that authorizes the apprehension of a disorderly person by civilians<sup>5</sup>, provides:

Whenever an offense is committed in his presence, any constable or police officer shall, and **any other person may**, apprehend without warrant or process any

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<sup>1</sup> N.J. STAT. §2A:169-3 (2020).

<sup>2</sup> See Ira P. Robbins, A Narrowed Scope of Citizen’s Arrest, 25 CORNELL J.L. & PUB. POL’Y 557 (2016).

<sup>3</sup> L. 1898, c. 239 §36, p. 953. In 1937, the arrest of disorderly persons without process was codified as N.J.S. §2:206-2 (1937). The current section, N.J.S. §2A:169-3 was included in N.J.S. §2C:98-2, which repealed all sections listed in it, by L.1978, c.95, §2C:98-2 eff. Sept. 1, 1979, but was deleted from §2C:98-2, and listed in §2C:98-3, which allocated §2A:169-3, by L.1979, c. 178, §§145, 146, eff. Sept. 1, 1979.

<sup>4</sup> *Levine v. State*, 110 N.J.L. 467, 468-469 (1933).

<sup>5</sup> As used in this Memorandum, “civilian” denotes an individual who is not currently employed as a trained, law enforcement officer for the federal government, state, county, or municipality.

disorderly person, and take him before any magistrate<sup>6</sup> of the county where apprehended.<sup>7,8</sup>

This statute permits private individuals to lawfully detain another who commits an offense in their presence.<sup>9</sup> Private persons can, however, encounter legal difficulties in interpreting this statute.

As it did 110 years earlier, the current statute permits a person to effectuate the arrest of another without warrant or process.<sup>10</sup> Although the statute does not require a “warrant” or “process” the Court does. Citizen complaints are subject to review pursuant to the New Jersey Rules of Court.<sup>11</sup>

The statute is also presents additional interpretive challenges, since it does not address the level of probable cause required to make an arrest; the length of detention that is legally permitted; or the appropriate amount of force used to effectuate the arrest.<sup>12</sup>

Title 2A is not the only Title that addresses the topic of a citizen’s arrest. The Code of Criminal Justice contains two statutes that do so as well.

- *The Shopkeeper’s Privilege*

One form of citizen’s arrest is commonly referred to as the “shopkeeper’s privilege.”<sup>13</sup> This privilege allows a merchant to detain a suspected shoplifter in an attempt to recover willfully concealed, unpurchased merchandise.<sup>14</sup> Historically, these statutes “arose as a result of a dilemma faced by merchants: whether to absorb the loss by turning a blind eye to a suspected shoplifter or to apprehend the suspect, risking a lawsuit if the shopkeeper’s reasonable beliefs turned out to be erroneous or [could] not be proven in court.”<sup>15</sup> New Jersey has chosen to codify this privilege.<sup>16</sup>

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<sup>6</sup> For the Commission’s work regarding the term “magistrate”, see the Final Report from Samuel M. Silver Addressing the use of the Term Magistrate in the New Jersey Statutes to the New Jersey Law Revision Commission 1 (Jul. 30, 2020) (on file with the Commission and available at <https://www.njlrc.org/projects/2020/1/13/use-of-magistrate-in-the-new-jersey-statutes?rq=magistrate>).

<sup>7</sup> N.J. STAT. §2A:169-3 (2020). (Emphasis added). Chapter 169, General Provisions, originally contained 11 provisions. With the exception of N.J. STAT. §2A:169-3 (2020), the other 10 provisions contained in this Chapter were repealed by N.J. STAT. §2C:98-2 (1978).

<sup>8</sup> In 1983, the arrest of an individual within New Jersey by federal law enforcement officers was considered a “citizen’s arrest.” This was remedied with the passage of N.J.S. 2A:154-5. Federal law enforcement officers empowered to arrest offenders against laws of state.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* But see New Jersey Rules of Court, R. 7:2-2(b) (Authorization for Process of Citizen Complaints).

<sup>11</sup> See New Jersey Rules of Court, R. 7:2-2(b) (Authorization for Process of Citizen Complaints).

<sup>12</sup> For an in-depth treatment of citizen’s arrest, see Ira P. Robbins, A Narrowed Scope of Citizen’s Arrest, 25 CORNELL J.L. & PUB. POL’Y 557 (2016).

<sup>13</sup> Ira P. Robbins, A Narrowed Scope of Citizen’s Arrest, 25 CORNELL J.L. & PUB. POL’Y 584 (2016).

<sup>14</sup> N.J. STAT. §2C:20-11(e) (2020).

<sup>15</sup> Ira P. Robbins, A Narrowed Scope of Citizen’s Arrest, 25 CORNELL J.L. & PUB. POL’Y 585 (2016).

<sup>16</sup> N.J. STAT. §2C:20-11(e) (2020).

The shoplifting statute in the New Jersey Code of Justice contains the “shopkeeper’s privilege.”<sup>17</sup> Currently, N.J.S. 2C:20-11(e) authorizes a merchant to detain an individual to determine the ownership of property if the shopkeeper believes that the individual has stolen or is attempting to steal store merchandise.<sup>18</sup> The statute provides, in relevant part:

e. A law enforcement officer, or a special officer, **or a merchant, who has probable cause** for believing that a person has willfully concealed unpurchased merchandise and that he **can** recover the merchandise by taking the person into custody, may, for the purpose of attempting to effect recovery thereof, **take the person into custody and detain him in a reasonable manner for not more than a reasonable time**, and the taking into custody by a law enforcement officer or special officer or merchant shall not render such person criminally or civilly liable in any manner or to any extent whatsoever [...]<sup>19</sup>

The New Jersey Statute authorizes a shopkeeper to “effect the arrest of a suspected shoplifter based upon probable cause, regardless of whether the offense occurs in [his or her] presence.”<sup>20</sup> This standard appears to be based on the assumption that “...shopkeepers have an in-depth knowledge of his or her premises and inventory, has a financial motivation to thwart potential shoplifters, and generally has no concurrent motivation to wrongfully detain a customer.”<sup>21</sup> As a practical matter, however, the civilians authorized to act under this statute are not engaged in state action. Thus, they are free to engage in “unreasonable searches and seizures from the person of detained individuals without fear that the objects seized will be subject to suppression in a motion to suppress evidence” or that liability for erroneous detentions and searches will follow.<sup>22</sup>

Next, not every individual detained by a shopkeeper will be in possession of unpurchased merchandise. Nevertheless, a merchant who erroneously detains an innocent customer will not be “criminally or civilly liable in any manner or to any extent whatsoever.”<sup>23</sup> In its current form, the liability of the shopkeeper is based on the reasonableness of his or her actions under the circumstances and not the guilty or innocence of the customer.<sup>24</sup>

Further, the statute does not provide any guidance regarding the level of force that a merchant may employ to detain a suspected shoplifter.<sup>25</sup> Rather, the statute utilizes the phrase “in a reasonable manner.” In general, “the arrestor may use force to ensure the detainment of the

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

<sup>18</sup> 35 C.J.S. False Imprisonment § 11 (Glenda K. Harnad, J.D.) (June 2020 Update).

<sup>19</sup> N.J. STAT. §2C:20-11(e) (2020) (emphasis added).

<sup>20</sup> 51 N.J. PRAC., MUNICIPAL COURT PRAC. § 43:10 (Robert Ramsey) (2019-2020 ed.). *See State v. Ferraro*, 81 N.J. Super. 213 (Cnty. Ct. 1963).

<sup>21</sup> Ira P. Robbins, A Narrowed Scope of Citizen’s Arrest, 25 CORNELL J.L. & PUB. POL’Y 586 (2016).

<sup>22</sup> 51 N.J. PRAC., MUNICIPAL COURT PRAC. § 43:10 (Robert Ramsey) (2019-2020 ed.). *See State v. Ferraro*, 81 N.J. Super. 213 (Cnty. Ct. 1963).

<sup>23</sup> *Id.*

<sup>24</sup> *See generally*, 35 C.J.S. False Imprisonment § 11 (Glenda K. Harnad, J.D.) (June 2020 Update).

<sup>25</sup> N.J. STAT. §2C:20-11(e) (2020).

arrestee, but only such force as is required to prevent the arrestee's escape.<sup>26</sup> A court will generally, on a case-by-case basis, assess whether the force that was utilized was reasonable.<sup>27</sup>

Finally, the statute is silent on exactly how long the individual may be held in store custody. In New Jersey, the statute provides that an individual suspected of shoplifting may be held "for not more than a reasonable time."<sup>28</sup> Generally, "[c]ourts are hesitant to enunciate precisely what constitutes a reasonable amount of time, but it is generally considered to be the amount of time it takes to sufficiently investigate the suspect and determine whether he or she has committed a crime."<sup>29</sup>

• *The Library Employee Privilege*

In New Jersey, shopkeepers are not the only individuals who may detain those suspected of willfully concealing items with the intent to steal them. To "... help combat the theft of library materials," N.J.S. 2C:20-14 authorizes,

... [a]n employee of a library facility who has probable cause for believing that a person has willfully concealed library material and that he can recover the material by taking the person into custody, may, for the purpose of attempting to recover the material, take the person into custody and detain him in a reasonable manner for a reasonable time.<sup>30</sup>

Much like the shoplifting statute, this statute is similarly silent regarding any requirement that a library employee actually witness the concealment of the depository's materials before detaining an individual. The detention of a suspected individual must be based on probable cause, meaning "less than legal evidence necessary to convict though more than mere naked suspicion."<sup>31</sup>

A library employee who erroneously detains a patron will not be "civilly or criminally liable where the employee has probable cause for believing that the person arrested committed the offense of theft of library material."<sup>32</sup> Thus, under this New Jersey Statute, liability is based on the reasonableness of the library employee's actions under the circumstances and not the guilty or innocence of the patron.<sup>33</sup>

The library statute, much like the shoplifting statute, does not set forth with any specificity the level of force a library employee may employ to detain a someone suspected of

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<sup>26</sup> Ira P. Robbins, A Narrowed Scope of Citizen's Arrest, 25 CORNELL J.L. & PUB. POL'Y 587 (2016).

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

<sup>28</sup> N.J. STAT. §2C:20-11(e) (2020).

<sup>29</sup> Ira P. Robbins, A Narrowed Scope of Citizen's Arrest, 25 CORNELL J.L. & PUB. POL'Y 586 (2016).

<sup>30</sup> See N.J. STAT. §2C:20-12, *Governor's statement to Senate, No. 722*, L. 1985, c. 373.

<sup>31</sup> *State v. Gathers*, 234 N.J. 208 (2018).

<sup>32</sup> N.J. STAT. §2C:20-14 (a) and (c).

<sup>33</sup> See generally, 35 C.J.S. False Imprisonment § 11 (Glenda K. Harnad, J.D.) (June 2020 Update).

concealing library materials. The case law is devoid of any reference that would clarify this statute.

Finally, this statute allows **any** employee of the library to detain those suspected of concealing library material. There is a realistic fear that, “[p]lacing such power in the hands of ordinary, untrained individuals creates the possibility that citizens will misuse or abuse the privilege, sometimes with serious consequences....”<sup>34</sup>

• *Executive Orders – Face Masks*

The Coronavirus disease 2019 (“COVID-19”) is a contagious, and at times fatal respiratory disease caused by the SARS-CoV-2 virus. On March 9, 2020, as part of New Jersey’s coordinated response to address the Coronavirus, Governor Phil Murphy declared a State of Emergency and a Public Health Emergency. The issuance of Executive Order No. 103 declared that New Jersey was in a state of emergency as a result of a public health emergency across all 21 counties in New Jersey.

To further the State’s efforts to enforce social distancing and limiting public interactions Governor Murphy executed Executive Order No. 163.<sup>35</sup> This Executive Order provides “[...w]hen it is not practicable for individuals in outdoor public spaces to socially distance and keep a six-foot distance from others... all individuals shall wear face coverings.

An individual who does not wear a mask in a situation in which a mask is required is in violation of the Governor’s order. Pursuant to N.J.S. App. A:9-49(i), any person who violates an executive order “... shall be adjudged a disorderly person and shall be subject to imprisonment for a term not to exceed 6 months or shall pay a fine not to exceed \$1,000.00 or to both a fine and imprisonment, in the discretion of the court.” In addition, “[a]ny person who shall knowingly aid or abet another in the violation of any provision of this act shall also be adjudged a disorderly person and punishable in the same manner as the violation aided and abetted.”<sup>36</sup>

The laws regarding face masks are, “new, confusing, and not entirely understood.”<sup>37</sup> Criminal defense attorneys have observed that, “[b]ecause it is unclear what the actual penalties are for failing to wear a face mask are, no one should be effectuating citizen’s arrests for failing to wear one.”<sup>38</sup> When asked whether an individual should effectuate a citizen’s arrest against a person not wearing a mask, Governor Murphy responded, “[o]f course not.”<sup>39</sup> In addition, the Governor suggested that when a citizen observes another without a face mask, he or she should,

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<sup>34</sup> Ira P. Robbins, A Narrowed Scope of Citizen’s Arrest, 25 CORNELL J.L. & PUB. POL’Y 557 (2016).

<sup>35</sup> Exec. Order No. 163, (Jul. 08, 2020), \_\_\_\_ N.J.R \_\_\_\_ (2020) available at <https://www.njcourts.gov/attorneys/assets/attyresources/manualonstyle.pdf>

<sup>36</sup> N.J.S. App. A:9-49.

<sup>37</sup> See Jessica Remo, *Can you make a citizen’s arrest of someone who isn’t wearing a mask?* N.J. COM, Jul. 11, 2020, <https://www.nj.com/coronavirus/2020/07/can-you-make-a-citizens-arrest-of-someone-who-isnt-wearing-a-mask.html>.

<sup>38</sup> *Id.*

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

“... go tell someone in authority as opposed to go[ing] to the individual directly.... Find a police officer....”<sup>40</sup>

### Conclusion

The citizen’s arrest doctrine is complicated and its subtleties present challenges to individuals attempting to lawfully effectuate these types of arrests.<sup>41</sup>

Staff seeks authorization to conduct additional research and outreach regarding citizen’s arrests to determine whether the statutory provisions would benefit from modification or elimination.

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

<sup>41</sup> See Riley Brunch, *Bipartisan lawmakers push to do away with citizen’s arrest law*, VALDOSTA DAILY TIMES, Jun. 05, 2020, [www.valdostadailytimes.com/news/ga\\_fl\\_news/bipartisan-lawmakers-push-to-do-away-with-citizens-arrest-law/article\\_ecf06324-a739-11ea-84b1-4767d83ad0ca.html](http://www.valdostadailytimes.com/news/ga_fl_news/bipartisan-lawmakers-push-to-do-away-with-citizens-arrest-law/article_ecf06324-a739-11ea-84b1-4767d83ad0ca.html); AJ Willingham, *Citizen’s arrest laws aren’t cut and dry. Here’s what you need to know*, CNN, May 12, 2020, <https://amp.flipboard.com/@CNN/citizen-s-arrest-laws-aren-t-cut-and-dry-here-s-what-you-need-to-know/a-Bsp3nxJ4TL6bdezV5A79PA%3Aa%3A132361178-c31d9cd2b6%2Fcnn.com>; Editorial Board, *Citizens should not be emboldened to make arrests*, May 12, 2020, <https://www.bostonglobe.com/2020/05/13/opinion/citizens-should-not-be-emboldened-make-arrests/>.