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## CRIMINAL LAW—OBSTRUCTING GOVERNMENTAL ADMINISTRATION—THE PHYSICAL INTERFERENCE REQUIREMENT AND A CB RADAR WARNING

On the afternoon of December 19, 1975, William Case drove past a state police radar unit on a highway in St. Lawrence County, New York. Using the Citizen's Band radio (CB) in his car, he warned two other motorists of the radar location. Immediately thereafter, the police officer in the radar vehicle, which was also equipped with a CB, requested the broadcaster of the warning to identify himself and specify his location. Case complied, was apprehended, and later was charged with obstructing governmental administration.<sup>1</sup> In the Town Justice Court of Oswegatchie, New York, Case entered a guilty plea to the reduced charge of disorderly conduct,<sup>2</sup> and was fined one hundred dollars.<sup>3</sup> On appeal, the St.

1.

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

Obstructing governmental administration is a class A misdemeanor.

N.Y. PENAL LAW § 195.05 (McKinney 1975). As a class A misdemeanor, the offense is punishable by a sentence not to exceed one year and/or a fine not to exceed \$1000. *Id.* §§ 70.15 (1), 80.05 (1). Case was charged with the offense in an information reciting that he had warned other vehicles of the radar location by means of his CB radio.

2. The statute in relevant part states:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

• • •

2. He makes unreasonable noise; or

• • •

7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

N.Y. PENAL LAW § 240.20 (McKinney 1975).

3. Case had originally requested a jury trial but was dissuaded by the court and his counsel. He was informed that a jury trial was possible, but that it would necessitate the posting of \$200 cash bail pending trial, despite the fact that he had been free on his own recognizance for over a month. Since it was Saturday and Case did not have the cash required for bail, his attorney told him that he would have to spend the weekend in jail before she could obtain a review of the bail matter on Monday. Furthermore, she stated that such a trial would cost him well over \$2,000 in legal fees, and that in all probability he would be convicted anyway. She advised him to plead guilty to the disorderly conduct charge and to appeal the conviction. Case took his attorney's advice. Brief of Appellant at 3-4.

Lawrence County Court affirmed the disorderly conduct conviction, ruling that by pleading guilty Case had waived any claim that the accusatory instruments did not support a charge based on either obstructing governmental administration or disorderly conduct. On appeal to the New York Court of Appeals, *held*: reversed. Every element of the offense must be alleged in the information, and an objection to the sufficiency of the instrument is not barred by a plea of guilty. A CB message from one motor vehicle operator to another as to the location of a radar speed checkpoint does not constitute the crime of obstructing governmental administration. *People v. Case*, 42 N.Y.2d 98, 365 N.E.2d 872, 396 N.Y.S.2d 841 (1977).

The court rejected the prosecution's argument that the defendant's guilty plea precluded him from later attacking the sufficiency of the accusatory instrument.<sup>4</sup> Since the information and accompanying depositions failed to allege that the defendant's actions encompassed every element of the offense of obstructing governmental administration, the information was insufficient as a matter of law and could be challenged on appeal.<sup>5</sup>

The basis for the holding on the merits in *Case* is the court's interpretation of the requisite elements of the crime of obstructing governmental administration, as set forth in section 195.05 of the New York Penal Law. The present statute was drafted to consolidate several earlier provisions which proscribed very specific types of conduct.<sup>6</sup> It encompasses a more general range of actions and was designed to fill the gaps that plagued the former collection of obstruction statutes.<sup>7</sup> The elements necessary to constitute an of-

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4. See *People v. Scott*, 3 N.Y.2d 148, 152, 143 N.E.2d 901, 903-04, 164 N.Y.S.2d 707, 710 (1957); *People v. Koffroth*, 2 N.Y.2d 807, 808, 140 N.E.2d 742, 742, 159 N.Y.S.2d 828, 828 (1957); N.Y. CRIM. PROC. LAW § 100.15 (McKinney 1975). *But see* *People v. LaRuffa*, 34 N.Y.2d 242, 313 N.E.2d 332, 356 N.Y.S.2d 849 (1974).

5. See N.Y. CRIM. PROC. LAW § 100.40 (1) (McKinney 1975).

6. See, e.g., 1940 N.Y. Laws, ch. 11, § 13 (interfering with an officer of a society to prevent cruelty to animals) (repealed 1967); 1888 N.Y. Laws, ch. 145, § 7 (interfering with an officer investigating cruelty to children) (repealed 1967); 1881 N.Y. Laws, ch. 680, §§ 59, 61 (interfering with the state legislature) (repealed 1967); *id.* ch. 680, § 124 (resisting a public officer) (repealed 1967). These provisions were repealed when section 195.05 was enacted.

7. N.Y. PENAL LAW § 195.05 (McKinney 1975) (Hechtman, Practice Commentaries). Nevertheless the new section contains many of the gaps present in the former collection of obstruction statutes. Situations outside the scope of the prior statutes would appear to remain outside the scope of section 195.05. See *People v. Gilmore*, 26 Hun 1, 33 N.Y. Sup. Ct. 1 (1881); *People v. Wise*, 54 Misc. 2d 87, 281 N.Y.S.2d 539 (Crim. Ct. N.Y. 1967); *People v. Mann*, 43 Misc. 2d 786, 251 N.Y.S.2d 976 (Warren County Ct. 1964); *cf.* *People*

fense under section 195.05 clearly show this deliberate shift away from specific conduct statutes. The section requires specific intent, a resulting obstruction, and conduct that falls into at least one of three fairly broad categories: intimidation; physical force or interference; or an independently unlawful act.<sup>8</sup> Despite the expansion of these conduct categories, however, the present statute has not developed into the broad catchall that it might have become.

In an apparent attempt to avoid the constitutional problems of vagueness and overbreadth, the courts have limited the statute's application by strictly interpreting its terms. The constitutionality of section 195.05 was upheld in *Bishop v. Golden*,<sup>9</sup> wherein the court stated without reservation that the statutory language was neither vague nor overbroad. The court reasoned that the word "physical" in the statute modified both "force" and "interference," and therefore concluded that the statute did not purport to encompass every possible act of interference.<sup>10</sup> Although the court did not make an explicit statement, it was intimated in *Bishop* that the statute might succumb to first and fourteenth amendment challenges if every type of interference were proscribed.<sup>11</sup>

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v. Hill, 131 Misc. 521, 227 N.Y.S. 285 (Lewis County Ct. 1928) (no obligation to comply with requests of law enforcement officers who are acting outside the scope of their authority).

8. For the full text of the statute see note 1 *supra*.

9. 302 F. Supp. 502 (E.D.N.Y. 1969).

10. *Id.* at 506.

11. The court in *Bishop* stated that only by separating it from the word "physical" were the plaintiffs able to attack the word "interference." *Id.*

Although the courts in both *Bishop* and *Case* emphasized the significance of the limits imposed by the "physical" requirement, obstruction statutes in other states have been upheld despite the absence of any limitation on the type of interference proscribed. One example is a California obstruction statute:

Every person who wilfully resists, delays or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

CAL. PENAL CODE § 148 (West 1970). The court in *In re Bacon*, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966), rejected the vagueness and overbreadth argument and held that the statute's application did not result in a denial of due process. Similarly, Florida's obstruction statute was upheld and found to be neither vague nor overbroad in *Dreske v. Holt*, 536 F.2d 105 (5th Cir. 1976). That statute provides that "[w]hoever shall obstruct or oppose any . . . officer . . . in the execution of legal process or in the lawful execution of any legal duty, without offering or doing any violence to the person of the officer, shall be guilty of a misdemeanor of the first degree . . ." FLA. STAT. § 843.02 (1976). The physical/non-physical distinction is also absent in the Illinois obstruction statute, which provides that "[a] person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity commits a Class A misdemeanor. ILL. ANN. STAT. ch. 38, § 31-1 (1975). It was held that the statute

Adopting the syntactical analysis of the statute set forth in *Bishop*, subsequent cases have examined the type and amount of physical interference necessary to make out a prima facie case. They have held that neither violence nor direct physical contact is required, and that a variety of fairly passive acts—encircling a policeman,<sup>12</sup> going limp while being arrested,<sup>13</sup> and lying on the ground and locking arms with others<sup>14</sup>—may constitute physical interference.

Two cases involving different statutes, *District of Columbia v. Little*<sup>15</sup> and *People v. Maddaus*,<sup>16</sup> also appear to have influenced the construction of section 195.05.<sup>17</sup> Both held that a verbal refusal to permit an inspection does not constitute an actual "interference." Thus, even though excessive force is not required, physical interference must involve something beyond mere words. It would appear to be difficult, if not impossible, to distinguish between the obstruction caused by going limp while being arrested and that caused by verbally refusing to permit an inspection; nevertheless, both *Little* and *Maddaus* emphasized the fact that the defendant had done only the latter.<sup>18</sup> Presumably, if the defendants had strug-

is not a denial of substantive due process on the grounds of vagueness and overbreadth in *Landry v. Daley*, 280 F. Supp. 938 (N.D. Ill. 1968), *rev'd on other grounds*, 401 U.S. 77 (1971), *People v. Raby*, 40 Ill. 2d 392, 240 N.E.2d 595 (1968), *cert. denied*, 393 U.S. 1083 (1969), and *People v. Jackson*, 132 Ill. App. 2d 1059, 271 N.E.2d 673 (1971).

For a general discussion of the problems of overbreadth and vagueness see, e.g., Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

12. *People v. Shea*, 67 Misc. 2d 271, 326 N.Y.S.2d 70 (Yonkers City Ct. 1971).

13. *People v. Williams*, 25 N.Y.2d 86, 250 N.E.2d 201, 302 N.Y.S.2d 780 (1969); *People v. Crayton*, 55 Misc. 2d 213, 284 N.Y.S.2d 672 (App. T. 1967).

14. *People v. Knight*, 35 Misc. 2d 216, 228 N.Y.S.2d 981 (Magis. Ct. 1962). For an extensive discussion of other forms of non-violent interference, see Annot., 44 A.L.R.3d 1018 (1972).

15. 339 U.S. 1 (1950). The Court ruled in *Little* that the defendant's refusal to allow a Department of Health Inspector into her home did not constitute the crime of obstructing a public officer. The statute provided that "any person . . . interfering with or preventing any inspection authorized thereby, shall be guilty of a misdemeanor, and shall upon conviction in the Police Court, be punished by a fine of not less than \$5.00 nor more than \$45.00." City of Washington, D.C., Commissioner's Regulations Concerning the Use & Occupancy of Buildings § 12 (April 22, 1897) (amended July 28, 1922).

16. 4 N.Y.2d 1003, 152 N.E.2d 537, 177 N.Y.S.2d 517 (1958). In this case the court held that the defendant's refusal to consent to an inspection of the outhouse on his property did not constitute interference under section 186 of the Sanitary Code of New York City.

17. This is supported by the reference to both *Little* and *Maddaus* in the Practice Commentary to section 195.05.

18. In *Little* the Court noted that "[s]he neither used nor threatened force of any kind." 339 U.S. at 5. Similarly in *Maddaus*, the court stated that "by his conduct he did

gled with the inspectors they might have fulfilled the interference requirement.<sup>19</sup>

In attempting to draw the line between hindrance and interference, New York's courts have wrestled with the problem of the applicability of section 195.05 to a purely verbal act. In many instances the courts seem to have jumped ahead to the interpretation of "physical interference" without first defining the term "physical." It can be argued that speech is itself "physical," but this possibility is completely ignored in all of the relevant cases. For example in *People v. Longo*,<sup>20</sup> the defendant, an off-duty police officer, had conversed with an undercover narcotics agent engaged in a stakeout. As a result of defendant's actions, the suspect at some point became suspicious and left the area without concluding the planned drug transaction. The defendant was charged with obstructing governmental administration. The court ultimately dismissed the indictment on the issue of causation, reasoning that even if a verbal act were an accepted form of interference, it had not been established that the defendant's words clearly resulted in the identification of the undercover agent.<sup>21</sup> By way of dicta, the court suggested that a verbal act alone would probably not constitute physical force or interference within the accepted meaning of the words.<sup>22</sup>

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not 'interfere with or obstruct' an inspector, within the meaning of [the statute]." 4 N.Y.2d at 1003, 152 N.E.2d at 537, 177 N.Y.S.2d at 517.

19. In some circumstances it has been held that a refusal to submit to an inspection may be considered an obstruction. In *People v. Fidler*, 280 App. Div. 698, 117 N.Y.S.2d 313 (1952), the court stated that the refusal to drive trucks onto scales for inspection, along with the locking of the trucks and the retention of the keys might be sufficient to sustain the charge of obstructing a public officer. Similarly, in *People v. DeMartino*, 67 Misc. 2d 11, 323 N.Y.S.2d 297 (Suffolk County Ct. 1971), the defendant also went beyond mere refusal in attempting to prevent an inspection of his bar. The court found that the "defendant stood in the officer's way . . . and did physically prevent the officer from making his inspection," and was therefore guilty of obstructing governmental administration. *Id.* at 12, 323 N.Y.S.2d at 298.

20. 71 Misc. 2d 385, 336 N.Y.S.2d 85 (Onondaga County Ct. 1971).

21. *Id.* at 390, 336 N.Y.S.2d at 91.

22. The court stated:

If there were uncontroverted evidence that the defendant intentionally revealed the identity of an undercover police agent to one under investigation (or to any other person with the intent that the suspect be warned) and such identification were made by words *and* acts, then we agree a prima facie case might be made out for the crime charged here. However, we do not believe that a verbal act *alone* constitutes physical force or interference within the accepted meaning of these words.

*Id.* (emphasis added). Although the court discussed three elements—intent, words, and acts—it appears that "alone" refers to words in the absence of acts. This distinction highlights

Another lower court in New York tackled the issue of verbal acts as a form of interference and reached a similarly uncertain result. The defendant in *People v. Ketter*<sup>23</sup> gave the police a false name after his arrest. This resulted in his later being charged with the additional crime of obstructing governmental administration. Since his false statement was not independently unlawful,<sup>24</sup> the prosecution claimed that it was a form of interference. Fearing the conception of a limitless catchall provision, the court held that "mere words alone" are insufficient to constitute physical interference under section 195.05, and dismissed the charge.<sup>25</sup>

In *Case*, the Court of Appeals considered two distinct issues. First, it focused on the applicability of the language of the statute to a purely verbal act. Second, it hinted at the question of how severely society should respond to the proliferation of CB radar warnings.

Writing for the majority, Judge Cooke based the decision on the physical/non-physical distinction. Although it does not represent a deviation from established law, the holding finally clarifies the point that words alone do not constitute physical interference under section 195.05. The court adopted the syntactical analysis used in *Bishop* and *Ketter*—reading physical to modify "interference" as well as "force"—and ruled that "the interference would have to be, in part at least, physical in nature."<sup>26</sup> At least for the purposes of the statute, a verbal act, regardless of its effect, is not to be considered a form of physical interference. Chief Judge Breitel, concurring in result, agreed that the present statutory language

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the failings of the physical/non-physical test. If a verbal tip-off is not an illegal obstruction, should it really differ if the actor identifies the undercover policeman by other means, such as pointing or touching? An example of such other means is found in *Commonwealth v. Kelly*, Pa. Super. Ct., 369 A.2d 438 (1976), wherein a policeman intentionally identified an undercover agent engaged in a stakeout by placing him under arrest. The court held that the actions of the arresting officer constituted sufficient physical interference to justify the obstruction conviction under 18 PA. CONS. STAT. ANN. § 5101 (Purdon 1973).

23. 76 Misc. 2d 698, 351 N.Y.S.2d 579 (Crim. Ct. N.Y. 1974).

24. This conduct would not come under criminal impersonation, N.Y. PENAL LAW § 190.25 (McKinney 1975), since there was no "intent to obtain a benefit or to injure or defraud another." See *People v. Jones*, 84 Misc. 2d 737, 376 N.Y.S.2d 885 (Sup. Ct. 1975).

25. 76 Misc. 2d at 700, 351 N.Y.S.2d at 581. The court reached a similar result in *People v. Gaissert*, 75 Misc. 2d 478, 348 N.Y.S.2d 82 (Nassau County Ct. 1973). The defendant was charged with obstructing governmental administration after falsely identifying himself to a police officer. The court dismissed the charge, holding that the false statement was not an "independently unlawful act" proscribed by section 195.05.

26. 42 N.Y.2d at 102, 365 N.E.2d at 875, 396 N.Y.S.2d at 844.

precluded any other interpretation of the interference requirement.<sup>27</sup>

The treatment of the broad policy issue triggered a difference of opinion. On one hand, the majority appeared to suggest that a CB warning simply did not constitute conduct reprehensible enough to warrant a year's imprisonment.<sup>28</sup> On the other, Chief Judge Breitel took the position that CB warnings frustrate law enforcement on the highways, and that the obstruction statute should be amended—presumably to include such warnings. To support his call for legislative action, he argued that under section 195.05 as currently construed someone who revealed the identity of a police decoy to muggers could not be punished.<sup>29</sup> The court was unanimous on one point: the future legality of CB radar warnings, and the question of how to distinguish the various grades of obstructions are issues that ought to be left to the legislature.<sup>30</sup>

The most delicate issue suggested by *Case* is when, if ever, it should be considered criminal to advise another to obey the law.<sup>31</sup> Although the motive is highly questionable, the CBer is merely warning another to comply with the law, thus arguably achieving what is the most desirable result—drivers obeying the speed limits.<sup>32</sup>

27. Judges Jasen and Jones joined in the concurring opinion. *See id.* at 103, 365 N.E.2d at 875, 396 N.Y.S.2d at 844 (concurring opinion).

28. *See id.* at 99, 365 N.E.2d at 873, 396 N.Y.S.2d at 842.

29. "[L]imiting interference to physical acts leaves outside the scope of obstructing governmental administration the many nonphysical forms of effective interference, thus, the 'tip-off' to believed-to-be would-be muggers that the seemingly old and ailing man in civilian clothes is in reality an undercover police officer." *Id.* at 103, 365 N.E.2d at 875, 396 N.Y.S.2d at 844 (concurring opinion).

30. The majority noted that "[a]lthough a court must not be overly technical in interpreting penal provisions, penal responsibility cannot be extended beyond the fair scope of the statutory mandate." *Id.* at 101, 365 N.E.2d at 874, 396 N.Y.S.2d at 843. Chief Judge Breitel expressed a similar sentiment: "the statute, if it have a defect, should be amended." *Id.* at 103, 365 N.E.2d at 875, 396 N.Y.S.2d at 844 (concurring opinion).

31. *Id.* at 102, 365 N.E.2d at 875, 396 N.Y.S.2d at 844. *See generally* MODEL PENAL CODE § 242.3 (d), Status of Section (Proposed Official Draft 1962). The Code takes the position that CB warnings cannot be considered criminal conduct, and that an obstruction statute must discriminate between this type of conduct and more serious obstructions.

32. This "good deed" argument was advanced by the defendant in *Betts v. Stevens*, [1910] 1 K.B. 1 (1909):

It cannot be said that for one driver to indicate to another when he passes that the police are on the lookout would be to [obstruct a police officer]. . . . Indeed, so far as from obstructing the police, the appellant was really assisting them by preventing the commission or continuance of an offence. It is just as much the duty of the police to prevent the commission of offences as it is to detect offences actually being committed.

Chief Judge Breitel rejected that analysis, however, implying that the obvious goal of CB warnings is to allow drivers to speed without detection, and concluding that such warnings represent a serious problem that warrants enforcement.<sup>33</sup> Judge Cooke pointed out that criminalizing such conduct by eliminating the physical/non-physical distinction would nevertheless be unjust and impractical, since even a casual conversation between motorists at a rest stop could theoretically lead to an arrest.<sup>34</sup>

Interference appears to have been chosen as the focal point of the case in order to highlight the deficiencies of the present statute. If the court had wished to sidestep the complexities of the physical/non-physical distinction it could have based the decision on other grounds. In *Longo*, for example, the defendant prevailed on the question of causation, since it could not be shown that his words had in fact caused the identification of the undercover agent.<sup>35</sup> Similarly, in *Case*, the court could have focused on the effect of Case's warning—did it actually allow speeders to slow down and avoid radar detection?<sup>36</sup>

In the CB context, causation would be absent in two situations: where no one receives the message, and where those who receive the message are not speeding. Only where the CB warning is received by a speeding motorist, allowing him to slow down momentarily to avoid radar detection, could the state show that the CBER had caused an interference with law enforcement. Such a

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79 L.J.K.B. at 19 (Brief for Appellant). See generally Tomlinson, *Wilful Obstruction of Peace Officers in Canada*, 26 U. TORONTO FAC. L. REV. 31 (1968).

33. 42 N.Y.2d at 103, 365 N.E.2d at 875, 396 N.Y.S.2d at 844. Although CB proponents maintain that CB use encourages highway safety, it has been argued that a prime motive behind the initial purchase of a CB unit is to allow a driver to speed and avoid speed checkpoints. Tuite, *Ten-Thirteen on the Airwaves*, N.Y. Times, Dec. 12, 1976, § 21, at 35, col. 4.

34. 42 N.Y.2d at 103, 365 N.E.2d at 875, 396 N.Y.S.2d at 844.

35. 71 Misc. 2d at 390, 336 N.Y.S.2d at 91. See text accompanying notes 20-22, *supra*.

36. Although the court did not discuss the issue, the information sworn to by the State Police Officer does not explicitly state that the warned vehicles were speeding before they reached the radar checkpoint. 42 N.Y.2d at 100, 365 N.E.2d at 873-74, 396 N.Y.S.2d at 842.

Attempted obstruction of governmental administration has been held not to be an indictable offense. In *People v. Schmidt*, 76 Misc. 2d 976, 352 N.Y.S.2d 399 (Crim. Ct. N.Y. 1974), the defendant was charged with obstructing governmental administration. On the motion of the district attorney this charge was reduced to attempted obstruction of governmental administration. The court dismissed the charge, stating that attempted obstruction of governmental administration represented only a hypothetical offense: "The statutory definitions of . . . obstructing governmental administration (§ 195.05) include acts which are, in their very nature, attempts. Therefore, there cannot be an attempt to commit a crime which is itself a mere attempt to do an act or accomplish a result." *Id.* at 978, 352 N.Y.S.2d at 402.

showing, however, might present an intriguing paradox. If a police officer could state that he had observed the warned motorist speeding, how could his actions have been obstructed by the CBer's warning?<sup>37</sup>

Specific intent is another element courts have considered in obstruction cases. For example, in *In Re S.*<sup>38</sup> an elementary school student had disrupted classes by talking loudly, using obscene language, refusing to be seated after being told to do so, and pushing the teacher when she attempted to compel him to take his seat. Intimidation, physical force and a resulting obstruction were all clearly shown, yet the obstructing governmental administration charge was dismissed because there was no showing of a specific intent to obstruct the teacher's performance. This may provide a possible argument in the case of a CB radar warning. Section 195.05 requires that the actor intentionally create the obstruction,<sup>39</sup> and

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37. In *Bastable v. Little*, [1907] 1 K.B. 59 (1906), the defendant was charged with wilfully obstructing a police officer in the execution of his duty. The police had established a speed trap in order to observe and time the speed of cars driven over a measured distance on the road. The defendant, "by means of signals made with his hand and with a sheet of newspaper, and in one instance by calling out the words 'police trap,' warned the drivers of motor cars which he saw approaching the measured distances that the police were on the watch as aforesaid." *Id.* at 60. Dozens of cars were warned, and "the cars in every case slackened speed on the drivers being warned." *Id.* The court dismissed the charge, noting that there was no proof that the warned cars were in fact speeding at any time. Lord Chief Justice Alverstone added that "we are not dealing with the lawfulness or unlawfulness of warning a person who is actually breaking the law at the moment; we are dealing with the question whether it is an offence under the section to warn people that there is a police trap in front." *Id.* at 62.

The next time it considered the causation requirement in a speed trap warning case, the King's Bench reached a different result. *Betts v. Stevens*, [1910] 1 K.B. 1. The defendant, a scout of the Automobile Association, warned cars displaying the association badge of a police speed trap. Unlike *Bastable*, there was testimony by the police that "a considerable number of cars approached the trap or control at a speed exceeding twenty miles an hour." *Id.* at 5. The court affirmed the conviction, stating:

However, nothing that I now say must be construed to mean that the mere giving of a warning to a passing car that the driver must look out as there is a police trap ahead will amount to an obstruction of the police in the execution of their duty in the absence of evidence that the car was going at an illegal speed at the time of the warning given, but where it is found, as in this case, that the cars were already breaking the law at the time of the warning and that the act prevented the police from getting the only evidence which would be required for the purposes of the case, there I think the warning does amount to obstruction.

*Id.* at 7.

Also, causation could conceivably be proved where the officer had not observed the motorist speeding, if the warned motorist testifies that he had indeed been speeding and that he had slowed down upon hearing the warning, thus escaping detection.

38. 71 Misc. 2d 1032, 337 N.Y.S.2d 774 (Fam. Ct. Queens County 1972).

39. The intent requirement for section 195.05 is stressed in the Practice Commentaries: Within the scope of § 195.05 are such cases as (1) an assault on a public ser-

the CBER may argue that his intention was merely to remind others of the legal speed limit. The very nature of CB warnings, however, may prove to be the flaw in this argument. The realities of the circumstances—that the warnings clearly allow speeders to avoid detection—may discredit the “good deed” contention.

Although much of the emphasis of the *Case* decision focused on the shortcomings of the present statute, the court did furnish some general guidelines for its revision. Basically, the goal is to draft an obstruction statute that discriminates between the various grades of obstructions, applies to certain non-physical forms of interference, and yet does not become an overly broad catchall. The court's reliance on *Bishop* indicates that it does not consider the simple elimination of the adjective “physical” to be a viable solution.<sup>40</sup> From the examples given in the decision, it appears that the court favors a revision centered on both intent and result, rather than solely on the categorization of the conduct.<sup>41</sup>

Some possible alternatives are offered by section 242 of the Model Penal Code, a result-oriented statute dealing with conduct that obstructs a lawful arrest and “creates a substantial risk of

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vant . . . provided that the defendant's intent is to prevent such public servant from performing an official function; (2) tampering with a motor vehicle of a housing inspector, provided that the defendant's intent is to prevent such inspector from carrying out his official duties; (3) engaging in disorderly conduct in the chamber of a legislative body with intent to obstruct the legislative session.

N.Y. PENAL LAW § 195.05 (McKinney 1975) (Hechtman, Practice Commentaries) (emphasis added). Section 15.05 (1) of the Penal Law defines “intentionally” as follows: “A person acts intentionally with respect to a result or to a conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.” *Id.* § 15.05 (1). “Intentionally” may refer to result or conduct, but the construction of section 195.05 makes it clear that it applies to result. “Intentionally” modifies “obstructs, impairs or perverts” (the result) rather than “by means of intimidation, physical force or interference, or . . . any independently unlawful act” (the conduct). *See id.* § 195.05.

Although the purpose of section 15.05 is to “limit and crystalize the culpable mental states involved in the criminal law,” many of the defects of the former statutes have persisted. *Id.* § 15.05 (Hechtman, Practice Commentaries). For a discussion of the problems in distinguishing between specific and general intent under the former Penal Code, see, e.g., *People v. Corrigan*, 195 N.Y. 1, 87 N.E. 792 (1909); *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901); *People v. Stevens*, 109 N.Y. 159, 16 N.E. 53 (1888). The effect of section 15.05 and the present distinction between intentional result and intentional conduct is noted in *People v. Usher*, 39 App. Div. 2d 459, 336 N.Y.S.2d 935 (1972), *aff'd mem.*, 34 N.Y.2d 600, 310 N.E.2d 547, 354 N.Y.S.2d 952 (1974). The court stated that “[a] person acts ‘intentionally’ with respect to a result when his conscious objective is to cause such result . . .” 39 App. Div. 2d at 410, 336 N.Y.S.2d at 936. *See People v. Tegins*, 90 Misc. 2d 498, 395 N.Y.S.2d 907 (Suffolk County Ct. 1977). *See also Comment, Rethinking the Specific-General Intent Doctrine in California Criminal Law*, 63 CAL. L. REV. 1352 (1975).

40. 42 N.Y.2d at 102, 365 N.E.2d at 875, 396 N.Y.S.2d at 844. *See note 11 supra.*

41. *Id.* at 103, 365 N.E.2d at 875, 396 N.Y.S.2d at 844.

bodily injury to the public servant or anyone else."<sup>42</sup> This would arguably separate the CB warning from the tip-off of an undercover policeman's identity, wherein the policeman's safety might be jeopardized by the identification.<sup>43</sup> A second possibility is a provision that restricts the application of the obstruction statute to interference with "the apprehension, [or] prosecution . . . of another for [a] crime,"<sup>44</sup> rather than the more general interference with a "governmental function" required under section 195.05. This might effectively separate obstructions on the basis of the seriousness of the resulting harm, since speeding is a traffic infraction, and not a crime.<sup>45</sup>

Although consolidation of the earlier statutes was intended to broaden the coverage of the obstruction provision, it may be that in practice the opposite is true. A return to a more specific statute could prove more effective in separating the wide range of obstruction offenses. In this instance, the legislature would have to decide whether or not a CB warning should be considered punishable conduct, and possibly revise the obstruction statute to cover such conduct specifically. This would avoid the problem discussed in *Case*—applying the physical/non-physical distinction to conduct that does not clearly fit the test. A separate CB statute, defining the CB radar warning as a violation or traffic infraction, could also insure that the punishment reflects the seriousness of the offense.<sup>46</sup> Such a scheme, however, presents the possibility of an overlap in statutory provisions.<sup>47</sup> Under section 195.05 as now written, and with the addition of a separate CB offense, the CBer might be subject to two charges for the transmission of a warning: one under the new CB provision, and a second based on section 195.05,

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42. MODEL PENAL CODE § 242.2 (Proposed Official Draft 1962).

43. Although a CB warning may help a speeder escape radar detection, and allow him to continue engaging in dangerous conduct, the warning has not created the dangerous condition.

44. MODEL PENAL CODE § 242.3 (Proposed Official Draft 1962).

45. N.Y. PENAL LAW § 10.00 (2) (McKinney 1975). Similar offenses, categorized as violations, would also be excluded by this type of statute. *See id.* § 70.15 (4).

46. One of the purposes of the Penal Law is "to differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor." N.Y. PENAL LAW § 1.05 (4) (1975). For a discussion of the proportionality issue in New York, see *People v. Broadie*, 37 N.Y. 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975) and *People v. Davis*, 33 N.Y.2d 221, 306 N.E.2d 787, 351 N.Y.S.2d 663 (1973), *cert. denied*, 416 U.S. 973 (1974).

47. It can be argued that an overlap of penal provisions is preferred over a gap, but in many cases careful drafting can eliminate the problem.

insofar as it proscribes an obstruction caused by an "independently unlawful act."<sup>48</sup> If it is desirable to retain this language, the problem could be eliminated by incorporating the specific CB statute into article 195 and expanding the phrase in section 195.05 to proscribe "any independently unlawful act, *excluding the offenses stated under this article.*"

Much like the court's division of the issues, the impact of its decision is twofold. In legal terms, the court has clarified the "interference" problem by requiring an interference that is "in part at least, physical in nature."<sup>49</sup> Although the majority had no serious misgivings about the dismissal in this instance, they made it clear that gaps must be filled to prevent more serious offenses from slipping through. The present statute leaves little room for judicial interpretation, since the court stated that it could not disregard the modifier, "physical."<sup>50</sup> The physical/non-physical distinction is the major defect in the statute, and both opinions emphasize its failure to differentiate on the basis of the seriousness of the resulting harm.

On a practical level, the court quite clearly ruled that CB radar warnings do not constitute the crime of obstructing governmental administration.<sup>51</sup> The court did not involve itself in a weighing of the pros and cons of CB use, but the decision nevertheless reflects the growing public acceptance of the "Smokey warning." It has been estimated that well over one in twenty passenger cars are equipped with CB units, and there is no indication that the demand has reached its peak.<sup>52</sup> There are some indications that the prime motive for purchasing a CB is to "outwit Smokey,"<sup>53</sup> but CBers nevertheless argue that its potential for harm is far outweighed by its advantages in giving drivers a means to communicate

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48. The "independently unlawful act" would be the transmission of the CB warning.

49. 42 N.Y.2d at 102, 365 N.E.2d at 875, 396 N.Y.S.2d at 844.

50. *Id.* at 101, 365 N.E.2d at 874, 396 N.Y.S.2d at 843.

51. *Id.* at 99, 365 N.E.2d at 873, 396 N.Y.S.2d at 842.

52. Harwood, *America with its Ears On*, N.Y. Times, April 25, 1976, § 6, at 28.

53. See note 33 *supra*. The battle between traffic police and speeders is not entirely a product of the recent CB popularity. For example, in *People v. Wright*, 53 Misc. 2d 942, 280 N.Y.S.2d 213 (Orange County Ct. 1967), the defendant motorist flashed his headlights on and off to warn others of a police radar checkpoint. He was charged with a violation of section 375 (2) (c) of New York's Vehicular and Traffic Law, which forbids the display of white lights which "cast a constantly moving, oscillating, revolving, rotating or flashing beam" by all but police or other emergency vehicles. N.Y. VEH. & TRAF. LAW § 375 (2) (c) (McKinney 1975). The court held that the statute was never meant to apply to this type of display.

road conditions, report accidents, and request aid in emergencies.<sup>54</sup>

The fear that CB warnings would seriously reduce the effectiveness of highway speed enforcement caused law enforcement groups to protest CB use from its inception. For example, in 1973 the ICC yielded to pressure by forcing most major trucking firms to remove the CB units from their trucks.<sup>55</sup> In the face of immense public support, however, the anti-CB movement soon died out.<sup>56</sup> At the present time there seems to be no strong impetus for criminalizing CB use in New York.<sup>57</sup>

Although the court stated that the legality of CB radar warnings is ultimately a question for the legislature, the majority voiced the opinion that CB warnings do not warrant severe reprisals.<sup>58</sup> It was acknowledged that the warnings do allow some people to speed, but public support, favorable aspects of CB use, and a significant gap in the statute tipped the scales in favor of the defendant. For the present at least, *Case* represents a victory for the "Good Buddies" over "Smokey."

J. GREGORY YAWMAN

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Similarly, in *People v. Faude*, 88 Misc. 2d 434, 388 N.Y.S.2d 562 (Justice Ct. Town of Cheektowaga 1976), the defendant's automobile was equipped with a "fuzzbuster," a device used to detect the presence of radar. He was charged with a violation of section 397 of New York's Vehicular and Traffic Law which states, in relevant part:

A person, not a peace officer, who equips a motor vehicle with a radio receiving set capable of receiving signals on a frequency allocated for police use or knowingly uses a motor vehicle so equipped or who in any way knowingly interferes with the transmission of radio messages by the police without having first secured a permit so to do . . . is guilty of a misdemeanor.

N.Y. VEH. & TRAF. LAW § 397 (McKinney 1975). The court dismissed the charge, noting that there was no indication in the legislative history of the statute that it contemplates any device other than those capable of receiving voice messages or interfering with police transmissions. The "fuzzbuster" merely notifies the driver that radar beams are within a certain proximity, and therefore falls outside the scope of the statute. *But cf.* VA. CODE ANN. § 46.1-198.1 (Supp. 1977) (prohibiting the use of fuzzbusters). Although the fuzzbusters are quite different from CBs, the Virginia statute may indicate a renewed interest in optimum radar speed enforcement.

54. Harwood, *supra* note 52. See also Tuite, *supra* note 33.

55. The regulation was repealed later that year. Harwood, *supra* note 52.

56. *Id.*

57. For example, in New York, Governor Carey announced a plan to supply 10,000 elderly residents of Rochester with CB units to help them protect themselves against crime. One channel would be set aside for direct access to police. N.Y. Times, May 24, 1977, at 39, col. 1.

58. 42 N.Y.2d at 99, 365 N.E.2d at 873, 396 N.Y.S.2d at 842.

