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Case Note: Criminal Law - People v. Francis, 45 App. Div. 2d, 358 N.Y.S.2d 148 (2d Dep't 1974)

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CRIMINAL LAW—Firearms Possession—New York Statutory Exception Reducing Possession of a Loaded Firearm From a Felony to a Misdemeanor When In One's Place of Business Does Not Apply to an Employee Lacking a Proprietary Interest. *People v. Francis,* 45 App. Div. 2d 431, 358 N.Y.S.2d 148 (2d Dep't 1974).

Defendant was arrested while at his place of employment (a United States Post Office) for the unlawful possession of a weapon.[1] In New York illegal possession of a loaded firearm is a felony.[2] Upon conviction[3] defendant appealed, claiming that he came within the exception of section 265.05 of the New York Penal Law, which states

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1. People v. Francis, 45 App. Div. 2d 431, 358 N.Y.S.2d 148 (2d Dep't 1974).

2. The New York firearms law, which encompassed all the various crimes of possession of weapons, was formerly codified as N.Y. PENAL LAW § 265.05 (McKinney 1967) [hereinafter cited as OLD LAW]. OLD LAW § 265.05(2) provided: "Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm and, at the same time, has in his possession a quantity of ammunition which may be used to discharge such firearm is guilty of a class D felony. Such possession shall not, except as provided in subdivision three of this section [previous conviction], constitute a felony if such possession takes place in such person's home or place of business." In 1974 a new firearms law was enacted. The new firearms law, codified at N.Y. PENAL LAW §§ 265.01-.04 (McKinney Supp. 1974) [hereinafter cited as NEW LAW], is the substantive equivalent of the OLD LAW. *See* NEW LAW § 265.03, 1974 Practice Commentary. NEW LAW section 265.02(4), the present counterpart of OLD LAW section 265.05(2), provides that a person is guilty of criminal possession of a weapon in the third degree when "[h]e possesses any loaded firearm. Such possession shall not, except as provided in subdivision one [previous conviction], constitute a violation of this section if such possession takes place in such person's home or place of business. Criminal possession of a weapon in the third degree is a class D felony." Therefore, possession of a firearm in one's home or place of business or possession of an unloaded firearm is a misdemeanor unless such possessor has a prior felony conviction, in which case he is guilty of a felony.

3. The defendant was indicted for possession of a weapon as a class D felony and was allowed to plead guilty to attempted possession of a weapon as a class E felony. Upon the imposition of sentence defendant appealed alleging that the trial court erred in accepting his felony plea when he was guilty of only a misdemeanor. 45 App. Div. 2d at 431, 358 N.Y.S.2d at 150.

that if a person is found in possession of a loaded firearm in his home or place of business, he is guilty of only a class A misdemeanor.[4] The appellate division affirmed, refusing to apply the "place of business" exception.[5]

The merits of gun control legislation have received much attention.[6] All fifty states plus the District of Columbia have enacted some form of gun control law,[7] attempting to prevent the unlawful

4. OLD LAW § 265.05(3) provided: "Any person who has in his possession any firearm . . . is guilty of a class A misdemeanor . . . ."

5. 45 App. Div. 2d at 435, 358 N.Y.S.2d at 153.

6. *See, e.g.*, C. BAKAL, THE RIGHT TO BEAR ARMS (1966); THE NATION, June 7, 1971, at 706-07; NEW REPUBLIC, May 30, 1970, at 11; U.S. NEWS & WORLD REPORT, Aug. 11, 1969, at 40-41.

7. ALA. CODE tit. 14, §§ 161-86 (1959), *as amended*, (Supp. 1973); ALASKA STAT. §§ 11.55.010-.080 (1970), *as amended*, (Supp. 1973); ARIZ. REV. STAT. ANN. §§ 13-911 to -924 (1956); ARK. STAT. ANN. §§ 41-4501 to -4525 (1964), *as amended*, (Supp. 1973); CAL. PENAL CODE §§ 12000-582 (West 1970), *as amended*, (West Supp. 1974); COLO. REV. STAT. ANN. §§ 41-11-1 to -4, 40-11-8 to -11 (1964), *as amended*, (Supp. 1965); CONN. GEN. STAT. REV. §§ 53-202 to -206a (1973); DEL. CODE ANN. tit. 11, §§ 461-68B (1953), *as amended*, (Supp. 1970); *id.* tit. 24, §§ 901-05 (1953), *as amended*, (Supp. 1970); D.C. CODE ANN. §§ 22-3201 to -3217 (1967); FLA. STAT. ANN. §§ 790.01-.26 (1965), *as amended*, (Supp. 1974); GA. CODE ANN. §§ 26-2901 to -2909 (1968), *as amended*, (Supp. 1974); HAWAII REV. STAT. §§ 134-1 to -15, -31 to -34, -51 to -52 (Supp. 1973); IDAHO CODE §§ 18-3301 to -3315 (Supp. 1974); ILL. ANN. STAT. ch. 38, §§ 24-1 to -6 (1970), *as amended*, (Supp. 1974); IND. ANN. STAT. §§ 10-4701 to -4759 (Burns 1971); IOWA CODE ANN. §§ 695.1-.29 (1950), *as amended*, (Supp. 1974); *id.* § 696.1-.11 (1950), *as amended*, (Supp. 1974); KAN. STAT. ANN. §§ 21-4201 to -4206 (1974); KY. REV. STAT. ANN. §§ 527.010-.060 (Spec. Penal Code Pamphlet 1975); LA. REV. STAT. ANN. §§ 40:1751-91 (1965); *id.* § 40:1801-04 (Supp. 1974); ME. REV. STAT. ANN. tit. 15, §§ 391-93 (1965), *as amended*, (Supp. 1974); *id.* tit. 25, §§ 2031, 2041-42 (Supp. 1973); MD. ANN. CODE art. 27, §§ 36-36F (Cum. Supp. 1974); MASS. ANN. LAWS ch. 140, §§ 121-31H (1972), *as amended*, (Supp. 1973); MICH. COMP. LAWS ANN. §§ 28.421-.434 (1967), *as amended*, (Supp. 1974); MINN. STAT. ANN. §§ 609.66-.67 (1964), *as amended*, (Supp. 1974); *id.* §§ 624.61, 625.16 (1964); MISS. CODE ANN. §§ 97-37-1 to -33 (1972), *as amended*, (Supp. 1974); MO. ANN. STAT. § 564.610-.660 (Vernon 1953), *as amended*, (Vernon, Cum. Supp. 1975); MONT. REV. CODES ANN. § 94-3524 to -3530, -3578 to -3579 (1969); NEB. REV. STAT. §§ 28-1001 to -1011 (1964); NEV. REV. STAT. §§ 202.280-.440 (1973); N.H. REV. STAT. ANN. §§ 159:1-:17 (1964), *as amended*, (Supp. 1973); N.J. STAT. ANN.

use of these weapons while preserving the privilege to bear arms[8] for those who use guns for lawful purposes. These restrictions have been unsucessfully challenged as violations of both federal[9] and state constitutions.[10] Most jurisdictions with gun control statutes do not

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§§ 2A:151-1 to -63 (1969), *as amended*, (Supp. 1974); N.M. STAT. ANN. §§ 40A-7-1 to -8 (1972); N.Y. PENAL LAW §§ 265.00-.40 (McKinney Supp. 1974); N.C. GEN. STAT. §§ 14-269 to -269.1 (1969); N.D. CENT. CODE §§ 62-01-01 to -05-04 (1960), *as amended*, (Supp. 1973); OHIO REV. CODE ANN. §§ 2923.11-.24 (Page, Spec. Supp. 1973), *as amended*, (Page, Current Service III 1974); OKLA. STAT. ANN. tit. 21, §§ 1273, 1276-82 (1958); *id.* §§ 1272, 1283-89.16 (Supp. 1974); ORE. REV. STAT. §§ 166.180-.645 (1974); PA. STAT. ANN. tit. 18, §§ 6101-41 (1973), *as amended*, (Supp. 1974); R.I. GEN. LAWS ANN. §§ 11-47-1 to -56 (1970), *as amended*, (Supp. 1974); S.C. CODE ANN. §§ 16-121 to -149 (1962), *as amended*, (Supp. 1973); S.D. COMPILED LAWS ANN. §§ 22-14-1 to -4 (1969); TENN. CODE ANN. §§ 39-4901 to -4919 (1955), *as amended*, (Supp. 1974); TEX. PENAL CODE ANN. §§ 46.01-.08 (1974); UTAH CODE ANN. §§ 76-10-501 to -525 (Supp. 1973); VT. STAT. ANN. tit. 13, §§ 4003-15 (1974); VA. CODE ANN. §§ 18.1-258 to -272 (1960), *as amended*, (Cum. Supp. 1974); WASH. REV. CODE ANN. §§ 9.41.010-.270 (1961), *as amended*, (Supp. 1974); W. VA. CODE ANN. §§ 61-7-1 to -15 (Supp. 1974); WIS. STAT. ANN. §§ 920.20-.24 (1968), *as amended*, (Supp. 1974); WYO. STAT. ANN. §§ 6-237.1 to -246.4 (1959), *as amended*, (Supp. 1973).

8. As of 1966, fifteen state constitutions contained no specific provision guaranteeing the right to bear arms. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATHOLIC U.L. REV. 53, 54 (1966). However, one of those states, Illinois, subsequently amended its constitution to provide the right, so that the only remaining states are Arkansas, California, Delaware, Iowa, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Virginia, West Virginia, and Wisconsin. *Id.*; *see* ILL. CONST. art. 1, § 22.

9. Miller v. Texas, 153 U.S. 535 (1894); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (interpreting the second amendment "right to bear arms" to be only a limitation on the federal government and not state governments).

10. Carlton v. State, 63 Fla. 1, 58 So. 486 (1912); Nunn v. State, 1 Ga. 243 (1846); People v. Liss, 406 Ill. 419, 94 N.E.2d 320 (1950); State v. Angelo, 3 N.J. Misc. 1014, 130 A. 458 (Super. Ct. 1925); People v. Persce, 204 N.Y. 397, 97 N.E. 877 (1912); English v. State, 35 Tex. 473 (1872). *But see* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822) (holding that the right to bear arms is absolute). For a more detailed discussion of the constitutional problems of gun control, see AMERICAN BAR FOUNDATION, FIREARMS AND LEGISLATIVE REGULATION (1967); G. NEWTON & F. ZIMRING,

impose criminal responsibility for the mere possession of a handgun,[11] but limit the place and manner in which guns can be possessed.[12]

The New York court, in deciding whether to apply the "place of business" exception of section 265.05,[13] considered the opinions of other jurisdictions whose statutes contain similar language. In Texas, "[a] person commits an offense if he intentionally, knowingly, or wrecklessly carries on or about his person a handgun . . . ."[14] This restriction does not apply to a person "on his own premises or premises under his control . . . ."[15] In *Flores v. State,*[16] a Texas defendant challenged his felony conviction on the grounds that he was an employee of the establishment where he was arrested for possession of a pistol. On appeal, the court held it was reversible error not to submit the following charge to the jury:

> [W]here a person is employed to work and is working, it is his place of employment and he has a right under the law to carry a pistol on said premises.[17]

The court interpreted a person's place of employment as "premises under his control" and within the exception.[18] Thus, the Texas stat-

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FIREARMS & VIOLENCE IN AMERICAN LIFE (1970); Bessick, *Gun Control Statutes and Domestic Violence,* 19 CLEV. ST. L. REV. 556 (1970); Jacobs, *Firearms Control,* 42 ST. JOHN'S L. REV. 353 (1968); Levin, *The Right to Bear Arms: The Development of the American Experience,* 48 CHI.-KENT L. REV. 148 (1971); Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation,* 38 U. CHI. L. REV. 185 (1970); Note, *Firearms Legislation,* 18 VAND. L. REV. 1362 (1965).

11. Although several states require a license or permit to purchase firearms, New York is the only jurisdiction which requires a license to possess (keep at home or place of business). C. BAKAL, *supra* note 6, at 348.

12. Forty-four states prohibit or require a permit to carry concealed weapons. *Id.* at 346.

13. *See* note 2 *supra.*

14. TEX. PENAL CODE ANN. § 46.02(a) (1974). The statute further provides: "An offense under this section is a felony of the third degree if it occurs on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages." *Id.* § 46.02(c).

15. *Id.* § 46.03(2).

16. 486 S.W.2d 577 (Tex. Crim. App. 1972).

17. *Id.* at 578.

18. The official commentary to TEX. PENAL CODE ANN. section 46.02

ute neither prevents employees from carrying guns,[19] nor prohibits a person from carrying a pistol from his home to his place of business.[20] The fact that an employee has no proprietary interest in the premises where he works does not appear significant; he is still considered to be within the exception.

Coker v. State[21] and *Miller v. State*[22] interpreted "place of business" as used in a Georgia statute[23] prohibiting the carrying of any pistol or revolver without a license outside the home, automobile, or place of business.[24] In *Coker*, an overseer of a plantation was charged with carrying a pistol without a license. The court reversed his conviction and stated that Coker had a right to carry his pistol anywhere on the plantation since " 'home or place of business' . . . [is] broad enough to include any portion of a farm or plantation where one employs his time and makes his living."[25] Concerning defendant's lack of any proprietary interest, the court held that "[t]he plantation was as much his home and place of business as if he owned it."[26] Any doubts as to the scope of the *Coker* reasoning were settled in *Miller*, where defendant, a farm laborer, was charged with carrying a weapon without a license from his lodging to his employer's residence.[27] The court held: "the space between [the

observes that the Texas courts construe the law to permit an employee to carry a weapon on his employer's premises. TEX. PENAL CODE ANN. § 46.02, 1974 Practice Commentary (Supp. 1974).

19. Barker v. Satterfield, 111 S.W. 437 (Tex. Civ. App. 1908); Page v. State, 25 S.W. 774 (Tex. Crim. App. 1894); Poston v. State, 132 Tex. Crim. 317, 104 S.W.2d 516 (1937).

20. Davis v. State, 135 Tex. Crim. 659, 122 S.W.2d 635 (1938). However, a gun may not be carried habitually between home and business. *Id.* at 661, 122 S.W.2d at 636.

21. 12 Ga. App. 425, 76 S.E. 103 (1912).

22. 12 Ga. App. 479, 77 S.E. 653 (1913).

23. GA. CODE ANN. § 26-2904 (1968), *as amended*, (Supp. 1974).

24. *Id.* § 26-2903 provides: "A person commits a misdemeanor when he has or carries on or about his person outside of his home, automobile or place of business any pistol or revolver, whether concealed or not, for which he has not obtained a license from the ordinary of the county in which he resides."

25. 12 Ga. App. at 426, 76 S.E. at 104.

26. *Id.*

27. Even though the employee's lodging and the employer's residence were on the same plantation, the reasoning would appear to apply even if

employer's house] and the house occupied by the accused . . . are included . . . within the term 'place of business' . . . ."[28]

Both *Coker* and *Miller* interpret "place of business" to be the place where one earns his livelihood,[29] defining the term as it is commonly understood. This interpretation, coupled with no requirement of any proprietary interest,[30] gives the "place of business" exception the maximum scope possible and excepts the person from criminal responsibility for possession of a pistol without a license.[31]

The Illinois Criminal Code[32] contains a provision similar to that of Texas and Georgia but prohibits the carrying of a concealed weapon in any vehicle.[33] In *People v. Cosby*,[34] defendant cab driver was found guilty of the unlawful use of a weapon when the arresting police officer, while checking the defendant's driver's license, observed the butt of a gun belonging to defendant protruding from a coat lying on the cab's front seat. In affirming the conviction, the court held that " 'fixed place of business' means exactly what it says—a place that is stationary or permanent."[35] While the court did not consider the issue of whether or not an employee in a fixed place of business may carry a weapon to and from his home to his place of business, *Cosby* seems to signal a literal interpretation of any exceptions in the Illinois statute.

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they were not. *Cf.* Strickland v. State, 137 Ga. 1, 72 S.E. 260 (1911) (statute must be given a "reasonable construction").

28. 12 Ga. App. at 479, 77 S.E. at 653.

29. *Id.*; 12 Ga. App. at 426, 76 S.E. at 104.

30. The question that arises from the definition of the term "place of business" as the place where one earns his livelihood is whether that definition can be refined to include a proprietary interest in the place where one earns his livelihood. If it can be so included, the whole class of employees, regardless of their work, are excluded from the exception.

31. Newman v. Griffin Foundry & Mach. Co., 38 Ga. App. 518, 144 S.E. 386 (1928); Franklin v. State, 12 Ga. App. 483, 77 S.E. 653 (1913).

32. ILL. ANN. STAT. ch. 38, § 24-1(a)(4) (Smith-Hurd Supp. 1974).

33. "A person commits the offense of unlawful use of weapons when he knowingly: Carries concealed in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver or other firearm . . . ." *Id.*

34. 118 Ill. App. 2d 169, 255 N.E.2d 54 (1969).

35. *Id.* at 173, 255 N.E.2d at 57.

In *Peoples v. State*,[36] defendant was arrested for carrying a concealed firearm,[37] and claimed that he was within the home or place of business exception of the statute.[38] Defendant, an employee of a grocery store,[39] observed two men stealing property from the store and obtained the gun from the back of the store. Defendant accosted the men and delayed them while waiting for the police, who found him outside the store with a pistol in his clothing.[40] Although the defendant did not have any proprietary interest in the premises, the owner of the store testified that he had purchased the gun used by defendant and implied that defendant had the authorization to protect the premises. Reversing the conviction,[41] the court held that while the purpose of the statute is to promote firearm safety and prevent the illegal use of firearms,[42] this had to be balanced with a weapon's " 'lawful use in defense of life, home and property and for other lawful purposes . . . .' "[43] The result seems appropriate but the reasoning used, *i.e.*, the ability of the owner to impliedly authorize his employee to act as a security guard, gives many employees the right to handle weapons and qualify for the exception.

New Jersey permits an exception to its prohibition on carrying

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36. 287 So. 2d 63 (Fla. 1973).

37. The defendant was charged with violating FLA. STAT. ANN. § 790.01(1) (Supp. 1974), which reads in part: "Whoever shall carry a concealed weapon on or about his person shall be guilty of a misdemeanor . . . ."

38. *Id.* § 790.25(3): "[I]t shall be lawful for the following persons to own, possess, and lawfully use firearms and other weapons, ammunition, and supplies for lawful purposes. . . . (N) A person possessing arms at his place of business."

39. Defendant also lived on the premises, behind the building in an old car. 287 So. 2d at 66.

40. Naturally, the two men escaped. *Id.* at 65.

41. *Id.* at 67.

42. *Id.*

43. *Id.*; *cf.* Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972). FLA. STAT. ANN. § 790.25(4) (Supp. 1973) provides: "This act shall be liberally construed to carry out the declaration of policy herein and in favor of the constitutional right to keep and bear arms for lawful purposes. This act shall be supplemental and additional to existing rights to bear arms now guaranteed by law and decisions of the courts of Florida, and nothing herein shall impair or diminish any of such rights."

weapons without a permit.[44] Any firearm possessed in the person's home, place of business, or other property owned by him is exempted.[45] In *State v. Valentine,*[46] the manager of a bar was arrested for possession of a revolver during the course of his employment. The court rejected defendant's contention that he was in his place of business because defendant had no proprietary interest therein.[47] Interpreting the statute, the court found an overriding public policy in the legislation to "limit the use of guns as much as possible."[48] By interpreting the statute to require a proprietary interest to qualify for the place of business exception, the great majority of all employees are excluded from this exception.[49]

New York provides no right to possess any firearm without a permit[50]—regardless of where it is possessed. Violation of the statute is a class D felony[51] unless the possession takes place in the defendant's home or place of business;[52] in the latter situation, the charge is reduced to a class A misdemeanor. The initial application of this reduced charge exception was in a trilogy of taxicab cases[53] in which defendant cabdrivers were arrested in the course of their employment for carrying a pistol without a permit. In all three cases the

44. N.J. STAT. ANN. § 2A:151-41 (1969) provides in part: "[A]ny person who carries, holds or possesses in any automobile . . . or other vehicle, or on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or public area . . . [a] pistol or revolver without first having obtained a permit to carry the same . . . is guilty of a high misdemeanor."

45. *Id.* § 2A:151-42(a).

46. 124 N.J. Super. 425, 307 A.2d 617 (App. Div. 1973).

47. *Id.* at 427, 307 A.2d at 619.

48. *Id.*

49. *Id.* But the court hinted that the lack of proprietary interest would not be fatal if there was a specific delegation of authority by the owner to his employee, thereby enabling the employee to act as security man. *Cf. id.*; *see* State v. Bloom, 11 N.J. Misc. 522, 524, 167 A. 221, 222 (Super. Ct. 1933).

50. NEW LAW § 265.01; OLD LAW § 265.05.

51. *See* note 2 *supra.*

52. *Id.*

53. People v. Santiago, 74 Misc. 2d 10, 343 N.Y.S.2d 805 (Sup. Ct. 1971); People v. Santana, 77 Misc. 2d 414, 354 N.Y.S.2d 387 (Crim. Ct. 1974); People v. Anderson, 74 Misc. 2d 415, 344 N.Y.S.2d 15 (Crim. Ct. 1973).

felony charge was reduced to a misdemeanor because the cab constituted defendant's place of business and thus qualified for the exception.[54]

The legislative history concerning section 265.05[55] offers no guidance as to the extent of the "place of business" exception, and such questions as whether employees are covered, or whether there is a requirement of a proprietary interest, have been left to the courts. In *People v. Santiago*,[56] the court, noting the lack of precedent,[57] dismissed the felony indictment since "the letter and spirit"[58] of section 265.05 required that the possession of a pistol in a taxicab was "a possession in a 'place of business.' "[59] In *People v. Santana*,[60] defendant cabdriver emerged from his cab to answer the arresting officer's questions and was found to possess a concealed revolver. The court reduced the charge to a misdemeanor and stated:

> Subdivision 2 of section 265.05 of the Penal Law places in proper perspective the seriousness of the crime of possession of a weapon in one's home or place of business. By reducing it from a felony to a misdemeanor, the section ascribes a quasi-respectable intent to the possessor, suggesting that he keeps the weapon to protect himself and his property rather than to employ the same willfully to another's disadvantage.[61]

In considering the fact that defendant did not own the cab, it determined: "it is of no significance if the cab be fleet-owned, privately-owned, medallion, 'gypsy' or otherwise."[62]

The first review of section 265.05(2) in the appellate division was

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54. People v. Santana, 77 Misc. 2d 414, 416, 354 N.Y.S.2d 387, 389 (Crim. Ct. 1974); People v. Anderson, 74 Misc. 2d 415, 419, 344 N.Y.S.2d 15, 19 (Crim. Ct. 1973).

55. N.Y. LEGIS. DOC. No. 12, 187th Sess. (1964). This provision first appeared in subdivision 2 of section 1897 of the former Penal Law, on the recommendation of the New York State Joint Legislative Committee on Firearms and Ammunition. Law of Apr. 10, 1964, ch. 521, § 1, [1964] N.Y. Laws 1479 (repealed 1974).

56. 74 Misc. 2d 10, 343 N.Y.S.2d 805 (Sup. Ct. 1971).

57. *Id.* at 11, 343 N.Y.S.2d at 806.

58. *Id.*

59. *Id.*

60. 77 Misc. 2d 414, 354 N.Y.S.2d 387 (Crim. Ct. 1974).

61. *Id.* at 415, 354 N.Y.S.2d at 389.

62. *Id.*

People v. Levine.[63] Defendant cabdriver, while operating his cab, became involved in an argument with another motorist and displayed his pistol. The other motorist was an off-duty patrolman and the defendant was arrested and indicted for a felony.[64] The appellate division affirmed the trial court's felony conviction, though it reduced the defendant's sentence to a five year term of probation. *Levine* focuses on the conflicting goals inherent in most gun control legislation: reducing the availability of guns for criminal purposes while retaining their access for legitimate reasons such as the defense of one's home or place of business. While New York denies firearms to all its citizens without a permit, it also distinguishes the situation where it is probable that the individual had possession for a nonviolent purpose, *i.e.*, in defense of his home or business,[65] by providing for a reduced charge.[66] The flaw in this consideration is that in a highly urbanized society there are frequent frayings of tempers, and, as in *Levine,* when a firearm is readily available, the distinction between its use in defense of one's business and in an agressive and therefore criminal manner, is illusory. It helps the victim little if the aggressor had an honorable motive to carry the weapon but used it criminally[67] or whether the aggressor had criminal intentions from the beginning.

People v. Francis[68] discusses the rationale for including or excluding individuals from the section 265.05 exception, and adopts a narrow interpretation of "place of business." In holding that the lack of a proprietary interest denies one the mitigating effects of the exception, the court has determined that an employee has no place of business within the meaning of the statute.[69] In rejecting the

63. 42 App. Div. 2d 769, 346 N.Y.S.2d 756 (2d Dep't 1973) (mem.).

64. *See* 45 App. Div. 2d at 433, 358 N.Y.S.2d at 151, *citing Levine.*

65. NEW LAW § 265.02(4); OLD LAW § 265.05(2).

66. *Id.*

67. The vast majority of homicides resulting from firearms are committed in a moment of rage and are not generally the result of a single-minded intent to kill. STAFF OF THE NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE, FIREARMS AND VIOLENCE IN AMERICAN LIFE 48 (1970). Seventy-four percent of the victims of homicides in Chicago in 1967 were acquainted with their assailants. Zimring, *Is Gun Control Likely to Reduce Violent Killings?,* 35 U. CHI. L. REV. 721, 722 (1968).

68. 45 App. Div. 2d 431, 358 N.Y.S.2d 148 (2d Dep't 1974).

69. *Id.* at 435, 358 N.Y.S.2d at 153.

dissent's argument that "the words 'place of business' should be construed, at the very least, as including any *fixed* place of employment" the majority stated:

> Such reasoning, pursued to its ultimate conclusion, seemingly would condone the act of countless numbers of employees of large corporations and governmental agencies in carrying illegal, concealed, operable guns at their places of employment, subject only to a charge of a misdemeanor rather than a felony. The foreseeable consequences are foreboding.[70]

Francis interpreted the purpose of section 265.05 "to limit the use of guns, ever mindful of the fact that 'concealed weapons present an immediate and real danger to the public.' "[71]

The ramifications of *Francis* are substantial. If upheld by the court of appeals[72] it will signal a fundamental change in the view of the New York courts from one emphasizing the privilege of the individual to bear arms to one which penalizes "conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests . . . ."[73] It cannot be disputed that the type of conduct displayed in *Levine* (the brandishing of a gun) constituted a threat of substantial harm. *Francis* is a departure from the reasoning of most other jurisdictions. It signals a judicial attitude of strict interpretation of the law and gives new meaning to a statute which, whenever violated, only lightly penalized the violator.[74]

The dissent in *Francis* claimed that the narrow construction of the section did not give it "the meaning that could reasonably be ascribed to it by the average person."[75] When the interpretation of the Texas and Georgia statutes as including employees within the

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70. *Id.*

71. *Id. See also* People v. Moore, 32 N.Y.2d 67, 72, 295 N.E.2d 780, 784, 343 N.Y.S.2d 107, 113, *cert. denied*, 414 U.S. 1011 (1973).

72. N.Y. C.P.L.R. § 5601(a) (McKinney Supp. 1974) allows an appeal as a matter of right to the New York Court of Appeals by virtue of a dissent at the Appellate Division level.

73. N.Y. PENAL LAW § 1.05(1) (McKinney 1967).

74. People v. Santiago, 74 Misc. 2d 10, 343 N.Y.S.2d 805 (Sup. Ct. 1971); People v. Santana, 77 Misc. 2d 414, 354 N.Y.S.2d 387 (Crim. Ct. 1974); People v. Anderson, 74 Misc. 2d 415, 344 N.Y.S.2d 15 (Crim. Ct. 1973).

75. 45 App. Div. 2d at 439, 358 N.Y.S.2d at 157 (dissenting opinion).

exception is considered, it appears reasonable that the "common understanding of men" as to the meaning of "place of business" could differ. While the Penal Law must give "fair warning of the nature of the conduct proscribed,"[76] the present decision did not cast an unfair burden on the defendant since his sentence was reduced to the time already served.[77]

Thus another effect of *Francis* is to give notice, if *Levine* did not, of the position New York courts will take when faced with an employee in possession of a weapon without a license in the course of his employment. It appears unlikely that any employee can sucessfully assert that his place of employment is his place of business as meant by the statute.[78]

The ultimate goal of all gun control legislation is to reduce the availability of weapons for criminal purposes. In *Francis* the court has manifested a determination to insure that this goal is attained. However, if the courts are to deny law abiding individuals the ability to defend themselves with the most lethal means available, it is essential that criminals also be denied this force.

James S. Normile

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76. N.Y. PENAL LAW § 1.05(2) (McKinney 1967).

77. 45 App. Div. 2d at 435, 358 N.Y.S.2d at 153. The court stated that the "judgment should be modified, as a matter of discretion in the interests of justice, by reducing the sentence to the time served . . . ." *Id.* "The defendant was released on bail March 28, 1973 after serving about five weeks of his six months sentence." *Id.* at 439 n.4, 358 N.Y.S.2d at 157 n.4 (dissenting opinion).

78. The majority in *Francis* seemed to approve of the specific delegation of power in Peoples v. State, 287 So. 2d 63 (Fla. 1973). 45 App. Div. 2d at 434, 358 N.Y.S.2d at 152. *See also* text accompanying note 43 *supra*.