TO THE TERROR OF THE PEOPLE: PUBLIC DISORDER CRIMES AND THE ORIGINAL PUBLIC UNDERSTANDING OF THE SECOND AMENDMENT

Mark Anthony Frassetto*

ABSTRACT

In the aftermath of the Supreme Court's 2008 decision in *District of Columbia v. Heller*, perhaps the most controversial and hotly contested undecided issue in Second Amendment law is to what extent the right to bear arms applies outside of the home. As in *Heller*, where the Supreme Court relied in large part on the historical record to come to its decision, history has played a critical role in cases addressing the carrying of firearms in public. Advocates' arguments in these cases center, in part, on whether English and founding-era American laws regulating the carrying of firearms required an intent to terrorize. This debate stems from mentions of 'public terror' in several historical treatises, cases, and statutes. Advocates of a broad right to carry in public claim these sources support their theory that historical laws prohibited public carry only when it was *intended* to terrorize the public. In contrast, those supporting a more limited right to carry argue these sources support their theory that historical laws prohibited public carry because such conduct was *inherently* an act of public terror.

This article brings new sources to bear on the debate, specifically, cases and treatises addressing the common-law public disorder crimes of riot, rout, unlawful assembly, and affray from the late sixteenth century to the late nineteenth century. Because these crimes, like publicly carrying weapons, are rooted in concerns about public terror, they serve as analogous sources to use in determining what the terror language in historical legal discussions of public carry really means. The public disorder cases and treatises discussed in this article show that these crimes sometimes involved the carrying of

* Senior Counsel, Everytown for Gun Safety; B.A. Marquette University; J.D. Georgetown University Law Center. I would like to thank Professor Saul Cornell, Professor Darrell Miller, William Taylor, Eric Tirschwell and my wife for their guidance in drafting this article. Opinions expressed in this Article are solely those of the author and do not necessarily reflect the views of Everytown for Gun Safety.

weapons, and when they did, they were deemed to automatically incite public terror without any necessity for intent.

I. INTRODUCTION

In the aftermath of the Supreme Court's 2008 decision in *District of Columbia v. Heller*, which found the Second Amendment protects an individual right to keep and bear arms unconnected to militia service, perhaps the most controversial and hotly contested undecided issue is to what extent the right applies outside of the home.[1] The federal courts of appeals have been sharply split on the issue. The United States Courts of Appeals for the Second, Third and Fourth Circuits have upheld laws that prohibit public carry except for individuals with a specific need for self-defense.[2] In contrast, the Seventh and Ninth Circuits have struck down total bans on public carry and the D.C. Circuit has struck down a requirement that applicants for concealed carry permits show a specific need for self-defense greater than the general population.[3] As in *Heller*, where the Supreme Court relied in large part on the historical record to come to its decision, history has played a critical role in illuminating the original public meaning of the Second Amendment in many of these cases.[4]

A significant portion of the historical debate in public carry cases centers around the interpretation of a fourteenth-century English law, the Statute of Northampton, which reads in relevant part:

> That no man great nor small, . . . [shall] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere . . . .[5]

The Statute of Northampton formed the basis for Anglo-American public carry regulation during the seventeenth and eighteenth centuries.6 It was codified in many colonial and early-American legal codes and was

---

1 District of Columbia v. Heller, 554 U.S. 570 (2008); Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. F. 218, 218-22 (2014).

2 Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Peruta v. Cty. of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc).

3 Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012); Wrenn v. Dist. of Columbia, 864 F.3d 650 (D.C. Cir. 2017); Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018).

4 *See Peruta*, 824 F.3d at 929-39; *Wrenn*, 864 F.3d at 658-61; Young v. Hawaii, 896 F.3d at 1053-73.

5 Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng).

6 *Wrenn*, 864 F.3d at 659-60.

enforced as part of the common law in many other states.[7] Because, according to Justice Scalia's opinion in *Heller*, the Second Amendment was "enshrined with the scope [it was] understood to have when the people adopted [it]," the correct view of the founding-era understanding of the Statute of Northampton is an extremely important consideration for determining the original public understanding of the right to keep and bear arms at the time of the ratification of the Second Amendment.[8]

The theories about the meaning of the Statute of Northampton have generally broken down into two categories. The first theory is that the Statute of Northampton functioned as a general prohibition on carrying weapons in public, at least in populated cities and towns.[9] The second theory is that the Statute of Northampton may have at some point acted as a total prohibition on public carry, but, as applied under the common law in effect in the seventeenth and eighteenth centuries, it only prohibited actually threatening someone with a weapon.[10] Essentially, the latter view is that the Statute of Northampton evolved as it became part of the common law to only cover intentionally threatening conduct.[11]

---

7 Id.; see also Saul Cornell, The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace, 80 L. & CONTEMP. PROBS. 11, 27-30, 32 (2017).

8 Modern Originalist methodology looks to the 'original public meaning' of constitutional provisions, meaning the way the constitutional provision would have been understood by an educated speaker of the English language at the time of ratification. Lawrence B. Solum, What is Originalism? The Evolution of Contemporary Originalist Theory, SCHOLARSHIP @ GEO. L., 15 (2011), https://scholarship.law.georgetown.edu/facpub/1353. This is different than a search for the subjective intentions of those who actually drafted the constitutional provisions, often called 'original intentions originalism,' which has largely fallen to the wayside as an originalist methodology. Id. at 8, 10, 30. While the Northampton regulatory tradition was substantially less important by the time of the ratification of the Fourteenth Amendment, it was still considered an important touchstone by state courts interpreting state constitutional right to bear arms provisions. English v. State, 35 Tex. 473, 476 (1872) (citing statute of Northampton as described by Blackstone in support of state public carry prohibition); Simpson v. State, 13 Tenn. (5 Yer.) 356, 360 (1833) (discussing how English practice has been superseded).

9 Patrick Charles, The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why it Matters, 64 CLEV. ST. L. REV. 373, 468-69 (2016) (discussing the development of the narrow interpretation of the Statute of Northampton which developed in the mid twentieth century); see, e.g., Brief of Amici Curiae Historians, Legal Scholars, & CRPA Foundation in Support of Appellees and in Support of Affirmance at 14, Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017) (No. 15-7057) ("No State prohibited the Public Carrying of Arms in the Early Republic."); Mark Anthony Frassetto, The First Congressional Debate on Public Carry and What it Tells Us About Firearm Regionalism, 40 CAMPBELL L. REV. 335, 338 (2018) (noting disagreement).

10 Patrick Charles, Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry 114 n.294 (2018).

11 There seems to be some dispute among this theory's adherents about whether the threat had to be explicit and intentional or could be circumstantial. Compare Brief of Amici Curiae National Rifle Association of America, Inc. in Support of Appellants and Reversal at 9, Gould v. O'Leary, No. 17-2202 (1st Cir. Dec. 15, 2017) ("The requirement of an intent to terrify the public was carried down by English courts into the nineteenth and twentieth centuries."); Eugene Volokh, Implementing the Right to Keep and Bear Arms For Self Defense: An Analytical Framework and

The dispute over the meaning of the Statute of Northampton hinges on the interpretation of a variety of treatises, cases, and other primary sources from the seventeenth to nineteenth centuries.12 Specifically, advocates of the limited reading of the Statute of Northampton point to a line from Sir John Knight's Case, an English criminal case arising out of a prosecution of a local anti-Catholic official for going armed to a church service.13 One of the reporters documenting the case provided the following description:

> The Chief Justice said, that the meaning of the statute of 2 Edw. 3, c. 3 [the Statute of Northampton], was to punish people who go armed *to terrify the King's subjects*. It is likewise a great offence at the *common law*, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law . . . .[14]

Advocates for the narrow reading also cite to a snippet from Blackstone's commentaries:

> The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, *by terrifying the good people of the land*; and is particularly prohibited by the statute of Northampton . . . .[15]

They rely on these mentions of public terror to support their position that the Statute of Northampton's prohibition on public carry was limited to instances where defendants engaged in conduct intended to terrorize.[16]

---

a Research Agenda, 56 UCLA L. REV. 1443, 1481 (2009) ("Even carrying normally dangerous arms was punishable if it was done in a way that indicated a likely hostile intent, perhaps simply by the unusualness of the behavior . . . .").

12 See generally Wrenn, 864 F.3d at 659-60; English, 35 Tex. at 476 (citing Blackstone); Peruta, 824 F.3d at 932-22; Cornell, supra note 7; Patrick J. Charles, The Statute of Northampton by the Late Eighteenth Century: Clarifying the Intellectual Legacy, 41 Fordham Urb. L.J. City Square 10 (2013).

13 David B. Kopel, The First Century of Right to Arms Litigation, 14 Geo. J.L. & Pub. Pol'y 127, 135 (2016).

14 Sir John Knight's Case (1686) 87 Eng. Rep. 75, 76 (K.B.).; *see also* Rex v. Sir John Knight (1686) 90 Eng. Rep. 330; Comberbach 38 (K.B.) (emphasis added).

15 4 William Blackstone, Commentaries *148-49 (emphasis added); see also 1 William Hawkins, A Treatise of the Pleas of the Crown ch. 63, § 9, p. 136 (London, Elizabeth Nutt 1716) ("That no wearing of Arms is within the meaning of this Statute, unless it is accompanied such Circumstances as are apt to terrify the People, from whence it seems clearly to follow, That Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons, or having their usual Number of Attendants with them, for their Ornament or Defense, in such Places, and upon such occasions, in which it is common fashion to make use of them, without causing the least Suspicion of an intention to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows That Persons armed with privy Coats of Mail to the Intent to defend themselves against their Adversaries are not within the Meaning of this Statute, because they do nothing in terrorum Populi").

16 Kopel, supra note 13, at 135-36, 138-39; Eugene Volokh, The First and Second Amendments, 109 Colum. L. Rev. Sidebar 97, 101 (2009).

Those who take a textual approach to interpreting the Statute of Northampton—including the author of this article—argue that carrying weapons in populated public places was intrinsically terrifying and that the discussion of public terror in judicial opinions and legal treatises was an explanation for the prohibition, rather than a separate element of the crime.[17] This appears to be the way that law enforcement officials were trained to enforce the law during the relevant time period.[18] Proponents of the broader reading also cite to several sources saying that an actual breach of the peace was not required to violate the Statute of Northampton.[19]

This article brings new sources to bear on the debate, specifically, cases and treatises addressing the common-law public disorder crimes of riot, rout, unlawful assembly, and affray from the late sixteenth century to the late nineteenth century.[20] Because these crimes, like publicly carrying weapons, are rooted in concerns about public terror, they serve as analogous sources to use in determining what the terror language in historical legal discussions of public carry really means.[21] The public disorder cases and treatises discussed in this article show that these crimes sometimes involved the carrying of weapons, and when they did, they were deemed to automatically incite public terror.

The author would like to provide a few notes of caution before beginning. These analogous statutes cannot fully clarify the founding-era public understanding of the Statute of Northampton's terror element. The common-law public disorder crimes, generally requiring misconduct by a group, are self-evidently different than the act of an individual carrying a weapon in public, but they do provide interesting and useful comparisons, particularly when the criminal conduct also involved carrying weapons. This article is also an initial survey of these materials and should certainly not be considered comprehensive. Additional research and scholarship will need to

---

17 *See generally* Cornell, *supra* note 7.

18 *Id.* at 18-20.

19 Chune v. Piott (1614) 80 Eng. Rep. 1161; 1 Ro. R. 237 (K.B.); James Ewing, A Treatise on the Office & Duty of a Justice of the Peace, Sheriff, Coroner, Constable, and of Executors, Administrators, and Guardians 546 (1805); Joel Prentiss Bishop, Commentaries on the Law of Statutory Crimes (1873).

20 Blackstone describes the difference between riot, rout and unlawful assembly thus: "An unlawful assembly is when three, or more, do assemble themselves together to do an unlawful act . . . and part without doing it, or making any motion towards it. A rout is where three or more meet to do an unlawful act upon a common quarrel. . . and make some advances towards it. A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel . . . or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner." BLACKSTONE, *supra* note 15, at c. 11., https://bit.ly/2tBN8Wq.

21 The author searched pre-founding English and early American caselaw extensively for terms such as "to the terror of the people," and "in terrorum populi" for additional examples of crimes including public terror within their definitions without success.

be done to determine if the conclusions in this article are generalizable or limited to the select materials included here.

Section two of this article will summarize the common law tradition regulating public carry from the enactment of the Statute of Northampton in the fourteenth century until the adoption of modern public carry regulations beginning in the second half of the nineteenth century. This section will specifically address how the regulation of public carry related to the common-law crimes of riot, rout, and unlawful assembly and the relationship between public terror and the commission of these crimes.

Section three will discuss English case law and common-law treatises related to public disorder crimes, focusing on whether the terror element was active or passive and the impact of weapons on the public terror analysis. This section will cover from the sixteenth century up until the American founding period.

Section four will discuss the development of public disorder crimes in American law and American common-law treatises, again focusing on whether an intent to terrorize, actual terror, or potentially terrifying conduct was required and the impact of weapon possession on this analysis. Section five will seek to draw conclusions from the previous section and identify outstanding questions about the historical record.

II. THE COMMON LAW TRADITION OF REGULATING FIREARMS IN PUBLIC

Laws regulating the carrying of weapons in public go back at least as far as early-classical Athens and the Roman Republic.[22] The earliest Anglo-Saxon codes also included provisions about who could have weapons and how they were to be carried.[23] English colonists brought English statutory and common law with them to America, and the English tradition formed the basis of American firearms regulation through much of the nineteenth century. This section will discuss this Anglo-American tradition in sequence.

---

[22] John Potter, The Antiquities of Greece 182 (4th ed. 1722) (quoting law of Solon prohibiting public carry: "He shall be fined, who is seen to walk the City-Streets with a sword by his Side, or having about him other Armour, unless in the case of Exigency."); This history was well known to founding era legal thinkers, most notably William Blackstone who wrote, "by the laws of Solon, every Athenian was finable who walked the city in armour." Blackstone, supra note 15, at 149; Mike Duncan, The STorm Before the Storm: The Beginning of the End of the Roman Republic 35 (2017) ("As weapons were not permitted to be carried inside the Pomerium –the sacred city limits—Nasica and his followers armed themselves mostly with table legs and other bludgeons.")

[23] Laws regulating weapons go at least as far back as the first English language legal code when King Aethelbert of Kent prohibited, "a man [to] furnish weapons to another where there is strife though no evil be done. . . .". *The Laws of King Aethelbert, No. 18*., DUKE U. SCHOOL OF L., https://law.duke.edu/gunlaws/0602/english-law/468868/ (last visited July 15, 2018).

A. English Tradition

A useful starting point for assessing the Anglo-American tradition of regulating the carrying of weapons in public is the enactment of the Statute of Northampton by the English Parliament in 1328. The Statute provided: "no man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere."[24] The prohibition was reenacted at least twice during the fourteenth century.[25] There is little serious dispute that during this time period, the Statute was understood as a complete prohibition on carrying weapons in public, at least in populated areas.[26]

In the sixteenth century, firearms, and especially pistols, became increasingly popular in England.[27] Queen Elizabeth I responded to this trend by calling for the strict enforcement of the Statute of Northampton's prohibition on carrying "Daggers, Pistolles, and such like, not only in the Cities and Townes, [but] in all parts of the Realme in common high[ways], whereby her Majesty's good quiet people, desirous to live in [a] peaceable manner, are in feare and danger of their lives . . . ."[28] Fifteen years later, Queen Elizabeth I again called for stringent enforcement of the Statute, this time tying the need to enforce the law directly to "the terror of all people professing to travel and live peaceably."[29]

This view, connecting the conduct prohibited by the Statute of Northampton to the intrinsic threat of public terror, was acknowledged by the Court of the King's Bench in 1615.[30] In *Chune v. Piott*, a false arrest

---

[24] Statute of Northampton, 2 Edw. 3, c. 3. (1328) (Eng.). The Statute of Northampton was not the first time the English Government had regulated weapons. It built on earlier prohibitions on carrying firearms in London after curfew and prohibiting weapons at Parliament. Statutes for the City of London, 13 Edw. 1 (1285) (Eng.) (making it a crime "to be found going or wandering the streets of [London], after Curfew . . . with Sword or Buckler, or other Arms for doing Mischief"); Coming Armed to Parliament Act, 7 Edw. 2, 170 (1313) (Eng.) (prohibiting brining "Force [or] Armour" to the "Parliament at Westminster).

[25] Riding Armed Act, 7 Ric. 2, c. 13 (1383) (Eng.); Riding Armed, Liveries, Justices of Assize, etc., 20 Ric. 2 c. 1. (1396) (Eng.). A separate provision was adopted punishing "rid[ing] or going armed covertly or secretly with Men or Arms against any other." Treason Act, 25 Edw. 3 c. 2, § 13 (1351) (Eng.).

[26] *See* Patrick Charles, *The Faces of the Second Amendment Outside of the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 11 (2012); *But see* Clayton E. Cramer, The Statute of Northampton (1328) and Prohibitions on the Carrying of Arms (Sept. 19, 2015) (unpublished manuscript) (available at SSRN: https://ssrn.com/abstract=2662910) (arguing the statute only prohibited going armed in defensive armor).

[27] Charles, *supra* note 26, at 21.

[28] Id. (citing By The Quenne Elizabeth I: A Proclamation Against The Common Use Of Dagges, Handgunnes, Harquebuzes, Calliuers, And Cotes Of Defence 1 (London, Christopher Barker 1579)).

[29] *Id.* at 22.

[30] *See* Chune v. Piott (1614) 80 Eng. Rep. 1161; 1 Ro. R. 237 (K.B.) (Eng.).

prosecution turning on the powers of sheriffs to arrest those they witness committing crimes, Justice John Croke stated:

> Without all question, the sheriffe hath power to commit, *est custos* & conservator *pacis*, if contrary to the statute of Northampton, he sees any one to carry weapons in the high-way, in *terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.[31]

This description of the Statute of Northampton as prohibiting carrying weapons "*in terrorem populi regis*" (To the terror of the King's People[32]) without breaking the peace seems to imply that a passive, rather than an active, threat to the public, was all the conduct that was required to break the peace.[33] Terror language also appears to have been included in the standard form for an indictment for violating the Statute of Northampton. For example, in October 1608 in Malton, James Harwood was indicted for the "outragious misdemeanor[]" of "go[ing] armed and weaponed with a lance-staff plated with iron, pistolls, and other offensive weapons, to the great terrour . . . ."[34]

A consideration of public terror was also an important element in Lord Chief Justice Edward Coke's famous decision in *Semayne's Case*, which distinguished between the right of a man to "assemble his friends and neighbours to defend his house against violence" and the prohibition on "assembl[ing] them to go with him to the market or elsewhere for his safeguard against violence."[35] The *Semayne* decision is most famous for its statement that a man's house is his "castle and fortress" and for establishing that killing in defense of one's person or property within the home would not result in the forfeiture of property that was a potential (though by then unlikely) punishment for killing in self-defense.[36] While *Semayne's Case* is most notable for its discussion of the special value which the law places on an individual's home, it is relevant here for its statement that going armed in public, at least in a group, was prohibited by the statutes of the day.[37]

---

31 *Id.* at 1162.

32 *In terrorem populi*, THE FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/In+terrorem+populi (last visited April 24, 2018).

33 *Chune*, 80 Eng. Rep. at 1162; 1 Ro. R. at 330.

34 Rex v. Harwood, Quarter Sessions at Malton (Oct. 4-5, 1608), in 1 North Riding Record Society, Quarter Sessions Records 132 (Rev. J.C. Atkinson ed., 1884) (ellipses in the original). The inclusion of the ellipses in the original could reasonably be read to mean the terror language began the pro forma portion of the indictment.

35 Semayne's Case (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a 91 b (K.B.) (Eng.).

36 *Id.*; Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85, 88-89 (2017).

37 Semayne's Case, 77 Eng. Rep. at 195; 5 Co. Rep. at 93 b.

Popular treatise writers also described the Statute of Northampton in similar terms. William Hawkins stated the common law crime of affray was committed "where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause Terror to the People."[38] Later Hawkins states that "no wearing of Arms is within the meaning of this Statute, unless it is accompanied by such Circumstances as are apt to terrify the People."[39] However, following the precedent established by *Semayne's Case*, Hawkins made clear that "a Man cannot excuse the wearing of such Armour in Publick by alledging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault."[40] Hawkins stated that circumstances in which carrying a weapon in public was non-threatening did not include everyday life, but rather were limited to specific situations including the wealthy carrying "common weapons" in "such Places, and upon such Occasions, in which it is the common Fashion to make use of them;" wearing chain mail for purely defensive purposes; when suppressing riots, rebels, enemies, and disturbers of the peace; and when gathering force in defense of one's home.[41]

In his 1683 treatise, Joseph Keble attributed part of the terror created by going armed to the asymmetry between the armed and unarmed stating, "Yet it may an affray be, without word or blow given; as if a man shall shew himself furnished with armour or weapon which is not usually worn," this was because going armed created, "a fear upon other that be not armed as he is."[42] Keble explained that this fear created by carrying weapons was why the statute of Northampton was described as "in terrorem populi."[43]

Similarly, Blackstone described the common law crime of affray, which was often discussed by treatise writers like Blackstone alongside the Statute of Northampton, as: "The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, *by terrifying the good people of the land*; and is particularly prohibited by the statute of Northampton."[44]

A very small number of cases directly address the Statute of Northampton and, as a result, those that do are fiercely debated, none more so than the 1686 prosecution of Sir John Knight before the Court of King's

---

38 1 William Hawkins, A Treatise of the Pleas of the Crown 135 (1721).

39 *Id*. at 136.

40 *Id*.

41 *Id*. at 136, § 7, 9, 10.

42 Joseph Keble, An Assistance to Justices of the Peace, for the Easier Performance of Their Duty 147 (1683).

43 *Id*; *see also* John Ward, The Law of a Justice of Peace and Parish Officer 6–7 (1769) (Describing that when a man furnishes "weapons not usually worn, it may strike a fear into others unarmed") (discussed in Cornell, *supra* note 7, at 22.).

44 Blackstone, *supra* note 15, at *148-49 (emphasis added).

Bench.[45] Knight was charged with violating the Statute for "walk[ing] about the streets armed with guns, and [going] into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects."[46] Knight, an ardent anti-Catholic, had recently broken up a Catholic mass by seizing the priest and went armed in the following days for fear of being assassinated by Catholics.[47] Knight testified that he normally rode in the countryside with "a sword and gun" but under normal circumstances left them at the end of town.[48]

At Knight's trial, "[t]he Chief Justice said, that the meaning of the statute of [Northampton] was to punish people who go armed to terrify the King's subjects," because going armed made it appear the "King were not able or willing to protect his subjects."[49] Notably, Knight defended himself on the grounds of his "active loyalty" to the crown rather than by denying that he created a public terror.[50] The jury acquitted him of the charge, but the verdict likely had more to do with the jurors' agreement with his anti-Catholic positions than their views about the terror element of the Statute of Northampton.[51]

In 1689, Parliament enacted the English Bill of Rights, which provided that: "the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law," but this did not impact the Statute of Northampton which remained in effect and continued to be enforced.[52]

---

45 *Compare* Brief of Amici Curiae National Rifle Association of America, Inc. in Support of Appellants and Reversal at 9, Gould v. O'Leary, No. 17-2202 (1st Cir. Dec. 15, 2017), *with* Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellees and Affirmance at 7, Wrenn v. District of Columbia, 864 F.3d 650 (2017) (D.C. Cir. 2016) (No 16-7025).

46 Sir. John Knight's Case (1686) 87 Eng. Rep. 75, 76 (K.B.) (Eng.).

47 CHARLES, *supra* note 10, at 117-18; Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, *in* THE RIGHT TO BEAR ARMS: HISTORICAL PERSPECTIVES AND THE DEBATE ON THE 2ND AMENDMENT (Jennifer Tucker, Bart Hacker, and Margaret Vining eds.) (forthcoming 2019).

48 CHARLES, *supra* note 10, at 118.

49 *Id.* at 76; Another reporter of the decision paraphrased the court as saying "this offence had been much greater, and better laid at common law. But tho' this statute be almost gone into desuetudinem, yet where the crime shall appear to be malo animo, it will come within the Act . . . ." Rex v. Sir John Knight (1686) 90 Eng. Rep. 330, 330; Comberbach 38, 38-9 (K.B.) (Eng.); see also Cornell, *supra* note 7, at 14 ("The liberty interest associated with the right to arms was always balanced against the concept of the peace. If an individual's exercise of this right threatened the peace, individuals could be disarmed, imprisoned, and forced to provide a peace bond").

50 CHARLES, *supra* note 10, at 119.

51 *Id.* at 119. For a summary of anti-Catholic measures and the push for Catholic equality *see* Mark Anthony Frassetto, Catholic Emancipation 1760-1829 (Jan. 9, 2013) (unpublished manuscript) (available at https://bit.ly/2KvNqof).

52 The Bill of Rights 1689, 1 W. & M. c. 2 (Eng.); *see Middlesex Sessions: Justices' Working Documents*, LONDON LIVES (Mar. 2018), http://bit.ly/1U8OhO7.

B. American Tradition

When the American colonies began to adopt their own versions of the Statute of Northampton in the late seventeenth century, the fear created by the carrying of firearms in public appears to have been a substantial motivating factor. In 1686, New Jersey was the first state to codify a Statute of Northampton analogue, prohibiting "rid[ing] or go[ing] armed with sword, pistol or dagger" because those going armed put "several persons . . . in great fear."[53] A few years later, Massachusetts directly tied its restriction on carrying weapons in public with riot, affray, and breach of peace by calling for the arrest of "all Affayers, Rioters, Disturbers or Breakers of the Peace, and such as shall ride or go armed Offensively."[54] Virginia directly incorporated the terror element in its statute prohibiting any man to "go nor ride armed by night nor by day, in fair or markets, or in other places, in terror of the Country."[55] In 1795, Massachusetts specifically added the phrase "to the fear or terror of the good citizens of the Commonwealth" to its prohibition on "rid[ing] or go[ing] armed offensively."[56] Tennessee similarly prohibited "any person . . . to publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or other dangerous weapon to the fear or terror of any person."[57] Notably, under Tennessee's law, violators of the statute were "punished as for a breach of the peace, or riot at common law."[58] Other states also continued to enforce the law through their common

---

53 An Act Against Wearing Swords, etc., ch.9, 1686 N.J. Laws 289, 289-90. (Some have suggested New Jersey's 1686 statute only prohibited carrying concealed weapons because the law called for the arrest of those who "presume privately to wear any pocket pistol," which they interpret as only prohibiting concealed carry. *Id.* While it is unclear if this understanding of the word "privately" is correct, the law could easily be interpreted to mean in one's private, as opposed to public, capacity, based on another provision of the law which states, "no planter shall ride or go armed with sword, pistol or dagger." *Id.* At the time, free inhabitants of the colony of then East Jersey were divided between a small elite class known as proprietors and the general free population known as planters).; *see generally Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683*, YALE L. SCH., http://avalon.law.yale.edu/17th_century/nj10.asp (last visited July 19, 2018).

54 An Act for the Punishing of Criminal Offenders, no. 6, 1694 Mass. Laws 12; *see also* An Act for Establishing and Regulating Courts of Public Justice within this Province, 1699 N.H. Laws 1 ("[E]very justice of the peace within this province may cause to be stayed and arrested, all affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively . . . .").

55 An Act Forbidding and Punishing Affrays, ch. 21, 1786 Va. Laws 33.

56 Act of 1692, ch. 2, 1795 Mass. Laws 436. Notably the same statute included a separate crime for "utter[ing] any menaces or threatening speeches." *Id.* Maine also enacted an identical law when it achieved independent statehood from Massachusetts. Act of Mar. 15, 1821, 1821, ch. 76 § 1, 1821 Me. Laws 285 ("[T]o cause to be staid and arrested, all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State, or such others as may utter any menaces or threatening speeches.").

57 Act of Nov. 13, 1801, ch. 22, § 6, 1715–1820 Tenn. Pub. Laws 708, 710.

58 *Id.*

law, although this likely represented a modest expansion in public carry from the English practice.[59]

The most prominent American case interpreting the Statute of Northampton and its continued vitality in American common law came more than fifty years after the ratification of the Second Amendment from the North Carolina Supreme Court.[60] *State v. Huntly* stemmed from a dispute between Robert Huntly and James Ratcliff over the ownership of several slaves.[61] Huntly responded to the dispute by "riding upon the public highway, and upon the premises of James H. Ratcliff . . . armed with a double barreled gun" and was heard making threats against Ratcliff and others.[62] Huntly was indicted and convicted for the common law offense of going armed to the terror of the people and appealed his conviction to the North Carolina Supreme Court. Huntly claimed that the Statute of Northampton and its accompanying common law crime were no longer in effect in North Carolina because the state had abrogated the English statutes in 1838.[63] The Court rejected this claim, instead finding that the Statute of Northampton merely codified preexisting common law.[64] The Court found that Huntly's actions "attack directly the public order and sense of security, which it is one of the first objects of the common law" and "lead almost necessarily to actual violence."[65] The Court rejected the idea that "such acts are less mischievous here or less the proper subjects of legal reprehension, than they were in the country of our ancestors."[66] The Court also rejected claims that North Carolina's right to bear arms provision protected defendant's conduct, stating:

> While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised. If he employ those arms, which he ought to wield for the safety and protection of the country, to the annoyance and terror and danger or its citizens, he deserves

---

59 See, e.g., A Bill for the Office of Coroner and Constable (Mar. 1, 1682), in Grants, Concessions & Original Constitutions of the Province of New Jersey 251 (Aaron Leaming & Jacob Spicer, eds., 2002) (N.J. constable oath) ("I will endeavour to arrest all such persons, as in my presence, shall ride or go arm'd offensively."); John M. Niles, The Connecticut Civil Officer 154 (1833) (explaining that it was a crime to "go armed offensively," even without threatening conduct); John A. Dunlap, The New York Justice 8 (1815); Letter to the Editor, Principles Embraced by all the Friends of Peace, Vermont Telegraph, Feb. 7, 1838, at 77 (discussing enforcement of local carry laws in New England).

60 State v. Huntly, 25 N.C. (3 Ired.) 418 (1843).

61 *Id.* at 419.

62 *Id.* at 418-19.

63 *Id.* at 420.

64 *Id.* at 420.

65 *Id.* at 421-22.

66 *Id.* at 422.

> but the severer condemnation for the abuse of the high privilege, with which he has been invested.

The Court went on to discuss the terror element in the common law crime, clarifying that "the carrying of a gun *per se* constitutes no offence," instead only "carry[ing] about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people" was prohibited.[67] The court stated that "for any lawful purpose" including "business or amusement" a person could carry a weapon, but made clear that "[n]o man amongst us carries [a gun] about with him, as one of his every day accoutrements."[68]

The other widely cited American case discussing the Statute of Northampton, also a product of the south, is *Simpson v. Tennessee*[69], in which William Simpson was indicted and convicted of the crime of affray for "being arrayed in a warlike manner" in a "public street" to the "great terror and disturbance of divers[e] good citizens of the said State."[70] On appeal, the Tennessee Supreme Court reversed the conviction.[71] The Court adopted Blackstone's definition of the crime of affray, which required (i) fighting (ii) between two or more people (iii) in a public place where it could cause terror to the people.[72] The Court found the at-issue indictment did not include either of the first two elements.[73] The Court rejected the alternate formulation of affray from Hawkins's Treatise, which was cited by the prosecution: "in some cases there may be an affray where there is no actual violence, as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people."[74] The Court acknowledged that the Hawkins formulation was consistent with the Statute of Northampton, which arguably formed part of the common law tradition of Tennessee, but then declared that the "[Tennessee] constitution has completely abrogated it."[75] The Court went on to say that the Tennessee state constitution protected

---

67 *Id.* at 422-23. The court also clarified that guns as a class constituted a "dangerous or unusual weapon" because "[a] gun is an 'unusual weapon' wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every day accoutrements—as part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law abiding state." *Id.* at 420, 422.

68 *Id.* at 422-23.

69 Simpson v. State, 13 Tenn. (5 Yer.) 356 (1833).

70 *Id.* at 361.

71 *Id.* at 362.

72 *Id.* at 357.

73 *Id.* at 357-358.

74 *Id.* at 358.

75 *Id.* at 359-60.

a right of "all the free citizens of the State to keep and bear arms for their defence, without any qualification whatever as to their kind or nature."[76]

Simpson v. Tennessee is a bizarre and difficult to explain case. The Tennessee Supreme Court appears to be unaware of Tennessee state law and egregiously misreads the state's constitution. The Court stated that the Statute of Northampton had been completely abrogated by the state's 1796 constitution[77]; however, the state passed its own version of the Statute in 1801.[78] Just twelve years before the Court's decision, Tennessee had also passed a law against anyone "so degrading himself by carrying a dirk, sword cane, French knife, Spanish stiletto, belt or pocket pistols, either public or private."[79] In fact, the revised code of Tennessee, published by order of the state legislature just two years prior to the *Simpson* decision, included both the 1801 common law provision against going armed and the 1821 prohibition on carrying weapons.[80]

The usefulness of *Simpson* as a precedent is further diminished by a decision from the Tennessee Supreme Court which occurred a mere six years later. *Aymette v. State*, involved a prosecution for carrying a bowie knife in violation of a state statute.[81] The defendant, William Aymette, appealed his conviction to the Tennessee Supreme Court, claiming it violated the state's right to bear arms provision.[82] The Court rejected this argument, finding that "[t]he words 'bear arms' too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress."[83] Tying the prohibition to the threat of public terror, the Court found that the legislature could regulate the wearing of arms "to preserve the public peace and protect our citizens from the terror, which wanton and unusual exhibition

---

76 *Id*. at 360; (the Tennessee Constitution's Second Amendment analogue read "that the free men of this State have a right to keep and to bear arms for their common defense." TENN. CONST. of 1796, art. 11, § 26).

77 *Id*. at 360.

78 Act of Nov. 13, 1801, ch. 22, § 6,1801 Tenn. Acts 259, § 6. ("That if any person or persons shall publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person, it shall be the duty of any judge or justice, on his own view, or upon the information of any other person on oath, to bind such person or persons to their good behavior.").

79 An Act to Prevent the Wearing of Dangerous and Unlawful Weapons, 1821, ch..13, 1821 Tenn. Pub. Acts 15-16.

80 1 The Statute Laws of the State of Tennessee of a General and Public Nature (rev. ed. John Haywood & Robert L. Cobbs, 1831).

81 Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840); (regarding An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in This State, 1838, ch. 123 § 2, 1838 Tenn. Pub. Acts 200, 201 that stated, "That if any person shall wear any Bowie knife, or Arkansas tooth-pick, or other knife or weapon that shall in form, shape or size resemble a Bowie knife or Arkansas toothpick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor.").

82 Aymette, 21 Tenn. at 156.

83 *Id*. at 158.

of arms might produce."[84] The Court further noted: "the citizens may bear them for the *common defense*; but it does not follow, that they may be borne by an individual, merely to terrify the people, or for purposes of private assassination."[85]

Very few American cases discussing the Statute of Northampton and its relevance to American common law exist because, beginning in the 1830s, states began shifting away from a public terror rationale for public carry regulations and instead required an individual need for self-defense.[86] In 1836, as part of a general reorganization of its law, Massachusetts recodified its 1795 public carry statute to read:

> [A]ny person [who] shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace.[87]

This law became a national model, especially in the Northern states. It was adopted in Wisconsin, Maine, Michigan, Virginia, Minnesota, and Oregon.88 In the early twentieth century, this regulatory focus became the national standard, as states across the country adopted licensing regimes focused on the need of the person carrying rather than the impact of carrying on the public.89 In 1923, the United States Revolver Association published an influential model law, which required applicants for concealed carry permits to demonstrate a "good reason to fear an injury to his person or

---

84 *Id*. at 159.

85 *Id.* at 160.

86 Eric Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015), http://www.yalelawjournal.org/forum/firearm-regionalism-and-public-carry.

87 Act of Feb. 1836, ch. 134 § 16, 1836 Mass. Laws 748; Sureties were a form of criminal punishment akin to a bond. See e.g. Punishment Sentences at the Old Bailey, Old Bailey Procs. Online, https://www.oldbaileyonline.org/static/Punishment.jsp#misc-sureties (last visited Oct. 2, 2018); 34 Edw. 3, 364 ch. 1 (1360) (Eng.); 4 BLACKSTONE COMMENTARIES *249 ("This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors.")

88 An Act to Prevent the Commission of Crimes, § 16, 1838 Wis. Laws 381; An Act of 1841, ch. 169 § 16, 1841 Me. Laws 709; An Act of May 18, 1846, ch. 162 § 16, 1846 Mich. Laws 690, 692; MINN. REV. STAT. ch.112, § 18 (1851); Proceedings to Prevent Commission of Crimes, ch. 16 § 16, 1853 Or. Laws 218, 220; 1861 Pa. Laws 248, 250, §6.

89 *See* 1906 Mass. Acts 160; An Act to Amend the Penal Law Generally, in Relation to the Carrying, Use and Sale of Dangerous Weapons, ch. 608, 1913 N.Y. Laws 1627; 1913 Haw. Laws. 25, act. 22, § 1; *See also* Frassetto, *supra* note 9, at 352-353 (describing development of public carry regulation in the District of Columbia).

property" before being issued a permit to carry a concealed weapon.90 The National Rifle Association's future president, Karl T. Frederick, an Olympic gold medalist in the pistol, was the primary author of the law.[91] This United States Revolver Association Model Act was largely adopted by the much more influential National Conference of Commissioners on Uniform State Laws in drafting the widely adopted Uniform Firearms Act.[92] The Uniform Firearms Act became the standard for regulating public carry in the twentieth century, with only a few states retaining a remnant of the public terror-based model of regulation.[93]

III. TERROR IN ENGLISH RIOT, ROUT, UNLAWFUL ASSEMBLY, AND AFFRAY LAW AND THE IMPACT OF CARRYING WEAPONS.

The crime codified by the Statute of Northampton was often discussed in conjunction with the public disorder crimes of affray, unlawful assembly, rout, and riot.94 Like the Statute of Northampton, these laws were often described as an effort to prevent or stop public terror (although they clearly also had other important political and social control purposes).95 Many of the treatises discussing these common-law crimes also discuss the types of actions that would turn otherwise lawful conduct into an affray, unlawful assembly, rout, or riot. Most of the examples of terrifying conduct offered by English judges and treatise writers required some overt act by a defendant likely to lead to public terror, but generally did not require an actual intention

---

90 34th Conference Handbook of the National Conference of on Uniform State Laws and Proceedings of the Annual Meeting 729 (1924); The Revolver Association model Bill was adopted by California, North Dakota, and New Hampshire. Dangerous Weapons Control Law of 1923, ch. 339, 1923 Cal. Laws 701; An Act Concerning the Possession Sale and Use of Pistols and Revolvers, ch. 252 § 2, 1923 Conn. Laws 3707; An Act to Control the Possession, Sale, and Use of Pistols and Revolvers to Provide Penalties and Other Purposes, ch. 188, 1923 N.D. Laws 379; An Act to Control the Possession, Sale, and Use of Pistols and Revolvers, ch. 118, 1923 N.H. Laws 138.

91 Adam Winkler, The Secret History of Guns, The Atlantic (Sept. 2011), https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/.

92 *See generally* An Act to Regulate the Possession and Sale of Pistols, Revolvers and Guns; to Provide a Method of Licensing Those Carrying Such Weapons Concealed; and to Provide Penalties for Violations of Such Regulations, no. 313, 1925 Mich. Laws 473; Act of March 12, 1925, ch. 64, 1925 N.J. Laws 185; Act of March 12, 1925, ch. 207, 1925 Ind. Laws 495; Act of February 26, 1925, 1925 Or. Laws 468, ch. 260.

93 Winkler, *supra* note 91 (noting that by 1932 "laws requiring a license to carry a concealed weapon were" in effect in most jurisdictions); Jessica Smith, *Going Armed to the Terror of the People*, UNC SCH. OF GOV'T: N.C. CRIM. L. (Dec. 20, 2012, 10:22 AM), https://nccriminallaw.sog.unc.edu/going-armed-to-the-terror-of-the-people/.

94 Fernando Pulton, A Treatise Declaring which be the Great and General Offences of the Realme 25 (1609), http://bit.ly/1CGUyZN (placing discussion of Statute of Northampton in chapter titled "Of Riots, Routs, Unlawful and Rebellious Assemblies"); Blackstone, supra note 15, at c. 11 (discussing Statute of Northampton in chapter titled "Of Offenses Against the Public Peace" which also addressed riot, rout, unlawful assembly and affray).

95 See Blackstone, supra note 15, at c. 11., https://bit.ly/2tBN8Wq.

to create pubic terror. The exception was carrying weapons in public, which, standing alone, was sufficient to create the public terror necessary to make otherwise lawful conduct illegal.

As was true for the public carry context, the terror requirement of public disorder crimes appears to originate at least as far back as the sixteenth century. One late-sixteenth-century treatise writer, William Lambard, described a necessary element of unlawful assembly, rout, and riot as "that their being together do breed some apparent disturbance of the peace." [96] Lambard explained that the requirement could be met by several overt acts, including "significance of speech, . . . turbulent gesture, or actual and express violence," or by the passive "theme or armor," (carrying weapons).[97] Such conduct could either make "the peaceable sort of men be unquieted and feared by the fact," or result in the "lighter sort and busy bodies be[ing] emboldened by the example."[98] Lambard tied this discussion of public disorder crimes to the crime of carrying weapons in public, placing it immediately after his discussion of the Statute of Northampton in a chapter titled "Of other breaches of the Peace."[99]

A few years later in in a criminal prosecution captioned *Howard v. Bell*, the Court of King's Bench weighed in on the impact of weapon possession on the crime of riot.[100] The court made clear that weapon possession could turn a lawful assembly into a riot, without other threatening conduct.[101] Several people were prosecuted and convicted for an unlawful assembly after organizing a large armed group in an effort to protect property rights.[102] The court specifically upheld a £100 penalty, stating that while "they might all join together in a quiet and peaceable manner," they could be prosecuted for "assembling the tenants to the number of 200 in an open field, [where a previous rebel group had fought a battle with the Queen's forces] weaponed with swords and daggers, abiding three hours together; and yet nothing was proved done there by any of the defendants . . . ."[103] The numbers and location certainly made the armed crowd inherently more threatening, so it would be inappropriate to read too much into the decision, but *Howard v. Bell* clearly stands for the concept that no action beyond public assembly with weapons was required to create public terror.

In William Shepherd's 1652 treatise, *The Whole Office of the Country Justice of the Peace*, he made clear that being armed, standing alone, could

---

96 William Lambard, Eirenarcha: or, of the Office of the Justices of the Peace 181 (1599).

97 *Id.*

98 *Id.*; *see also* Pulton, *supra* note 94, at 25 ("Dos Shew by Armour, Gesture, or Speech, that they meane to doe any violence, or to terriffie or feare any of the Kings people . . . .").

99 Lambard, *supra* note 96, at 177, 182.

100 Howard v. Bell (1616) 80 Eng. Rep. 241; Hobart 91 (K.B.).

101 *Id.*

102 *Howard*, 80 Eng. Rep. at 242; Hobart at 91-92.

103 *Id.*

turn a lawful gathering into an unlawful assembly or even a riot.[104] Shepherd's description of the effect of carrying weapons on the riot analysis closely follows the language of *Semayne's Case* discussed above: "And albeit one be threatened, and in danger of his life, and to defend himself he gathers a force, and they ride about armed, this is a Riot. Yet if they did abide in his house; happily, it may be justified."[105] This is another example of the connection between riot and carry law and the impact of simple weapon possession on public terror.

A case arising in Ireland shortly before the Glorious Revolution supports the view that no more than carrying was required for an armed gathering to constitute an unlawful assembly.[106] In the tense period leading up to the Glorious Revolution, a rumor spread among the Protestants in the small Irish town of Borrisokane that Catholics planned to massacre the town's Protestant population.[107] Protestants from the town and outlying areas armed themselves and gathered in the town to defend against the attack.[108] When it never came, the town's residents dispersed, ceased carrying arms, and the rumormongers were prosecuted for creating the public inconvenience.[109] Unfortunately for the misled Protestants, sixty of them were indicted for, and ten convicted of, unlawful assembly for forming an armed group in the town.[110] The government in London, concerned with this seventeen percent conviction rate, wrote to the two presiding judges about reports that they had instructed the jury that "any number of people armed as they pleased might meet [] provided they did no unlawful act."[111] One of the judges objected, claiming that both riot and unlawful assembly required an intent to do an unlawful act, but the other made clear that the judges had not extended this doctrine to armed groups, saying, "the very appearing with arms is an offense."[112]

The 1707 case *Queen v. Soley* generally adopted the views of Lambarde and the Irish case on the effect of weapons on public terror.[113] The *Soley* case arose out of the prosecution for riot of members of a mob who had broken into the local guildhall to prevent the election of a bailiff.[114] Lord Holt, in a

---

104 *See generally* William Shepherd, The Whole Office of the Country Justice of the Peace (1652).

105 *Id.* at 55; *Accord* John Bond, A Compleat Guide For Justices of the Peace 223 (1707) (Edition from John Adam's Library).

106 Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, *in* The Right to Bear Arms: Historical Perspectives and the Debate on the 2nd Amendment, (Jennifer Tucker, Bart Hacker, & Margaret Vining eds.) (forthcoming 2019).

107 *Id.* (citing Ormond Family Papers, VII, 365-367, 387).

108 *Id.*

109 *Id.*

110 *Id.* (citing Ormond Family Papers, VII, 365, 367).

111 *Id.* (citing Ormond Family Papers, VII, 371).

112 *Id.* (citing Ormond Family Papers, VII, 387).

113 Queen v. Soley (1707) 88 Eng. Rep. 935 (K.B.).

114 *Id.* at 935-36.

supporting decision, went into detail on the effect of arms in the public terror element of riot, making clear that the simple presence of "a number of men assemble[d] with arms" was "*in terrorem populi,* though no act is done."[115] Lord Holt then applied an oft-repeated example: "if three come out of an ale-house and go armed, it is a riot."[116] According to Lord Holt's opinion, terror could be caused without intent or even an affirmative act. In fact, Lord Holt distinguished between two ways to indict individuals for riot: riots stemming from passive acts, "riots without any act done, as going armed," had to be charged "in terrorem populi," while riots "when an act is done" could stand without the terror language in the indictment.[117] This distinction in riot indictments would be adopted as the standard for common-law riot in the United States.[118]

William Hawkins's influential treatise *Pleas of the Crown* made clear that the simple possession of weapons was sufficient to turn a lawful gathering into an unlawful assembly, stating that "riding together on the Road with unusual weapons . . . without any offer of Violence to any one in Respect either to his Person or Possessions, are not properly guilty of a Riot, but only an unlawful assembly."[119] Hawkins required other circumstances for a gathering to reach the level of a riot.[120] He then adopted a slightly modified version of the explanation originally offered at least 120 years earlier by Lambard, stating: "in every riot there must be some such Circumstance, either of actual Force or Violence, or at least of an apparent Tendency thereto, as are naturally apt to strike a Terror into the People, as the Shew of Armour, threatening Speeches or turbulent Gestures; for every such offense must be laid to be done in *Terrorem Populi*."[121] Hawkins's description made clear

---

115 *Id*. at 936.

116 *Id*. at 937. Oddly, Holt then states, "Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened, for he is in the protection of the law, which is sufficient for his defense." *Id.*

117 *Id*. at 937.

118 *See generally* Walter v. N. Ins. Co. of N.Y., 18 N.E.2d 906, 908 (Ill. 1938) (also noting that the legislature formally adopted the common law of England); State v. Whitesides, 31 Tenn. (1 Swan) 88, 89 (1851); Thomas K. Prevas, Schlamp v. State: *Reading the Riot Act: The Vagaries of Maryland's Common Law Riot Require Codification of the Crime*, 66 MD. L. REV. 1013, 1017 (2007).

119 Hawkins, supra note 15, at 157.

120 *Id*.

121 *Id*. At the time the term armor applied to both offensive and defensive weapons. *See generally* A New English Dictionary on Historical Principles (1928). Notably Clayton Cramer, another author in this volume, has made the claim that the Statute of Northampton's prohibition on going with "force and arms" referred exclusively to wearing defensive armour. *See* Cramer, *supra* note 26, at 25. However, it strains credulity to suggest that the Statute of Northampton's reference to "force and arms" refers exclusively to defensive armor. *See* Statute of Northampton, 2 Edw. 3, c. 3. 2 Edw. 3, 258, c. 3 (1328) (Eng.). A predecessor statute enacted by Edward I prohibits carrying "sword or buckler, or other arms for doing mischief," Statutes for the City of London, 13 Edw. 1 (1285) (Eng.), making clear that "arms" was understood to refer to weapons capable of being used offensively, as opposed to shields or other armor with exclusively defensive use. In a reaffirmation of the statute

that an actual intention to terrify the public was not necessary to transform a lawful gathering into an unlawful assembly and that the possession of weapons standing alone, "the shew of armour," was sufficient to meet the terror requirement.[122]

A similar explanation was given in Michael Dalton's treatise *The Country Justice*, noting that in order for an assembly to be a riot, "their demeanor must be such as shall or may breed some apparent disturbance of the peace . . . ." Dalton followed the Hawkins model about what types of conduct could create a terror, including "threatening speeches, turbulent gesture, shew of armour or actual force or violence."[123] He also followed earlier examples of what was meant by terror–essentially what would concern ordinary people or inspire the lawless to misconduct—"To the Terror of the peaceable sort of people or the imboldening and stirring up of such as are of evil disposition or else it can be no riot."[124]

The comical case of *Clifford v. Brandon* also made clear that violence or threats of violence were not necessary to create the public terror required for a riot conviction.[125] The *Clifford* case arose out of the Old Price Riots of 1809, which were popular protests inspired by ticket price increases at the Royal Theater at Covent Garden in London after it had raised prices and built more private boxes after going into deep debt rebuilding the theater after a fire.[126] In response to the price increases, furious patrons, known as the OPs (standing for "old price"), engaged in a months-long campaign of disrupting

---

of Northampton, Richard II prohibited riding with "launcegays," a type of spear similarly capable of offensive use. Riding Armed Act, 7 Rich. 2, c. 13 (1383) (Eng.). Henry IV prohibited the Welsh from "be[ing] armed nor bear[ing] defensible armour" — again, underscoring that being "armed" (offensively) was understood to differ from wearing (defensive) armor. Welshmen Act, 4 H. 4, c. 29 (1402) (Eng.). And, perhaps most significantly, the Statute of Northampton was also enforced against those carrying weapons rather than those wearing armor. Levett v. Farrar (1592) 78 Eng. Rep. 547; 1 Hawk. 267 (K.B.) (undersheriff confiscated "weapons"); Chune v. Piott (1614) 80 Eng. Rep. 1161, 1162; 1 Ro. R. 237, 330 (K.B.) (stating sheriff has the power to arrest anyone he sees "carry weapons in the high-way"); Rex v. Harwood, Quarter Sessions at Malton (Oct. 4-5, 1608), in 1 North Riding Record Society, Quarter Sessions Records, supra note 34, at 132 (prosecution of defendant "armed and weaponed with a lance-staff plated with iron, pistolls, and other offensive weapons . . . ."); see supra note 52 (arrest for going armed with a cutlass).

122 Hawkins, *supra* note 15, at 157.

123 *Id.;* MICHAEL DALTON, THE COUNTRY JUSTICE 425, 443-44 (1737).

124 Dalton, *supra* note 123, at 425, 443-44. Dalton also makes clear that the determination whether an armed assembly was a riot was a very nuanced and context bound analysis. Earlier in his treatise he notes "[a]n assembly of a hundred persons or more (yea though they be in Armour) yet if it be not in terror or affright to the people, and were assembled without any intent to break the peace, it is not prohibited by any of these statutes, nor unlawful. . . So the assembly of People, and their use of armour upon midsummer night in London, being only for Sport, is lawful; and though it be with a great Assembly of People and in Armour; yet it being neither an affright of the people, nor malum in se, nor to do any act with force or violence against the peace, it is lawful." *Id.* at 425.

125 Clifford v. Brandon (1810) 170 Eng. Rep. 1183; 2 Camp. 358 (Com. Pl.) (J. Mansfield).

126 Jacqueline Mulhallen, The Old Price Riots of 1809: Theatre, Class and Popular Protest, Counterfire.org (Nov. 12, 2012), http://www.counterfire.org/history/16136-the-old-price-riots-of-1809-theatre-class-and-popular-protest.

theater performances demanding a return to the previous prices.[127] Radical barrister Henry Clifford was arrested during one of these demonstrations and indicted for riot after expressing his approval for the rioters by pinning an OP badge to his hat.[128] Clifford turned the tables on his prosecutors by suing for false arrest, leading the court to consider whether the OPs conduct constituted a riot.[129] The court found the protesters' conduct "com[ing] to the theatre with a predetermined purpose of interrupting the performance [and] for this purpose mak[ing] a great noise and disturbance," constituted a riot.[130] The court made clear that the crowd's conduct constituted a riot even without the crowd "offering personal violence to any individual or doing any injury to the house."[131] Brandon's quiet support for the OP cause was, however, found not sufficient to make him a participant in the riot.[132]

Summarizing the English sources, neither intent to terrorize nor actual public terror was necessary for a public gathering to be considered an affray, unlawful assembly, rout, or riot, and simply carrying weapons was sufficient to satisfy the terror requirement of public disorder crimes, even if no one was placed in particular fear.

IV. THE AMERICAN DEVELOPMENT OF THE TERROR ELEMENT IN PUBLIC DISORDER CRIMES.

The American colonies broadly adopted the English standards for public disorder offenses.[133] American courts do not appear to have applied

---

127 Id.

128 Clifford, 170 Eng. Rep. at 1185; 2 Camp at 363-64.

129 Id.

130 Clifford, 170 Eng. Rep. at 1183; 2 Camp at 358.

131 Id. The Clifford case is also relevant for the current 'no platforming' phenomenon, stating "the audience in a public theater have a right to express the feelings excited in the moment by performance, and in this manner to applaud or hiss any piece which is represented, or any performer who exhibits himself on the stage." Id.; see also Clifford, 170 Eng. Rep. at 1187; 2 Camp at 369-370 ("The audience have certainly a right to express by applauses or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment."). Under the Clifford standard, the author of this article was within his rights to boo the band Limp Bizkit off stage during the 2003 Summer Sanitarium tour, but not to come with the express intent of booing Limp Bizkit off stage. Gil Kaufman, Limp Bizkit Walk Offstage After Chicago Crowd Gets Hostile, MTV.COM (July 28, 2003), http://www.mtv.com/news/1474912/limp-bizkit-walk-offstage-after-chicago-crowd-gets-hostile/. Relatedly, patrons at a restaurant may well be within their rights to boo government officials when they attempt to dine there, but activists entering the restaurant simply to protest would likely constitute an unlawful assembly under the nineteenth century English standard.

132 Clifford, 170 Eng. Rep. at 1188; 2 Camp at 372.

133 See infra Part IV.

new *mens rea* or result requirements, and courts continued to apply the Hawkins standard about weapons-carrying and the riot terror requirement.

A. American Treatises

Early American treatise writers adopted the English approach to public disorder crimes. Notes to the American edition of William Russell's *A Treatise on Crimes and Misdemeanors* made clear that in America, an overt act was not required to satisfy the public terror requirement and carrying weapons was sufficient: "if a number of men assemble with arms, in terrorem populi, though no act is done, it is a riot."[134]

Similarly, in J.A.G. Davis's treatise, *On Criminal Law*, he stated that the requirement that "in every riot there must be some such circumstances . . . as are naturally apt to strike a terror into the people" was satisfied by the "show of arms."[135] Like others, Davis made clear that there were exceptions to the general presumption that an armed group created a pubic terror, "[h]ence, assemblies of the people for the exercise of common sports or diversions are not riotous."[136] But this articulation of exceptions clarifies that, as a general rule, going armed was to the terror of the people.[137] Similarly, James Stewart's 1849 version of Blackstone's Commentaries adopted the Hawkins's definition of the riot terror element, making three points clear: (i) overt acts were not necessary, (ii) actual rather than potential terror was not necessary, and (iii) possession of weapons in public standing alone was terrifying. Stewart stated that in a public disorder indictment, there "must be given some circumstances of such actual force or violence, or, at least, of such apparent tendency thereto as are calculated to strike terror into

---

134 1 William Russell, A Treatise on Crimes and Misdemeanors 350-51 (Daniel Davis et al eds., 1st American ed. 1824) (The quoted section is included as a footnote to "it seems to be clearly agreed, that in every riot there must be some such circumstances either of actual force or violence, or at least an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done in terrorem populi. But it is not necessary in order to constitute this crime that personal violence should have been committed."); see also 2 Thomas Tomlins & George Granger, The Law Dictionary Explaining the Rise, Progress, and Present State of the British Law clv (1st American ed. 1836) ("[I]f a number of men assemble with arms, in terrorem populi, though no act is done; so if three come out of an alehouse and go armed . . . . In every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people, as the show of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done in terror of the people. [citing Hawkins c. 65 § 5] But it is not necessary, in order to constitute this crime, that personal violence should have been committed.").

135 J.A.G. Davis, A Treatise on Criminal Law with an Exposition of the Office and Authority of Justices of the Peace of Virginia 252 (1838).

136 *Id.*

137 *Id.*

the public; as a show of arms, threatening speeches, or turbulent gestures."[138] Stewart's edition of Blackstone then referenced *Clifford v. Brandon*, clarifying that there does not have to be individual violence or threats of violence in a public disorder indictment because the crime does not require "personal violence to any individual" or "injury" done to property.[139]

An 1849 edition of Francis Wharton's treatise, *Precedents of Indictments and Pleas*, adopted the English model articulated by Coke in *Semayne's Case*, that an armed group with no overt actions or particular person terrorized constituted a riot, stating:

> [P]ersons riding together on the road with unusual weapons . . . in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect to either his person or possession, are not properly guilty of a riot, but only of an unlawful assembly.[140]

Like many English and American sources, Wharton's treatise also stated that "circumstances . . . apt to strike a terror into the people" included both the passive "show of arms" and the active "threatening speeches or turbulent gestures."[141] Similarly, in Oliver Barber's *Treatise on the Criminal Law of the State of New York*, he noted the controversy over whether an armed group would constitute a riot or an unlawful assembly, but affirmed that a "show of arms" was "naturally apt to strike a terror into the people."[142]

This common-law terror standard remained in effect in both the United States and England through the late nineteenth century.[143]

B. American Case Law

Federal courts in the Founding era embraced traditional English common law standards for public disorder offenses which remained in effect

---

138 James Stewart, The Rights of Persons Being the First Book of Blackstone's Commentaries, Incorporating the Alterations Down to the Present Time 868 (2d ed. 1849).

139 *Id.* at 868-69.

140 Francis Wharton, Precedents of Indictments and Pleas Adapted to the use both of the Courts of the United States and those of all the Several States 488 (1849).

141 *Id.* at 488-89.

142 Oliver Lorenzo Barber, A Treatise on the Criminal Law of the State of New York; and Upon the Jurisdiction, Duty, and Authority of Justices of the Peace, and Incidentally, of the Power and Duty of Sheriffs, Constables, & in Criminal Cases 224 (2d ed. 1852).

143 Thomas Frederick Simmons, The Constitution and Practice of Courts Martial 436-37 (1875) ("To constitute a riot, there must be, not only the unlawful assembly of three or more, but some act of violence, or at least some apparent tendency thereto as may naturally apt to strike terror into the people, as the show of arms, threatening speeches, or turbulent gestures."); Constantine Molloy, The Justice of the Peace of Ireland 102-03 (1890) ("If a number of persons assemble with arms, to the terror of the people, though no act is done, it is a riot . . . In every riot there must be circumstances tending to excite terror, such as the show of arms, threatening speeches, turbulent gestures, or the like.").

in the newly minted United States.[144] The most prominent early example stemmed from prosecutions that arose out of tax revolts in Western Pennsylvania over an excise tax placed on whisky by the Washington Administration.[145] A force of federalized militia, led by President George Washington, marched into Pennsylvania, suppressed the revolt, and arrested several of the participants.[146] Although the ringleaders escaped capture, federal authorities tried several of the participants for treason.[147] In one of the cases, the United States Circuit Court for the Pennsylvania Circuit relied heavily on the English tradition to find that a group carrying arms was sufficient to create a public terror:

> By the English authorities, it is uniformily and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent by force and terror, the execution of a law, is an act of levying war. . . . [A]n assembly armed and arrayed in a warlike manner for a treasonable purpose is Bellum levatum [raised for war], though not Bellum percussum [engaged in war]. Those, likewise, who join afterwards, though not concerned at first in the plot, are as guilty as the original conspirators; for in Treason all are principals; and whenever a lawless meeting is convened, whether it shall be treated as riot, or treason, will depend on the quo animo [evil intent].[148]

The influential anti-Federalist judge and treatise writer St. George Tucker criticized the successful prosecution in an essay appended to his edition of Blackstone's Commentaries.149 Specifically, Tucker disparaged the Circuit Court's reliance on a treatise by Matthew Hale, which states an armed group "carries a terror with it, and a presumption of warlike force."150 Tucker explains that under the court's and Hale's understanding, "[t]he bare circumstances of having arms, therefore, of itself, creates a presumption of warlike force in England, and may be given in evidence there, to prove quo

---

144 Carlton F.W. Larson, The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem, 154 U. PA. L. REV. 863, 901-04 (2006)

145 Whisky Rebellion, Encyclopedia Brittanica, https://www.britannica.com/event/Whiskey-Rebellion (last visited July 21,2018); see generally William Hogeland, The Whiskey Rebellion: George Washington, Alexander Hamilton, and the Frontier Rebels who Challenged America's Newfound Sovereignty (2006).

146 Michael Hoover, The Whiskey Rebellion, Alcohol and Tobacco Tax and Trade Bureau, https://www.ttb.gov/public_info/whisky_rebellion.shtml (last updated Aug. 21, 2014).

147 Id.; Larson, supra note 144, at 903-04.

148 United States v. Mitchell, 2 U.S. (2 Dall.) 348, 349 (1795).

149 5 St. George Tucker, Note B Concerning Treason, in Blackstone's Commentaries: with Notes of Reference to the Constitution and Laws of the Federal Government of the United States (1803).

150 Tucker, supra note 149, at 19, 45-6 (referring to 1 Matthew Hale, Pleas of the Crown 131, 144 (1736)); see generally, Cornell, supra note 7, at 33 (noting that the Jeffersonian Tucker's views were "not simply rooted in his experiences as a Virginian, but also in his growing opposition to Federalist constitutionalism.").

animo [evil intent] the people are assembled."[151] Tucker disagreed that the possession of arms alone by a group should be viewed as quo animo, given that "the right to bear arms is recognized and secured in the constitution itself."[152] Tucker pointed out that "[i]n many parts of the United States a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side."[153]

This context-specific analysis, calling into question whether the carrying of arms in rural western Pennsylvania was sufficient to create the presumption that the settlers were "arrayed in a warlike manner," appears to argue for different treatment of the carrying of arms based on local conditions and norms.[154] Notably, Tucker's view was inconsistent with that adopted by the federal circuit court and was directed primarily at the common law in place in Virginia at the time, acknowledging that different standards could have applied in different portions of the country.[155] In fact Associate Supreme Court Justice Joseph Story, a native of Massachusetts, disagreed, believing that the bearing of arms in public "in a military form, for the express purpose of overawing or intimidating the public," was treason "although no actual blow has been struck or engagement has taken place."[156]

An early and highly influential case adopting the English tradition laid out by Justice Holt in the *Soley* case was *Commonwealth v. Runnels*.[157] In *Runnels*, the Massachusetts Supreme Court adopted the rule that riot indictments in which an overt criminal act has been committed do not need to include the phrase "in terrorem populi," while indictments for riot "without committing any act" such as "going about armed" required the terror language because "the offence consists of terrifying the public."[158] This made clear that no overt act or intent was necessary to satisfy the terror element of public disorder crimes.[159] The *Runnels* standard was widely cited in riot cases across the country.[160]

---

151 Tucker, supra note 149, at 19.

152 *Id.*

153 *Id.*

154 *Id.* at 18.

155 Cornell, *supra* note 7, at 33.

156 Darrell A. H. Miller, Guns as Smut: Defending the Home-Bound Second Amendment, 109 Columbia L. Rev. 1278, 1306 (2009) (citing Joseph Story, Charge of Mr. Justice Story on the Law of Treason Delivered to the Grand Jury of the Circuit Court of the United States 7 (Providence, H.H. Brown 1842).

157 Commonwealth v. Runnels, 10 Mass. (10 Tyng) 518, 520 (1813).

158 *Id.*

159 *Id.*

160 S*ee* State v. Whitesides, 31 Tenn. (1 Swan) 88, 89 (1851) ("[I]n indictments for riots, which consist of going about armed, etc., the words in terrorem populi are essential; but that in those riots in which an unlawful act has been committed those words are unneccesary."); State v. Sims, 16 S.C. 486, 490 (1882) ("If the indictment charges the actual perpetration of a deed of violence, such as assault and battery, etc. it is not necessary to allege or prove that it was done to the terror of the people, but

Other courts directly followed the Hawkins standard originally articulated in the *Soley* case. *United States v. Fenwick*, a decision out of the D.C. Circuit (then the federal trial court in the District of Columbia) written by the highly influential Supreme Court reporter and Federalist judge William Cranch, articulated the terror standard in a riot prosecution as "assembl[ing] . . . in a tumultuous manner to disturb the peace, either by show of armor, threatening speeches, or turbulent gestures, to the terror of the people . . . ."[161] This standard continued to be applied well into the twentieth century.[162]

The Georgia Supreme Court also made clear that the English tradition survived in the United States in *Green v. State*, a riot prosecution in which the defendant was indicted for participating in an armed mob that had assembled to prevent an arrest.[163] The Georgia Supreme Court adopted the standard laid out by the Court of King's Bench in *Queen v. Soley*, stating, "if a number of men assemble with arms in terrorem populi, though no act is done, it is a riot."[164] The Court made clear that neither an overt act nor an actual intent to terrify was necessary by recycling the old English example of "three men com[ing] out of an ale house . . . armed" constituting a riot," showing that the simple action of a group carrying arms constituted the offense.[165]

C. Non-Firearm Affray Prosecutions

Several non-firearm-related affray cases also support the concept that the terror requirement did not require an intent to terrorize or actual public terror. In Taylor v. State, two men were prosecuted for an affray for meeting in an isolated field, a mile from the nearest road, for a fight.166 They were

---

proof of all the other circumstances alleged will support the indictment without proving directly any terror."); Marshal v. Buffalo, 50 A.D. 149, 154 (N.Y. App. Div. 1900) ("[I]n indictments for that species of riots which consist in going about armed, etc., without committing any act, the words aforesaid are necessary, because the offense consists in terrifying the public; but in those riots in which an unlawful act is *committed* the words are useless."); Brous v. Imperial Assurance Co., 224 N.Y.S. 136, 138 (N.Y. Sup. Ct. 1927) (Same).

161 United States v. Fenwick, 25 F. Cas. 1062, 1064 (D.C. Cir. 1836).

162 Commonwealth v. Brletic, 173 A. 686, 688-89 (Pa. Super. Ct. 1934) (explaining that "in every riot there must be some circumstances either of actual force or violence, or at least an apparent tendency thereto, as are naturally apt to strike terror into the people; as the show of armor, threatening speeches, or turbulent gestures . . . ."); Commonwealth v. Paul, 21 A. 421, 423 (Pa. Super. Ct. 1941) ("Even though it be said there were no circumstances either of actual force or violence, there were circumstances 'at least of an apparent tendency thereto, as are naturally apt to strike terror into the people; as the show of armour, threatening speeches, or turbeluent gestures, for every such offense must be laid to be done in terrorem populi.'").

163 Green v. State, 35 S.E. 97, 97 (Ga. 1900).

164 *Id.* at 100.

165 *Id.* at 100-01.

166 Taylor v. Alabama, 22 Ala. 15, 16 (1853).

seen by a third person and indicted for affray.[167] The Alabama Supreme Court vacated the indictment for affray, finding that the isolated field was not a public place sufficient to create public terror, but said nothing about the fact that two people meeting in a field to fight was clearly not intended to trigger a public terror.[168]

In *State v. Sumner*, a man was charged with affray for fighting in a town square.[169] The South Carolina Supreme Court upheld the dismissal of his indictment because several witnesses testified the defendant had been unwilling to fight and only fought in self-defense.[170] While charges were dismissed on other grounds, the question was raised whether the terror element had been sufficiently implicated in an altercation where "the by-standers seemed more anxious for the fight than the parties."[171] The court clarified that terror could be presumed and did not actually have to be shown, stating:

> Some stress has been laid upon the idea that there was no proof that the people were terrified. The existence of terror among the people, as a matter of fact, does not require proof, and so is the law in the case of riot. Suppose the fight be in a private place, any degree of terror that may be proved, among any number of persons, would not make it an affray. It must be charged to have been in a public place, and proved accordingly, and, it is presumed, the inference of law will be strong enough to import whatever of terror may be a necessary ingredient.[172]

The Court applied *Runnells* and the English tradition that in indictments for public disorder crimes based on unlawful acts it was not necessary to assert that the crime was done in terrorem populi, but for "those riots which are riots without any act done, as going armed," the indictment must say to the terror of the people.[173] The Court also cited to conduct that could not reasonably be described as intended to terrify—"[p]rize fights and pugilistic combats"—as examples of conduct necessarily constituting an affray.[174]

In *Commonwealth v. Simmons*, the Kentucky Supreme Court explained that public disorder crimes were deemed aggravated crimes because "[t]hey are committed in public" and to the "disturbance of the public peace" and

---

167 Id.

168 Id.

169 State v. Sumner, 36 S.C.L. (5 Strob.) 53, 53 (S.C. Ct. App. 1850).

170 Id. at 53-55.

171 Id. at 55.

172 Id. at 56.

173 Id.

174 Id. at 57; see also Cash v. State, 2 Tenn. (2 Overt.) 198, 199 (1813) ("It is because the violence is committed in a public place, and to the terror of the people, that the crime is called an affray, instead of assault and battery; and not because it took place by the mutual consent of the parties").

create an "incitement to disorder."[175] The public nature of the unlawful action, allowing for the possibility of public disorder or disturbance, rather than an actual fear created by the public, was the overriding concern, "for if the fighting be in private, it is no affray, but an assault; because if it be neither heard nor seen by any but the parties concerned it cannot be said to be to the terror of the people."[176]

In *Carwile v. State*, the Alabama Supreme Court discussed the standard for affray and also focused on the public nature of the location of the misconduct, rather than any intent or actual terror.[177] Carwile had engaged in a knife fight ninety feet from a public road, which was not witnessed by any members of the public.[178] The Court upheld the conviction, finding that a field within view of a public street was "in the same category with the street itself."[179] The Court made clear that it was the presence of the event in public, where "the fight could be heard, and its exciting scenes witnessed," rather than any actual or intended terror to the public that converted a crime from an assault and battery to an affray.[180] The terror of the people was "presumed to result from the fighting in a public place."[181] The Court made clear that even though "there was no actual terror," the crime of affray is still committed because the crime results from "the liability of fighting in a public place to produce it."[182] Rather than requiring an intention to create a public terror, the Court found "[t]error to the people is presumed from the fighting in a public place."[183]

Finally, in *State v. Lanier*, the North Carolina Supreme Court reversed the conviction of a man who had been charged under the common-law crime of affray for riding a horse through a courthouse unarmed while drunk and "being in perfect good humor."[184] The trial judge had instructed the jurors that if they believed either of the witnesses, they were required to return a guilty verdict.[185] The North Carolina Supreme Court reversed the conviction and ordered a new trial.[186] The court found that while drunkenly riding through a courthouse was "very bad behavior" and could still be criminal even though the defendant was unarmed, but it was a question for the jury

---

175 Commonwealth v. Simmons, 29 Ky. (6 J.J. Marsh.) 614, 615 (1831).
176 *Id*.
177 Carwile v. State, 35 Ala. 392 (1860).
178 *Id*. at 392-93.
179 *Id*. at 394-95
180 *Id*. at 393-94.
181 Id. at 394 (citing Joel Carter Bishop, Criminal Law 18 (1865) and State v. Sumner, 36 S.C.L. (5 Strob.) 53 (S.C. Ct. App. 1850)).
182 *Id*. at 394.
183 *Id*.
184 State v. Lanier, 71 N.C. 288, 288-89 (1874).
185 *Id*. at 289-90.
186 *Id*. at 290.

"whether under all the circumstances" the defendant engaged in conduct likely to create a public terror.[187]

D. Assessing the American Sources

While it is difficult to generalize across United States jurisdictions across the late eighteenth and nineteenth century, and this article certainly does not purport to be a general survey of public disorder crime case law, English tradition clearly did not disappear in the United States.[188] Both American courts and American treatise writers continued to rely extensively on the English tradition.[189] The terror element of public disorder crimes did not acquire a *mens rea* requirement in the early nineteenth century, and, in most cases, there was no requirement that naturally terrifying conduct actually terrify anyone.[190] Courts also continued to treat the possession of firearms by a group as sufficient to transform a lawful gathering into an unlawful assembly.[191]

While affray, unlawful assembly, rout, and riot are the only other crimes in the American common law that require an element of public terror, with the exception of affray—which in many common law treatises blended with prohibitions on public carry—they are not a perfect analogy to founding era public carry crimes. Obviously, a group, whether organized or disorganized or armed or not is inherently more threatening than an individual. In the context of going armed, especially with guns, this distinction may have been especially important. An individual armed with a firearm during the eighteenth or early nineteenth century would have been able to do relatively little damage compared to a group because only a single shot was available from the weapons of the time. This distinction, while still relevant, has obviously grown less important with modern firearms allowing a single individual to cause catastrophic amounts of death and mayhem on a scale only possible with a large crowd in earlier centuries.

It is also important to reiterate that this article does not purport to be a comprehensive survey and analysis of the law surrounding public disorder crimes throughout Anglo-American history. A deeper analysis could require revision of the tentative conclusions drawn here.

---

187 Id.

188 See generally Green v. State, 35 S.E. 97 (Ga. 1900); Taylor v. Alabama, 22 Ala. 15 (1853); Larson, supra note 144, at 903-04.

189 See generally Green, 35 S.E. 97; Taylor, 22 Ala 15; Commonwealth v. Runnels, 10 Mass. (10 Tyng) 518, 520 (1813); Barber supra note 142; Simmons supra note 143.

190 See generally Green, 35 S.E. 97; Carwile v. State, 35 Ala. 392 (1860); Commonwealth v. Simmons, 29 Ky. (6 J.J. Marsh.) 614, 615 (1831).

191 See generally United States v. Mitchell, 2 U.S. (2 Dall.) 348 (1795).

V. CONCLUSION

While public disorder crimes provide an imperfect analogy, they are the best resource available for understanding the terror element of the Statute of Northampton beyond the sources dealing directly with public carry. Several tentative conclusions can be drawn from these materials. First, public disorder crimes did not require an intent to create public terror. Individuals could be indicted and convicted for public disorder crimes with no intention to terrify anyone and, in some cases, no apparent knowledge that anyone was around to be terrified. Relatedly, public disorder crimes did not require an actual public terror, but rather punished conduct likely to terrorize the public. Finally, the carrying of arms without any overtly threatening conduct was sufficient to change otherwise lawful conduct into a public disorder crime.

Again, while it is difficult to assess how clearly one can transpose the public disorder standards onto the public carry terror requirement, to the extent they are transferable, they cut strongly toward the application of the common law Statute of Northampton as a prohibition on public carry generally as opposed to a prohibition only on carrying weapons with an intent to terrorize or in a manner that actually creates a public terror. Additional research will be necessary to confirm these tentative conclusions, but for courts considering challenges to public carry laws, they provide another reason to be deferential to the legislative branch and show restraint in striking down laws under the Second Amendment.