

**GOING ARMED WITH DANGEROUS AND UNUSUAL WEAPONS TO THE  
TERROR OF THE PEOPLE: HOW THE COMMON LAW DISTINGUISHED  
THE PEACEABLE KEEPING AND BEARING OF ARMS**

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Much ink has been spilt in recent times over what restrictions on firearm ownership by law-abiding citizens are permissible under the Second Amendment. Since it is litigation-driven, the debate evokes superficial references to the common law at the Founding and in the early Republic. Some states recognized going armed with dangerous and unusual weapons to the terror of the people as a common-law offense or made it a statutory crime. Some also required persons who went armed and made threats to others to get sureties to keep the peace. The peaceable carrying of arms was not an offense in any state, other than to the extent some states restricted the carrying of concealed weapons. The right to keep and bear arms as guaranteed by the Second Amendment and some state constitutions was sharply distinguished from going armed and making threats to others.

It is a fundamental principle of criminal procedure that an indictment must allege all elements of a crime, that jury instructions must include all elements of the crime, and that each element must be proven to the jury beyond a reasonable doubt. An indictment that fails to allege each element of the offense is subject to dismissal in a pretrial motion or at a later stage. It must be assured that the grand jury understood and actually found sufficient evidence of each element and that the defendant is given notice and informed of the alleged crime. These time-honored principles are enshrined in the Fifth Amendment's guarantee that "no person shall be held to

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answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,” and the Sixth Amendment’s guarantee that the defendant “shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . .” These procedures and guarantees fully apply to the crimes at issue here.

“Law office history” has been criticized by some historians who disfavor a robust Second Amendment, but the term may be more realistically applied the methodology of some attorneys to cherry pick passages from historical documents and delete key portions that support their litigation goals. A different term, “history office law,” might be used to call into question the manner in which some historians ignore basic elements of criminal procedure by simply crossing out elements of offenses required to constitute crimes in order to show a “long-standing tradition” of criminalizing the keeping and bearing of arms.

For the crime of going armed to the terror of the people, one cannot simply erase the offense elements that were in fact required to be alleged in indictments, given in jury instructions, and proven to the jury beyond a reasonable doubt. Those elements included not just going armed, but doing so to the terror of the people. This article addresses the nature of that crime from its English antecedents through its development in the early American Republic.

### **Going Armed to the Terror of the Subjects: The English Antecedents**

English criminal procedure required that every element of an offense must be alleged in the indictment or it would be dismissed. As Hawkins put it: “It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it . . . .”<sup>1</sup> Blackstone added the

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<sup>1</sup>Hawkins, *2 Pleas of the Crown*, ch. 25, § 98 (1762).

following:

Indictments must have a precise and sufficient certainty. . . . The *offence* itself must also be set forth with clearness and certainty; and in some crimes, particular words of art must be used, which are so appropriated by the law, to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it.<sup>2</sup>

The Statute of Northampton, 2 Edw. III c. 3 (1328), provided that no person other than the king's servants and ministers shall "come before the King's Justices . . . 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 . . . ."

What was the meaning of that awkward and archaic language?

In *Rex v. Knight* (1686), the King's Bench worded the Statute as prohibiting "all persons from coming with force and arms before the King's Justices, &c., and from going or riding armed in affray of peace . . . ."<sup>3</sup> It read forward the reference to an affray, as the original language provided that a person shall "bring no force in affray of the peace, nor to go nor ride armed . . . ." The information alleged that Sir John Knight "did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects, *contra formam statuti*." "The Chief Justice said, that the meaning of the statute . . . was to punish people who go armed to terrify the King's subjects."<sup>4</sup>

Counsel for the defendant contended: "This statute was made to prevent the people's

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<sup>2</sup>4 Blackstone, *Commentaries* \*301-02 (1769).

<sup>3</sup>*Rex v. Knight*, 3 Mod. 117, 87 Eng. Rep. 75,76 (K.B. 1686).

<sup>4</sup>*Id.*, 3 Mod. 118, 87 Eng. Rep. 76.

being oppressed by great men; but this is a private matter, and not within the statute.”<sup>5</sup> The chief justice further held: “But tho’ this statute be almost gone in desuetudinem [disuse], yet where the crime shall appear to be malo animo [with evil intent], it will come within the Act (tho’ now there be a general connivance to gentlemen to ride armed for their security) . . . .”<sup>6</sup>

Knight was acquitted. Why? He had walked in the streets and went into a church service with a gun. But the crime was not simply going or riding armed. A further element of the crime was that one must do so “to terrify the King’s subjects,” with “malo animo,” and “in affray of peace.” Nothing in the allegations or evidence suggest that he threatened anyone, brandished a weapon, or started a fight. He had gone armed, but that did not suffice.

This was not the only crime in which riding or going armed was but one element of the offense. Riding armed with others to slay, rob, or kidnap a person had far more serious elements than doing so while committing an affray.<sup>7</sup> Going or riding armed was but one element of these offenses.

William Hawkins, in an exposition of affrays in his *Treatise of the Pleas of the Crown* (first published in 1716), commented as follows:

no wearing of arms is within the meaning of the statute unless it be accompanied with such circumstances as are apt to terrify the people; from when 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

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<sup>5</sup>*Id.*, Comb. 38, 90 Eng. Rep. 330.

<sup>6</sup>*Id.*, Comb. 38-39, 90 Eng. Rep. 330.

<sup>7</sup>“And if percase any man of this Realm, Ride Armed covertly or secret with Men of Arms against any other to Slay him, or Rob him, or Take him, or Retain him till he hath made Fine and Ransom for to have his deliverance, it . . . shall be judged Felony or trespass, according to the Laws of the Land of old time used. . . .” Henry Care, *English Liberties* 42 (1680).

ornament or defence, in such places, and upon such occasions, in which it is the 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 the statute, because they do nothing *in terrorem populi*.<sup>8</sup>

Despite the reference to “persons of quality,” the same rules applied to the poor and uninfluential. To repeat Hawkins, the wearing of arms was not a crime unless “accompanied with such circumstances as are apt to terrify the people . . . .” That was an element that had to be alleged in the indictment and proven to the jury beyond a reasonable doubt. The suggestion that the wearing of arms by itself would terrify the people, which thus need not have been proven, disregards that separate statutory elements are not read to be redundant and useless verbiage. As the legal maxim states, every word is to be given effect – *verba cum effectu sunt accipienda*.

The Declaration of Rights of 1689, coming just three years after Knight’s case, further clarified that simply going armed without more was a right, not a crime. Abuses of James II and Charles II included: “By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed contrary to law.” Accordingly, “for the vindicating and asserting their ancient rights and liberties,” it was declared: “The subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.”<sup>9</sup>

Blackstone included among the auxiliary rights of the subject to protect the primary rights of personal security, personal liberty, and private property “that of having arms for their defence

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<sup>8</sup>1 Hawkins, *A Treatise of the Pleas of the Crown*, ch. 28, § 9 (8<sup>th</sup> ed. 1824).

<sup>9</sup>1 Wm. & Mary, sess. 2, ch. 2 (1689).

suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. and M. st. 2 c. 2 and it is indeed a public allowance under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>10</sup>

That was not inconsistent with the following also noted by Blackstone: “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 . . . .”<sup>11</sup> That was a far cry from having, carrying, and using arms lawfully in exercise of one’s natural right of resistance and self preservation.

The right to carry arms as codified in the Declaration of Rights, but not to do so in a manner that would terrify the King’s subjects, was recognized in *Rex v. Dewhurst* (1820), a case arising out of an armed assembly protesting against a massacre and advocating parliamentary reform.<sup>12</sup> The court gave the following jury instruction:

“The subjects which are Protestants may have arms for their defence suitable to their condition, and as allowed by law.”

But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm . . . .<sup>13</sup>

As late as 1914, it was held that even an Irishman could not be convicted under the

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<sup>10</sup>1 Blackstone, *Commentaries* \*142-43.

<sup>11</sup>4 Blackstone, *Commentaries* \*148.

<sup>12</sup>*Rex v. Dewhurst*, 1 State Trials, New Series 529 (1820).

<sup>13</sup>*Id.* at 601-022.

Statute of Northampton for walking down a public road while armed with a loaded revolver:

Without referring to old principles, which are admitted by all, we think that the statutable misdemeanour is to ride or go armed without lawful occasion *in terrorem populi* . . . .

. . . . The words “in affray of the peace” in the statute, being read forward into the “going armed,” render the former words part of the description of the statutable offence. The indictment, therefore, omits two essential elements of the offence – (1) That the going armed was without lawful occasion; and (2) that the act was *in terrorem populi*.<sup>14</sup>

In sum, it was an offense under the Statute of Northampton to go or ride armed in a manner that creates an affray or terror to the subjects. It was not an offense simply to carry arms in a peaceable manner. A serious historian cannot snip off what were elements of the offense in support of a current agenda to represent the Statute of Northampton as demonstrating a historical tradition of banning the peaceable carrying of arms. The ethical duty of candor to the tribunal should dissuade an attorney from representing to a court that a crime consisted or consists in something less than all of its elements. The rules of criminal procedure, including the sufficiency of indictments and the requirement that every element of an offense must be proven, are no different today than in Sir John Knight’s time.

### **Going Armed in the Early Republic: Statutory Provisions in Virginia and Massachusetts**

At the Founding, some but not all of the states recognized going armed to the terror of the people as a common law crime, and some made it a statutory offense. Carrying a weapon in and of itself was not an offense. Indeed, at the Founding four states explicitly guaranteed the

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<sup>14</sup>*Rex v. Smith*, 2 Ir. R. 190, 204 (K.B. 1914).

constitutional right to “bear arms,”<sup>15</sup> and more states followed as the Republic grew. The Second Amendment would declare that “the right of the people to keep and bear arms, shall not be infringed.”

Initially, there were only two kinds of laws regarding the mere possession and carrying of firearms. In all states, free males of specified age groups were required to provide arms for themselves and to carry and use them in militia service. In some states, slaves and persons of color were prohibited from possession or carrying arms without a license or at all.<sup>16</sup> In later years, some states prohibited the carrying of weapons concealed.

This article does not address the extent to which bearing arms was a constitutional right, but instead focuses on to what extent it may have been a crime. Some states reenacted a version of the Statute of Northampton, of which Virginia and Massachusetts were representative. Did those states make it a crime peaceably to carry a firearm or other weapon, or was there one or more elements of the offense besides going armed?

In Virginia, a Committee of Revisors – of which Thomas Jefferson played the leading role – drafted a restatement of the statutory law which included the common law and elements of such English statutes as were deemed applicable.<sup>17</sup> One of the provisions reported by the

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<sup>15</sup>“That the people have a right to bear arms for the defense of themselves, and the state . . .” Pa. Dec. of Rights, Art. XIII (1776); Vt. Const., Art. I, § 15 (1777). “That the People have a right to bear Arms for the Defense of the State . . . .” N.C. Dec. of Rights, Art. XVII (1776). “The people have a right to keep and bear arms for the common defence.” Mass. Dec. of Rights, Art. XVII (1780).

<sup>16</sup>On such laws of each state at the Founding, see generally Halbrook, *A Right to Bear Arms* (1989).

<sup>17</sup>Edward Dumbauld, *Thomas Jefferson and the Law* 134-36 (1978).

Committee, presented to the General Assembly by James Madison, would be passed as an Act Forbidding and Punishing Affrays (1786).<sup>18</sup> It provided in pertinent part that no man shall “come before the Justices of any court, or other of their ministers of justice doing their office, with force and arms, . . . nor go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the country . . . .”<sup>19</sup> This offense had three pertinent elements: (1) going or riding armed, (2) in fairs, markets or “other places,” which according to the canon of *noscitur a sociis* (associated words) meant other places like fairs and markets, and (3) in terror of the country.

A sufficient indictment of the above could not simply allege the first element, but would have been required to allege all three. It was “an established rule, that in general, if an Indictment pursues the words of a Statute in describing an offence, . . . it is sufficient . . . .”<sup>20</sup> A demurrer (motion to dismiss) would be sustained for an insufficient indictment.<sup>21</sup>

In no manner was this read to prohibit the peaceable carrying of arms, even by groups. Regarding the law of treason in England, Sir Matthew Hale had observed in *Pleas of the Crown* that “the very use of weapons by such an assembly, without the king’s licence, unless in some

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<sup>18</sup>2 Jefferson, *Papers* 519-20 (Julian P. Boyd ed. 1951). “This Bill is a good example of TJ’s retention of the language of early English statutes, with its archaic provision for the forfeiture of ‘armour,’ &c. It is also a good example of TJ’s ability to condense the involved language of the earlier English statutes that he thought worthy of retaining in the revision . . . .” *Id.* at 520 (note by editor).

<sup>19</sup>*A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force*, ch. 21, at 30 (1803).

<sup>20</sup>*Rasnick v. Commonwealth*, 4 Va. (2 Va. Cas.) 356, 357 (1823).

<sup>21</sup>*Commonwealth v. Lodge*, 43 Va. (2 Gratt.) 579, 580-81 (1845).

lawful and special cases, carries a terror with it, and a presumption of warlike force, &c.”<sup>22</sup> St. George Tucker commented in his 1803 treatise that “the bare circumstance of having arms, therefore, of itself, creates a presumption of warlike force in England, and may be given in evidence there, to prove *quo animo* the people are assembled.”<sup>23</sup> Tucker proceeded to ask:

But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In 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 an European fine gentleman without his sword by his side.<sup>24</sup>

It is unclear how long the Virginia law remained on the books, and no judicial decision exists reciting its language. Had it been read to ban the mere carrying of firearms, its draftsman Thomas Jefferson would have been one of its biggest violators, as he regularly went armed and defended the right to do so.<sup>25</sup> As he advised his 15-year old nephew: “Let your gun therefore be the constant companion of your walks.”<sup>26</sup>

If it was still law in 1838, the enactment was not interpreted to prohibit the habitual carrying of concealed weapons, as in that year the legislature for the first time provided: “If a free person, habitually, carry about his person hid from common observation, any pistol, dirk, bowie

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<sup>22</sup>St. George Tucker, *Concerning Treason*, in 5 Tucker, *Blackstone’s Commentaries*, ed. app. at 19 (1803).

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

<sup>24</sup>*Id.*

<sup>25</sup>See Halbrook, *The Founders’ Second Amendment* 131, 260, 316-18 (2008). In 1803, Jefferson wrote an innkeeper that “I left at your house . . . a pistol in a locked case,” and asked that a friend pick it up. See original letter at <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=210>.

<sup>26</sup>Jefferson, *Writings*, Merrill D. Peterson ed., 816-17 (1984).

knife, or weapon of the like kind, he shall be fined fifty dollars.”<sup>27</sup> This provision would have been unnecessary if going armed was already an offense, not to mention that this provision only restricted going armed habitually and hiding the arms. Law enforcement officers were not exempt – the Virginia high court affirmed the conviction of a constable who “drew out a pistol and dirk” against a person to levy an execution.<sup>28</sup>

In 1847, Virginia enacted the following: “If any person shall go armed with any offensive or 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 be required to find sureties for keeping the peace.”<sup>29</sup> Any person engaging in the subject conduct, if anyone complained, could continue doing if the court did not find that keeping the peace required sureties. If sureties were required, he could simply obtain them. There were no published judicial decisions on the provision.

At a more general level, courts could require a person to enter into a recognizance with sureties to keep the peace, particularly in regard to a specified person who was threatened, for a given period.<sup>30</sup> If a person violated the recognizance, a writ of *scire facias* could be issued alleging the violation with specificity and requiring the person to answer in court.<sup>31</sup> Specific threats or harm were required for a finding that sureties were needed to ensure that the person kept the peace.

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<sup>27</sup>Virginia Code, tit. 54, ch. 196, § 7 (1849).

<sup>28</sup>*Hicks v. Commonwealth*, 48 Va. (7 Gratt.) 597, 598 (1850).

<sup>29</sup>1847 Va. Laws 127, 129, § 16.

<sup>30</sup>*Welling's Case*, 47 Va. (6 Gratt.) 670 (1849).

<sup>31</sup>*Randolph v. Brown*, 4 Va. (2 Va. Cas.) 351 (1823).

Virginia’s only prohibition on carrying a firearm *per se* applied not just to slaves, but also to free blacks. Among the “numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States,” was the restriction “upon their right to bear arms.”<sup>32</sup>

In Massachusetts, the Act of 1795 punished “such as ride or go armed offensively, to the fear or terror of the good citizens of this commonwealth. . . .”<sup>33</sup> Elements of the offense included (1) riding or going armed, (2) offensively, i.e., not peaceably, and (3) to the fear or terror of the good citizens. Just riding or going armed alone was not an offense. As the Massachusetts Supreme Judicial Court stated the rule:

The general principle applicable to criminal pleading requires that an indictment shall set forth, with technical particularity, every allegation necessary to constitute the offence charged; and the constitution, adopting and sanctioning this principle, provides, “that no subject shall be held to answer for any crime or offence, until the same is fully, substantially and formally described to him.”<sup>34</sup>

It is unclear how long the Massachusetts law remained on the books, and no judicial decision exists reciting its language. However, an 1825 decision did differentiate being armed from misuse of arms: “The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him

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<sup>32</sup>*Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

<sup>33</sup>2 *Perpetual Laws of the Commonwealth of Massachusetts* 259 (1801).

<sup>34</sup>*Commonwealth v. Eastman*, 55 Mass. (1 Cush.) 189, 223 (1848). The court added: “If an indictment for murder, should allege merely that the accused had committed the crime of murder upon the person of one A. B., or, if an indictment for larceny should simply set forth, that the defendant had stolen from C. D., in neither case would the offence be set forth with the particularity and precision required by law.”

who uses them for annoyance or destruction.”<sup>35</sup>

The above was fully consistent with the following 1836 enactment:

If any person 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, for a term not exceeding six months, with the right of appealing as before provided.<sup>36</sup>

The above did not prohibit a person from going armed with the specified weapons. It required an aggrieved person to file a complaint and to show reasonable cause to fear injury or breach of the peace, and such a finding by the court would have to entail threats or other bad behavior. Even then, the subject person could show reasonable cause to fear injury. And if the court found otherwise and determined that his keeping the peace required sureties, the person could simply find sureties and continue going armed.

The above statute reflected general remedies available to a person who was injured or feared injury or breach of the peace by another. “He may complain to the proper tribunal, and procure an indictment, if a sufficient cause exists. He may apply to a magistrate, and ask that sureties to keep the peace may be required of one from whom he may apprehend any serious personal injury.”<sup>37</sup>

Generally, if a person who violated his recognizance to keep the peace such as by assaulting the person regarding who he was ordered to keep the peace, the Commonwealth could

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<sup>35</sup>*Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 314 (1825).

<sup>36</sup>1836 Mass. Laws 748, 750, ch. 134, § 16.

<sup>37</sup>*Mason v. Mason*, 36 Mass. (19 Pick.) 506, 508 (1837).

prosecute an action of debt upon this forfeited recognizance, or bring a writ of *scire facias*.<sup>38</sup>

“Where one, being under a recognizance to keep the peace, committed a breach of the peace, for which he was indicted and fined, it was *held* that he was nevertheless liable to an action for the penalty of the recognizance.”<sup>39</sup>

In sum, as exemplified by Virginia and Massachusetts, the statutory offense of going armed to the terror of the people required proof that the defendant did so in an offensive manner that terrified actual persons. Further, provisions requiring persons who went armed to find sureties to keep the peace required findings of offensive behavior that threatened the peace. Peaceably carrying arms was not subject to any sanction.

#### **Going Armed in the Early Republic: The Common Law in Tennessee and North Carolina**

To what extent was the prohibition of the Statute of Northampton recognized as a common law offense recognized in America? The courts of Tennessee and North Carolina grappled with the issue, the former holding that it was not and the latter holding that it was. The latter also provided significant detail regarding how both going armed and doing so to the terror of the people were separate elements of the offense, both of which must be alleged in the indictment and proven to the jury.

In *Simpson v. State* (1833), the Supreme Court of Errors and Appeals of Tennessee dismissed an indictment alleging that “William Simpson, laborer, with force and arms being arrayed in a warlike manner, in a certain public street or highway situate, unlawfully, and to the

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<sup>38</sup>*Commonwealth v. Green*, 12 Mass. 1 (1815).

<sup>39</sup>*Commonwealth v. Braynard*, 23 Mass. (6 Pick.) 113 (1828).

great terror and disturbance of divers good citizens, did make an affray . . . .”<sup>40</sup> The court held that the indictment was insufficient as it failed to allege the elements of an affray of fighting between two or more persons.

The Attorney General sought to rely on Hawkins’ claim that “there may be an affray . . . where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes.”<sup>41</sup> That doctrine, averred the court, relied “upon ancient English statutes, enacted in favor of the king, his ministers and other servants, especially upon the statute of the 2d Edward III,” which provided that no man “shall go or ride armed by night or by day, etc.”<sup>42</sup>

The *Simpson* court repeated Hawkins’ comment about the Statute of Northampton “that persons of quality are in no danger of offending against this statute by wearing their common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places and upon occasions in which it is the 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.” *Id.* at 358-59.<sup>43</sup> The court held the English statute not to be incorporated into American common law:

It may be remarked here, that ancient English statutes, from their antiquity and

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<sup>40</sup>*Simpson v. State*, 13 Tenn. Reports (5 Yerg.) 356, 361 (1833).

<sup>41</sup>*Id.* at 357-58, citing Hawkins, *Pleas of the Crown*, book 1, ch. 28, sec. 4.

<sup>42</sup>*Id.* at 358.

<sup>43</sup>*Id.*

from long usage, were cited as common law; and though our ancestors, upon their emigration, brought with them such parts of the common law of England, and the English statutes, as were applicable and suitable to their exchanged and new situation and circumstances, yet most assuredly the common law and statutes, the subject-matter of this fourth section,<sup>44</sup> formed no part of their selection.

*Id.* at 359.

The *Simpson* court held in the alternative that if the Statute of Northampton had been brought to America, it was abrogated by Tennessee's constitutional guarantee "that the freemen of this state have a right to keep and to bear arms for their common defence."<sup>45</sup> That guarantee precluded recognition of "a man's arming himself with dangerous and unusual weapons" as part of the crime of an affray. "By this clause of the constitution, an express power is given and secured to 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 . . . ." The constitution having thus said that "the people may carry arms," doing so in itself could not be the basis of the element of "terror to the people" necessary for an affray.<sup>46</sup>

Recall the flimsy allegations of the bare-bones indictment that the laborer Simpson with no detail other than that "with force and arms being arrayed in a warlike manner" – who knows what specific act that legalese applied to – "to the great terror" of unidentified citizens he made an "affray" with no one.<sup>47</sup>

By contrast to the above case, the Supreme Court of North Carolina upheld indictments

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<sup>44</sup>I.e., Hawkins, book 1, ch. 28, sec. 4.

<sup>45</sup>*Id.* at 360, quoting Tenn. Const., Art. 11, § 26.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 361.

with language and under reasoning reflecting the legacy of the Statute of Northampton as including both going armed and doing so in a concrete manner to terrorize specific people. In *State v. Langford* (1824), the indictment alleged that the defendants “with force and arms, at the house of one Sarah Roffle, an aged widow woman, . . . did then and there wickedly, mischievously and maliciously, and to the terror and dismay of the said Sarah Roffle, fire several guns . . . .”<sup>48</sup> As the court stated, “men were armed with guns, which they fired at the house of an unprotected female, thus exciting her alarm for the safety of her person and her property. This is the *corpus delicti* . . . .”<sup>49</sup> The court recalled the words of Hawkins that “there may be an affray when there is no actual violence: as when a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people . . . .”<sup>50</sup>

Similarly, in *State v. Huntley* (1843), the North Carolina Supreme Court upheld an indictment alleging that the defendant, “with force and arms, . . . did arm himself with pistols, guns, knives and other dangerous and unusual weapons, and, being so armed,” publically threatened before various citizens “to beat, wound, kill and murder” another person and others, causing citizens to be “terrified,” all “to the terror of the people . . . .”<sup>51</sup> The court quoted Blackstone’s references to “the offence of riding or going armed with dangerous or unusual weapons, . . . by terrifying the good people of the land,” and to the Statute of Northampton.<sup>52</sup> It

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<sup>48</sup>*State v. Langford*, 10 N.C. (3 Hawks) 381 (1824).

<sup>49</sup>*Id.* at 383.

<sup>50</sup>*Id.*, quoting 1 Hawkins 136.

<sup>51</sup>*State v. Huntley*, 25 N.C. (3 Ired.) 418, 419 (1843).

<sup>52</sup>*Id.* at 420-21, quoting 4 Bl. Com. 149.

further quoted Hawkins' reference to an affray as including "where a man arms himself with dangerous and unusual weapons in such a manner, as will naturally cause a terror to the people . . . ."<sup>53</sup> It also noted the statement in Sir John Knight's case that the statute of Northampton was made in affirmance of the common law.<sup>54</sup>

The *Huntley* court next turned to the guarantee of the North Carolina bill of rights securing to every man the right to "bear arms for the defence of the State." While this "secures to him a right of which he cannot be deprived," he has no right to "employ those arms . . . to the annoyance and terror and danger of its citizens . . . ."<sup>55</sup> That said, "the carrying of a gun *per se* constitutes no offence. For any lawful purpose – either of business or amusement – the citizen is at perfect liberty to carry his gun."<sup>56</sup> However, he may not carry a weapon "to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people."<sup>57</sup>

Carrying a gun *per se* was a statutory offense as applied not just to slaves, but also to free blacks. In *State v. Newsom* (1844),<sup>58</sup> the North Carolina Supreme Court upheld a provision "to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens."<sup>59</sup> By inference, the right to carry firearms was thus considered

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<sup>53</sup>*Id.* at 421, quoting Haw. P. C. B. 1, ch. 28, sect. 1.

<sup>54</sup>*Id.* at 421, citing 3 Mod. Rep. 117.

<sup>55</sup>*Id.* at 422.

<sup>56</sup>*Id.* at 422-23.

<sup>57</sup>*Id.* at 423.

<sup>58</sup> 27 N.C. 203 (1844).

<sup>59</sup> *Id.* at 204.

to be a right that flowed inherently from one's citizenship. The court also opined that the Second Amendment only applied to the federal government, not to the states.<sup>60</sup>

Decisions on affrays were rendered by courts of other states that used some of the above familiar language without mentioning the English antecedents. *O'Neill v. State* (1849), a decision by the Alabama Supreme Court, upheld a conviction for an affray in which the apparently unarmed defendant rode up to the witness and called him a "thief, liar, rascal, &c., whereupon the witness caned him," but the defendant did not resist other than to "to throw up his hands to protect his head . . . ."<sup>61</sup> Reversing the conviction, the court held that quarrelsome words did not constitute an affray, adding in *dictum*: "It is probable, however, that if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows."<sup>62</sup>

### **Prohibitions on Carrying Concealed Weapons**

It was not an offense at common law or in the statutes of any state at the Founding peaceably to carry a concealed weapon. Going armed without the arm being seen inherently could not cause terror to anyone. In the early Republic, some states enacted laws prohibiting the carrying of arms in a concealed manner. That they found it necessary to do so further demonstrates that there was no preexisting common law offense of going armed *per se*.

Given that a ban on concealed carry was unprecedented, it was no small wonder that the

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<sup>60</sup> *Id.* at 207.

<sup>61</sup> *O'Neill v. State*, 16 Ala. 65, 65 (1849).

<sup>62</sup> *Id.* at 67, citing 1 *Russell on Crimes* 271.

first judicial decision thereon by a state court declared it unconstitutional. In *Bliss v. Commonwealth* (1822), the Kentucky Supreme Court reasoned that “in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.”<sup>63</sup> What if the legislature banned open carry, the court asked? It reasoned that the rule could not be that whichever mode of carry was banned first was thereby constitutional.<sup>64</sup>

The sister courts of other states rejected that view and upheld the bans on concealed carry because open carry was allowed. The Alabama Supreme Court said it this way in upholding the conviction of a sheriff for carrying a concealed pistol: “A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”<sup>65</sup>

The Georgia Supreme Court overturned the conviction of a defendant “for having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known and used as a horseman’s pistol,” but where it was not alleged that he carried it concealed.<sup>66</sup> While Georgia had no state constitutional guarantee to bear arms, the court reasoned: “The language of the *second* amendment is broad enough to embrace both Federal and state governments . . . . Is it not an unalienable right, which lies at the bottom of every free

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<sup>63</sup>*Bliss v. Commonwealth*, 2 Litt. 90, 92 (Ky. 1822).

<sup>64</sup>*Id.* at 93.

<sup>65</sup>*State v. Reid*, 1 Ala. 612, 616-17 (1840).

<sup>66</sup>*Nunn v. State*, 1 Ga. 243, 247 (1846).

government?”<sup>67</sup>

While holding that a statute prohibiting the carrying of concealed weapons was not in violation of the Second Amendment, the Louisiana Supreme Court reasoned that the right to carry arms openly “placed men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defense of themselves, if necessary, and of their country . . . .”<sup>68</sup> As this suggests, the open carry rule was tied into the social norms of the day.

The passage of prohibitions in some states on carrying concealed weapons and the decisions thereon upholding open carry again illustrate that there was no recognized common law offense simply of going armed without more. It would have been unnecessary to restrict concealed carry if both concealed and open carry were already crimes under the common law.

### **Conclusion**

Criminal law was and is serious business. Every word in the definition of a crime, whether under the common law or a statute, has meaning. In old England, the early Republic, or in today’s criminal justice system, elements of a crime could not simply be crossed out as meaningless or redundant. To be sure, a “history office lawyer” can broaden or invent new crimes, and a “law office historian” can insert these invented crimes in an *amicus curiae* brief to pursue predetermined litigation goals. But in the real world of criminal law, the world doesn’t operate that way.

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<sup>67</sup>*Id.* at 250.

<sup>68</sup>*State v. Chandler*, 5 La. Ann 489, 490 (1850). *And see State v. Jumel*, 13 La Ann. 399 (1858).

Take the crime of going armed to the terror of the people as an example. Imagine a prosecutor who brings an indictment simply accusing Jane Doe of going armed, without alleging the element of doing so with dangerous and unusual weapons which are identified and without alleging the element of doing so to the terror of the people or naming even one person as having been terrorized. When the defense counsel files a motion to dismiss for failure to allege a crime, the prosecutor responds that going armed states the crime, and the other verbiage and specifics are redundant. The judge will dismiss the indictment.

Assume alternatively that the indictment stated all elements of the offense, the case goes to trial, and the prosecutor puts on evidence only that the defendant went armed, but no evidence that anyone was terrorized, perhaps because the defendant acted peaceably at all times, those who saw the gun didn't have a reasonable apprehension of terror, didn't even care, or didn't even see the gun, and no one saw any gun other than the police officer who made the arrest. The defense attorney would then move to dismiss the charge, or to strike the Commonwealth's evidence in the parlance of some states, and the court would grant the motion.

Or assume that defense counsel for whatever reason didn't move to dismiss and the judge instructs the jury with the elements of the offense. There is no way the judge would instruct the jury that the defendant may be found guilty merely by going armed. Instead, the judge will tell the jury that to convict, the jury must find the defendant guilty of each and every element of the offense, including the allegedly redundant part about terrorizing the people.

In closing arguments, the prosecutor tells the jury that we've proven that the defendant carried a gun, that proves that he terrorized the people (albeit no one in particular), and we don't have to prove anything more for you to convict. Defense counsel points out that not one iota of

evidence has been offered that anyone was reasonably terrorized by his peaceably carrying of the gun. Who did he threaten? No one. Did he keep the peace? Yes. Under this scenario, the jury must acquit the defendant.

If no one was paying attention in the above scenarios, and the prosecutor and the defense counsel were incompetent, and the trial judge generally rules for the government just because they're the government (Captain Renault in *Casablanca* would be shocked, shocked that any such judges exist), the conviction would be overturned on appeal.

Perhaps few Americans would want to live in a society where the essential rights of due process, notice of the nature of crimes, and basic criminal justice procedures are disregarded. The great exception for some advocates, including both lawyers and historians, relates to the constitutional right of the people to keep and bear arms, the existence of which they deny in any event.

“Law office history” has been decried as an inferior mode of representing the nature of constitutional rights. Lawyers must defer to historians who deny selected constitutional rights. But historians are not subject to the same disciplinary rules as lawyers, although Michael Bellesiles’ fraudulent castigation of the Second Amendment turned a history professor into a bartender.<sup>69</sup> To be sure, lawyers writing *amicus curiae* briefs can and do say about anything without any worry that the disciplinary rules will apply to them.

Lawyers who actually practice criminal law are not so immune. Prosecutors and defense attorneys can have legitimate disputes about points of law, but “a lawyer shall not knowingly . . .

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<sup>69</sup>James Lindgren, “Fall from Grace: Arming America and the Bellesiles Scandal,” 111 *Yale Law Journal* 2195 (2002).

make a false statement of fact or law to a tribunal . . . .”<sup>70</sup> It would be unethical for a prosecutor to fail to inform a grand jury of all elements of an offense in order to obtain an indictment, to bring a defendant into court under the indictment, and to argue to the judge that the indictment states an offense when in fact the prosecutor deleted an essential element of the offense.

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<sup>70</sup>Rule 3.3(a)(1), American Bar Association Model Rules of Professional Conduct.  
[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_3\\_candor\\_toward\\_the\\_tribunal.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html).