HOW A FAKE CITATION MISLED COURTS TO UPHOLD "SENSITIVE PLACE" GUN BANS: THE SECOND CIRCUIT'S MISUNDERSTANDING OF FOUNDING-ERA LAW ON GOING ARMED

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ABSTRACT

This article concerns how a fake citation has misled courts to uphold "sensitive place" gun bans. *New York State Rifle & Pistol Ass'n v. Bruen* held that the Second Amendment presumptively protects conduct covered by its plain text. A state must justify its restriction by showing it to be consistent with America's historical tradition of firearm regulation. The original public understanding at the Founding is key to that question.

Post-*Bruen*, courts have sought to uphold restrictions that ban firearms in various "sensitive places" based on a misunderstanding of the Founding-era offense of going armed in a manner that terrorized the public. *Antonyuk v. James* upheld New York's place restrictions based on its claim that Founding-era Virginia and North Carolina laws banned going armed per se in fairs and markets. However, it conceded that Virginia only prohibited going armed "in terror of the Country," but maintained that North Carolina had no such element of the offense, adding that place restrictions in the late 19th century followed the North Carolina model. That historical tradition of regulation, the Second Circuit held, justifies New York's current law.

But *Antonyuk* has constructed a house of cards by ignoring actual North Carolina law and mistaking a privately published book for that law. In 1792, François-Xavier Martin published *A Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina*, which included

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the 1328 Statute of Northampton. *Bruen* commented that the Statute "has little bearing on the Second Amendment adopted in 1791," and in any event it was interpreted to apply only to going armed in a manner to terrorize others.

Antonyuk did not bother to research actual North Carolina law. In 1741, the colony of North Carolina enacted a law directing constables to arrest "all such Persons as, in your Sight, shall ride or go armed *offensively*"; by contrast, it further provided that "no Slave shall go armed with Gun, Sword, Club, or other Weapon." That same language was approved by an act passed in 1791 and continued to reappear in the statutes at least as late as 1855. Going armed was not a crime unless done so offensively, while going armed per se was a crime if the person was a slave.

Antonyuk further ignored North Carolina precedents. *State v. Huntly* recognized the common-law offense of going armed to terrify, but said that "the carrying of a gun *per se* constitutes no offence." That reading of the law was repeated over and over as late as 2024.

Courts have been misled by the citation of Martin's *Collection* as a "law" at the highest level. Dissenting in *Bruen*, Justice Breyer cited Martin as the authority for the proposition that "North Carolina enacted a law whose language was lifted from the Statute of Northampton virtually verbatim (vestigial references to the King included)." It boggles the imagination to think that the state would enact a law with several references to "the King" sixteen years after the Declaration of Independence.

It is unclear where the rumor started that Martin's book was a "law," but the Duke Center for Firearms Law includes it in its Repository of Historical Gun Laws under the citation "ch. 3, N.C. Gen. Stat. (Francois X. Martin 1792)." Chapter 3 of N.C. General Statutes in 1792 included no such provision. Another fake citation for this "law" that has been cited is "1792 N.C. Laws 60, 61 ch. 3," which does not exist.

The Ninth Circuit, in *Wolford v. Lopez*, recognized that *Bruen* rejected the purported place restrictions in North Carolina law, but upheld them anyway despite no Founding-era tradition of regulation. Yet the Third Circuit swallowed *Antonyuk* hook, line, and sinker to uphold New Jersey's extensive place bans, including the misrepresentation that Martin's book was a North Carolina "law," in *Koons v. Attorney General of New Jersey*. And then a different panel of the Second Circuit, in *Frey v. City of New York*, admitted

that "*Bruen* undermines" *Antonyuk*'s interpretation, but upheld other parts of New York's "sensitive place" bans despite no Founding-era tradition of regulation.

This matter is not about a single, erroneous citation with no consequence. In *Antonyuk*, the Second Circuit built its entire theory of Founding-era analogs on sand in order to comply with *Bruen*'s directive to find a historical tradition of regulation that supported New York's wide restrictions. That decision has since influenced two other circuits, covering three states, to adopt the same flawed approach—and others may soon follow. These decisions are based on a badly mistaken analysis of America's historical tradition of firearm regulation and should be overturned.

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1. INTRODUCTION

In recent years, whenever the Supreme Court renders a decision upholding "the right of the people to keep and bear arms" under the Second Amendment against state infringements, [1] legislatures in some states criminalize previously lawful conduct in order to circumvent the Court's

[1] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

rulings.[2] When the new laws are challenged, courts sometimes come to the rescue with arguments to uphold the restrictions based on reasons that purport to comply with the Court's precedents. This article traces how one appellate court relied on a single bogus citation to uphold one state's prohibitions on possession of firearms in most public places, creating a precedent other courts use to uphold bans in other states.

In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court set forth a two-part test for determining whether a restriction on firearms violates the right to keep and bear arms. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[3]

Types of regulations identified by the Court were Founding-era restrictions on carrying firearms at "sensitive places" such as legislative assemblies and courthouses.[4] However, sensitive places may not be expanded to include "all places of public congregation that are not isolated from law enforcement . . . ."[5]

Bruen held that the State of New York's requirement to show "proper cause" to a government official to obtain a permit to carry a firearm violates the Second Amendment right to bear arms.[6] To counter that decision, New York enacted the Concealed Carry Improvement Act, which severely limits the places where license holders may carry firearms.[7] The U.S. District Court for the Northern District of New York found that a number of the locations lacked historical support under *Bruen* as "sensitive places" and preliminarily enjoined enforcement thereof.[8]

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2 *See* Christopher Weber, *Federal Judge Blocks California Law That Would Have Banned Carrying Firearms in Most Public Places*, ASSOCIATED PRESS (Dec. 30, 2023, at 22:41 CT), https://perma.cc/67NW-R3FF; *see also* Mike Catalini, *Appeals Court Upholds New Jersey's Ban on Carrying Firearms in Sensitive Places*, ASSOCIATED PRESS (Sep. 10, 2025, at 14:26 CT), https://perma.cc/UP68-6KA5.

3 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

4 *Id.* at 30.

5 *Id.* at 31.

6 *Id.* at 70.

7 S.B. S51001, 2021–2022 State S., Extraordinary Sess. (N.Y. 2022), https://perma.cc/E7LM-89E6.

8 They include places providing "behavioral health, or chemical dependence care or

The U.S. Court of Appeals for the Second Circuit, in *Antonyuk v. Chiumento*, reversed the district court's decision as to the "sensitive places" restrictions.[9] However, the court let stand the lower court's injunction against the gun ban applicable to church members as a violation of the First Amendment's Free Exercise Clause.[10] It also upheld the lower court's injunction regarding "restricted places" where firearms may be possessed on private property open to the public only if the owner positively consents.[11]

The plaintiffs filed a petition for a writ of certiorari to the Supreme Court, which granted the petition, vacated the judgment, and remanded the case "for further consideration in light of *United States* v. *Rahimi*, 602 U. S. –– (2024)."[12] Following the remand, in 2024, the Second Circuit decided the case again, then styled *Antonyuk v. James*, rendering the same decision almost word-for-word, other than references to *Rahimi*.[13] Below, these decisions will be referred to as *Antonyuk I* and *Antonyuk II*.

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services"; "any place of worship or religious observation"; "public parks, and zoos"; "airports" even if the licensee complies with federal regulations; buses; places with a license for on-premise consumption of alcohol; "theaters," "conference centers," and "banquet halls"; and "any gathering of individuals to collectively express their constitutional rights to protest or assemble." Antonyuk v. Hochul, 639 F. Supp. 3d 232, 349 (N.D.N.Y. 2022).

9 Antonyuk v. Chiumento (*Antonyuk I*), 89 F.4th 271, 387 (2d Cir. 2023).

10 The court found that the ban is not neutral, as owners of retail businesses open to the public may decide whether to allow firearms on their premises, and the ban is not narrowly tailored to meet the state's interest. *Id.* at 350–51.

11 Specifically, the court agreed that plaintiffs are likely to prevail on their claim that the ban on firearms on private property open to the public, unless the property owner posts a conspicuous sign that firearms are permitted, violates the Second Amendment. Historically, enclosed private lands were closed to the public, but no historical analog supports the law's default application to places open to the public. *Id.* at 385–86.

12 Antonyuk v. James, 144 S. Ct. 2709, 2709 (2024) (mem.).

13 Antonyuk v. James (*Antonyuk II*), 120 F.4th 941, 1048 (2d Cir. 2024).

The plaintiffs then filed another petition for a writ of certiorari to the Supreme Court on two narrow issues not germane here.[14] That petition was denied.[15]

This article focuses on a critical error by the Second Circuit that entirely undercuts its analysis purporting to find historical analogs for the state's newly minted bans declaring various public areas as "sensitive places." For instance, the court upheld the park ban "at least insofar as the regulation prohibits firearms in *urban* parks, though not necessarily as to *rural* parks," which includes "wilderness parks, forests, and reserves."[16]

Antonyuk II's flawed analysis was followed by the Ninth Circuit in *Wolford v. Lopez*,[17] upholding gun bans in California and Hawaii, and by the Third Circuit in *Koons v. Attorney General New Jersey*, upholding gun bans in New Jersey.[18] With the first major precedent on the subject in place, it became easier for later courts to buy into the same defective analysis.

This article concerns only one issue in which some lower courts are resisting the Supreme Court's precedents on the Second Amendment. Given the breadth of such resistance, the Supreme Court should review and correct those courts that are pushing the envelope against its jurisprudence.

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14 Petition for Writ of Certiorari, Antonyuk v. James, 145 S. Ct. 1900 (Jan. 22, 2025) (No. 24-795), stated the issues presented as:

> 1. Whether the proper historical time period for ascertaining the Second Amendment's original meaning as applied to the states is 1791, rather than 1868; and
> 2. Whether "the people" must convince government officials of their "good moral character" before exercising their Second Amendment right to bear arms.

15 *Antonyuk*, 145 S. Ct. at 1900.

16 *Antonyuk II*, 120 F.4th at 1019.

17 116 F.4th 959, 1003 (9th Cir. 2024).

18 While this article was being prepared for publication, the Third Circuit granted rehearing en banc and vacated that decision. 156 F.4th 210, 219, 274 (3d Cir. 2025), *vacated*, 162 F.4th 100 (3d Cir. 2025).

2. *ANTONYUK* CLAIMS TWO FOUNDING-ERA ANALOGS, THEN ADMITS THAT ONE OF THEM DOESN'T COUNT

2.1. The 1328 Statute of Northampton Arises from the Grave, Supposedly Through the Founding-Era Statutes of Virginia and North Carolina

In *Bruen*, the Supreme Court seemed to have deep-sixed the 1328 Statute of Northampton. The Statute provided in part that English subjects may not

> 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, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure.[19]

New York argued that the Statute was a general ban on carrying arms for self-defense in public that watered down the original public understanding of the Second Amendment, but the Court gave no credence to the claim: "Notwithstanding the ink the parties spill over this provision, the Statute of Northampton—at least as it was understood during the Middle Ages—has little bearing on the Second Amendment adopted in 1791."[20] The Court read the Statute to apply to armor and to large weapons used in combat or to acts that breached the peace, but not to knives and other small arms peaceably carried for self-protection; handguns had not yet been invented.[21]

In *Sir John Knight's Case*, decided in 1686, Knight was prosecuted under the Statute for carrying arms during church services.[22] The King's Bench ruled that "'go[ing] armed *to terrify* the King's subjects' was 'a great

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19 N.Y. State Rifle & Pistol Ass'n v. *Bruen*, 597 U.S. 1, 40 (2022) (quoting 2 Edw. 3 c. 3 (1328)).

20 *Id.* at 41.

21 *Id.*

22 *Id.* at 43 (citing Sir John Knight's Case, 87 Eng. Rep. 75, 76, 3 Mod. 117, 117 (K.B. 1686)).

offence at the *common law*'" and that the Statute "'is but an affirmance of that law.'"[23] Noting that Knight was acquitted, *Bruen* explained that "one's conduct 'will come within the Act,'—*i.e.*, would terrify the King's subjects—only 'where the crime shall appear to be malo animo,' with evil intent or malice."[24]

Bruen further quoted from Serjeant William Hawkins's 1716 treatise that "'no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People.'"[25]

By the time of America's Founding, English law did not restrict the carrying of arms for self-defense. The colonies of Massachusetts and New Hampshire directed justices of the peace to arrest "such as shall ride or go armed Offensively . . . by Night or by Day, in Fear or Affray of Their Majesties Liege People."[26] Rejecting the argument that going "armed Offensively" meant carrying an offensive weapon, *Bruen* explained that these laws "merely codified the existing common-law offense of bearing arms to terrorize the people . . . ."[27]

Similarly, a 1786 Virginia statute provided that no person shall "go nor ride armed by night nor by day, in fairs or markets, or in other places, *in terror* of the Country."[28] And a 1795 Massachusetts statute directed justices of the peace to arrest "such as shall ride or go armed *offensively, to the fear or terror* of the good citizens of this Commonwealth."[29] As *Bruen* concludes, such laws restricted the carrying of arms only if done in a way to cause "fear" or "terror," and did not generally prohibit carrying in public.[30]

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23 *Id.* at 43–44 (quoting *Sir John Knight's Case*, 87 Eng. Rep. at 76, 3 Mod. at 118 (first emphasis added)).

24 *Id.* at 44 (citation omitted) (quoting Rex v. Sir John Knight, 90 Eng. Rep. 330, 330, 1 Comb. 38, 39 (K.B. 1686)).

25 *Id.* at 45 (quoting 1 WILLIAM HAWKINS, PLEAS OF THE CROWN 136 (1716)).

26 *Id.* at 46 (quoting 1692 MASS. ACTS & LAWS No. 6, 11–12; 1699 N.H. ACTS & LAWS ch. 1).

27 *Id.* at 47.

28 *Id.* at 49 (quoting COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA ch. 21, 33 (1794)) (emphasis added).

29 *Id.* at 49–50 (quoting 1795 MASS. ACTS & LAWS ch. 2, 436, in LAWS OF THE COMMONWEALTH OF MASSACHUSETTS) (emphasis added).

30 *Id.* at 50.

While *Bruen* rejected the argument that the Statute prohibited peaceably carrying arms in public, *Antonyuk II* purports to have found a way to raise the Statute from the dead and reinterpreted it as having "prohibited firearm carriage in general at fairs and markets regardless of conduct."[31] *Bruen* found the Statute did not prohibit carrying arms in public for self-defense generally, but it supposedly did not address "the more specific prohibitions in the statute such as carriage in fairs and markets."[32] The equivalent of fairs and markets would be "quintessentially crowded places" where firearms may be banned without regard to conduct.[33] So just when it seemed that *Bruen* pronounced the last rites for the Statute of Northampton, *Antonyuk II* seeks to resuscitate the Statute's reference to fairs and markets as places where arms may be banned without regard to conduct.

To show the Founding-era pedigree for its argument, the *Antonyuk II* court purports to have discovered that "at least two states—Virginia and North Carolina—passed statutes at the Founding that replicated the medieval English law prohibiting firearms in fairs and markets, *i.e.*, the traditional, crowded public forum."[34] Actually, neither state prohibited the mere possession of firearms at such places. The court recognized that regarding Virginia law,[35] but greatly misapprehended North Carolina law. And this historical misapprehension is the major pillar on which the court bases its conclusion upholding New York's gun ban on various locations under the "sensitive places" rubric.

2.2. Virginia Made it a Statutory Offense to Go Armed "In Terror of the Country," but *Antonyuk II* Claims a North Carolina "Law" That Banned Arms in Fairs and Markets

The 1786 Virginia statute provided that no man may come before justices of the courts "with force and arms," "nor go nor ride armed by night nor by day, in fair or markets, or in other places, in terror of the count[r]y,

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31 *Antonyuk II*, 120 F.4th 941, 1020 n.82 (2d Cir. 2024).

32 *Id.* (citation modified).

33 *Id.*

34 *Id.* at 1019–20.

35 *Id.* at 1020 n.82.

upon pain of being arrested and committed to prison . . . ."[36] *Antonyuk II* acknowledged that "the Virginia statute differed from the medieval English Northampton statute in that it prohibited *conduct* and not simply carriage, *i.e.*, bearing arms in 'terror' of the county [*sic*]. . . ."[37]

While accurate as to the Virginia statute, the Northampton statute, as interpreted in *Sir John Knight's Case* of 1686, also required a "terror" element.[38] *Antonyuk II* fails to discuss or even cite the *Knight* case.

The *Antonyuk II* court then turns to "a 1792 North Carolina statute replicating the 1328 British statute and prohibiting firearms in fairs or markets . . . ."[39] It refers to the "North Carolina *law* prohibiting 'to go nor ride armed by night nor by day, in fairs, markets.'"[40] It says that "the North Carolina *statute*, like the Northampton statute, appears to have prohibited firearm carriage in general at fairs and markets regardless of conduct."[41] And it cites this "law" as the *Collection of Statutes of the Parliament of England in Force in the State of North Carolina*, pp. 60–61, ch. 3 (F. Martin Ed. 1792).[42]

No such North Carolina "law" existed, and the *Collection* edited by F. Martin was not enacted into law. Unfortunately, *Antonyuk II* failed to conduct any research into the history of North Carolina's treatment of English statutes or the state's statutes and judicial decisions, which recognized going armed as a common-law offense only if done so in a manner to terrorize others. Here's the back story.

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36 1786 VA. ACTS ch. 49, 35. This original printing misspelled "country" as "county," but that was later corrected to refer to "country." *See* COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA ch. 21, 33 (1794), https://perma.cc/E236-NQ8P.

37 *Antonyuk II*, 120 F.4th at 1020 n.82. The court recognized that the District of Columbia also prohibited going or riding "armed by night nor day, in fairs or markets, or in other places, *in terror* of the country." *Id.* at 1020 n.81 (quoting An Act for Punishment of Crimes and Offences, within the District of Columbia, § 40 (1816), https://perma.cc/88PB-Y654 (emphasis added)).

38 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 50 (2022).

39 *Antonyuk II*, 120 F.4th at 1037.

40 *Id.* at 1020 (emphasis added) (internal punctuation omitted).

41 *Id.* at 1020 n.82.

42 *Id.* at 1019, 1020, 1037, 1039 n.114.

3. ACTUAL NORTH CAROLINA LAWS VERSUS MARTIN'S COLLECTION OF ENGLISH STATUTES

3.1. The Colony of North Carolina Recognized "Going Armed Offensively" to be a Common-Law Offense, but Excluded the Statute of Northampton from Being in Force

In 1749, the North Carolina General Assembly passed "An Act, to put in Force in this Province, the several Statutes of the Kingdom of England, or South-Britain, therein particularly mentioned."[43] It included several statutes of Edward III, but did *not* include the Statute of Northampton, 2 Edw. III c. 3 (1328).[44] The Act was published in *A Collection of All the Public Acts of Assembly of the Province of North-Carolina* (1751), which was confirmed by the General Assembly.[45] That volume also included two enactments passed in 1741. First, the Act to Appoint Constables required that constables take an oath to arrest "all such Persons as, in your Sight, shall ride or go armed *offensively*, or shall commit or make any Riot, Affray, or other Breach of his Majesty's Peace."[46] While no act of Assembly made that a crime, it reflected the common-law offense of an affray.

Second, and by contrast, An Act Concerning Servants and Slaves provided: "That no Slave shall go armed with Gun, Sword, Club, or other Weapon, or shall keep any such Weapon, or shall hunt or range with a Gun in the Woods, upon any Pretence whatsoever, (except such Slave or Slaves who shall have a Certificate, as is hereinafter provided;) . . . ."[47] So it was a crime for a slave to "go armed" per se, but it was an offense for a free person to go armed only if done so "offensively." It goes without saying that, if a master could authorize a slave to go armed peaceably, the master could also go armed peaceably.

The Second Circuit in *Antonyuk II* failed to mention the 1741 law, even though (as detailed below) it would be consistently repeated in the

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43 A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA 293 (New Bern, James Davis 1751), https://perma.cc/934K-RGZ2.

44 *Id.* at 295.

45 *Id.* at 293.

46 *Id.* at 131 (emphasis added).

47 *Id.* at 170 (passed as 1741 N.C. Sess. Laws 201, ch. 24, § 40).

North Carolina codes through the antebellum period. The 1741 law was cited in the U.S. Supreme Court's decision in *United States v. Rahimi* in connection with "the ancient common-law prohibition on affrays," which would provide "a mechanism for punishing those who had menaced others with firearms."[48]

As *Rahimi* noted, "Although the prototypical affray involved fighting in public, commentators understood affrays to encompass the offense of 'arm[ing]' oneself 'to the Terror of the People.'" [49] As described by Blackstone, "the going armed laws prohibited 'riding or going armed, with dangerous or unusual weapons, [to] terrify[ ] the good people of the land.'"[50] The Court cited a North Carolina decision, discussed below, stating that "such conduct disrupted the 'public order' and 'le[d] almost necessarily to actual violence.'"[51]

In that context, *Rahimi* explained that "at least four States—Massachusetts, New Hampshire, North Carolina, and Virginia—expressly codified prohibitions on going armed."[52] For North Carolina, it cited the "1741 statute" from the same source that is cited here.[53]

When the Supreme Court vacated *Antonyuk I*, it instructed the Second Circuit to reconsider its decision consistent with *Rahimi*, which in turn gave it notice of the 1741 North Carolina statute.[54] *Antonyuk II* simply ignored that directive and instead doubled down in favor of Martin's non-law.

Reflecting the above understanding, James Davis, a justice of the peace for the County of Craven, North Carolina, published the first manual for justices of the peace in the colony in 1774.[55] It stated:

> Justices of the Peace . . . may apprehend any Person who shall go or ride armed with unusual and offensive Weapons, in an

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48 602 U.S. 680, 697 (2024).

49 *Id.* (quoting THEODORE BARLOW, THE JUSTICE OF THE PEACE: A TREATISE 11 (1745)).

50 *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149).

51 *Id.* (quoting State v. Huntly, 25 N.C. 418, 421–22 (N.C. 1843)).

52 *Id.* at 698.

53 *Id.* (citing COLLECTION OF ALL OF THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA: NOW IN FORCE AND USE 131 (New Bern, James Davis 1751)).

54 Antonyuk v. James, 144 S. Ct. 2709, 2709 (2024) (mem.); United States v. Rahimi, 602 U.S. 680, 698 (2024).

55 JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE (New Bern, James Davis 1774).

> Affray, or among any great Concourse of the People, or who shall appear, so armed, before the King's Justices sitting in Court, and may bind such Offender to the Peace, or good Behaviour; and if he refuses to be so bound, may commit him.[56]

Stated otherwise, referring to the constable's oath: "He may take away Arms from such who ride, or go, offensively armed, in Terror of the People, and may apprehend the Persons, and carry them, and their Arms, before a Justice of Peace."[57] That stated the common-law offense perfectly.

3.2. As an Independent State, North Carolina Recognized Only the British Statutes and the Parts of the Common Law Consistent with Freedom and Independence to Remain in Force

As the above Act of 1749 made clear, the Statute of Northampton was not among the British statutes put in force in the colony of North Carolina. In 1776, following the Declaration of Independence and the adoption of the state constitution, the North Carolina Provincial Congress declared that "all such Statutes and such parts of the Common Law and Acts of Assembly heretofore in use here and not destructive of, repugnant to or inconsistent with the freedom and Independence of this State, or the United States of America" would be in force until the next session of the General Assembly.[58] That left open the question of which British statutes were "heretofore in use here" and otherwise not "inconsistent with the freedom and Independence" of America.

In 1778, using similar language, the General Assembly declared that "all such Statutes, and such Parts of the Common Law, as were heretofore in

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56 *Id.* at 13; *see also id.* at 122 (repeating the oath from the 1741 enactment).

57 *Id.* at 119. "In the Execution of his Office he may arm himself, and his Assistants, with Arms offensive and defensive: And he may apprehend any Person appearing in Public Places or Meetings, armed with unusual and offensive Weapons, to the Terror of the People, seize his Arms, and carry them, together with the Offender, before a Justice of Peace." *Id.* at 331.

58 An Ordinance to inforce the Statute Laws and such part of the Common Law and Acts of Assembly heretofore in use here (1776), *reprinted in* 23 STATE RECORDS OF NORTH CAROLINA 992 (1905), https://perma.cc/9H7W-KJR7.

Force and Use within this Territory, and all the Acts of the late General Assemblies thereof," or parts thereof "as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State, and the Form of Government therein established," unless otherwise abrogated, remained in force.[59] The "common law" referred to "the common law of England as of the date of the signing of the American Declaration of Independence."[60]

Which parts of the common law or of the British statutes declared to be in force in the 1749 enactment were not inconsistent with the state's freedom and independence and form of government, and were not otherwise done away with? Ultimately, that would be for the courts to decide. Referring to the 1778 law, it was argued in a case almost twenty years later: "This common law is kept in remembrance, by the memorials of former decisions handed down to us in the form of reports, and they are the precedents for future decisions—so far as they ascertain what the common law is in any given case, so far are the Judges authorised to say what it is in that case . . . ."[61]

In 1787, James Iredell (who would serve as a Justice on the U.S. Supreme Court from 1790 until 1799)[62] was commissioned by the General Assembly to revise and compile all laws that remained in force and to leave out acts that are repealed or obsolete.[63] The compilation was approved by an act passed in 1791 and was published as *Laws of the State of North-Carolina*, otherwise known as "Iredell's Revisal."[64] It contained the two "going armed" laws passed in 1741—the constable's oath to "arrest all such Persons as, in your Sight, shall ride or go armed offensively,"[65] and the prohibition that "no Slave shall go armed with Gun, Sword, Club, or other

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59 An Act to enforce such parts of the Statute and Common Laws as have been heretofore in Force and Use here (1778), *reprinted in* 24 STATE RECORDS OF NORTH CAROLINA 162 (1905), https://perma.cc/4Z99-KB4K.

60 Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 707 (N.C. 2021) (quoting Gwathmey v. State, 464 S.E.2d 674, 679 (N.C. 1995)).

61 Young v. Erwin, 2 N.C. (1 Hayw.) 323, 323–24 (1796).

62 *Justice James Iredell*, JUSTIA, https://perma.cc/9MZB-CLTS.

63 Commissioners of 1838, *Preface* to REVISED CODE OF NORTH CAROLINA ENACTED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1854, at xii–xiii (1855).

64 *Id.*; JAMES IREDELL, LAWS OF THE STATE OF NORTH-CAROLINA (Edenton, Hodge & Wills 1791).

65 IREDELL, *supra* note 64, at 70.

Weapon" without a certificate from his master.[66] It included no other "going armed" provisions.

3.3. François-Xavier Martin's Justice of the Peace Manual and *A Collection of the Statutes of the Parliament of England*

The *Antonyuk II* court refers to "F. Martin" as the editor of *A Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina*, which the court cites as the source of the North Carolina "law" that replicated the Statute of Northampton.[67] His full name was François-Xavier Martin.[68] Originally from France and then the island of Martinique, Martin came to Newbern, North Carolina, in 1786 when he was aged about 20, "destitute of resources, among strangers whose language he understood imperfectly, if he could speak it at all."[69] He found work for a printer, later founding his own press and newspaper, publishing almanacs, pamphlets, books, and acts of the Assembly. [70] Martin read the law and was admitted to the bar in 1789.[71]

In 1791, François-Xavier Martin published a compilation entitled *The Office and Authority of a Justice of the Peace and of Sheriffs, Coroners, &c.*[72] It provides the following definition: "AFFRAY is a fighting between two or more; but there must be a stroke given or offered, or weapon drawn: otherwise it is not an affray."[73] Drawing a weapon such as a sword or pistol would induce terror and is an example of going armed offensively. The only reference to going armed per se was the following: "No slave shall go armed

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66 *Id.* at 93.

67 *Antonyuk II*, 120 F.4th 941, 1019, 1020, 1037, 1039 n.114 (2d Cir. 2024).

68 *Martin, François Xavier*, ENCYCLOPEDIA.COM, https://perma.cc/924Y-DZBX; *see also* H. G. Jones, *Martin, François-Xavier*, NCPEDIA (1991), https://perma.cc/4YC3-6H.

69 HENRY A. BULLARD, A DISCOURSE ON THE LIFE, CHARACTER, AND WRITINGS OF THE HON. FRANÇOIS XAVIER MARTIN 18–19 (1850); *see also Martin, François Xavier*, *supra* note 68 (describing Martin's emigration from France to North Carolina).

70 H. G. Jones, *supra* note 68.

71 *Id.*

72 FRANÇOIS-XAVIER MARTIN, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE AND OF SHERIFFS, CORONERS, &C., ACCORDING TO THE LAWS OF THE STATE OF NORTH-CAROLINA (New Bern 1791).

73 *Id.* at 37.

with gun, sword, club, or other weapon," under the 1741 law.[74] No mention was made of the Statute of Northampton.

> Apparently, in 1791, Martin
> was encouraged by the legislature of North Carolina to prepare a compilation of the British statutes which were in force in that State at the period of the revolution. It was a work of immense labor to examine critically the whole body of British statutory law, with a view of ascertaining which of them were applicable to that colony.[75]

That was only his second year as a member of the bar.[76]

In 1792, Martin published, by his own press, *A Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina*, a mammoth volume totaling 424 pages.[77] The cover page states: "Published according to a resolve of the General Assembly by François-Xavier Martin, Esq."[78] No actual resolution of the General Assembly has been located. The work did not acknowledge oversight by any other person, much less approval by the General Assembly.

Martin noted in the Preface that "no act of Assembly afforded it, and . . . many, even among the most respectable, professors of the law disagree in regard to the applicability of a number of British statutes."[79] He denied having the work "dependent on my own judgment, which, unmatured by age and unsupported by experience, could not be deemed a criterion." [80] But he obviously had to make many judgment calls. As Martin modestly wrote: "How far my endeavors have been attended with success remains to be decided."[81]

Unfortunately, Martin's *Collection* "was utterly unworthy of the talents and industry of the distinguished compiler, omitting many important statutes, always in force, and inserting many others, which never were, and

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74 *Id.* at 240.

75 BULLARD, *supra* note 69, at 20.

76 *See* Jones, *supra* note 68.

77 FRANÇOIS-XAVIER MARTIN, A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA (1792).

78 *Id.*

79 *Id.* at iii.

80 *Id.*

81 *Id.* at iv.

never could have been in force, either in the Province, or in the State."[82] That was the conclusion of the Commissioners of 1833, who the General Assembly directed "to collate, digest, and revise, all the public statute laws of the State."[83] They consisted of then-Governor James Iredell, Jr., soon-to-be state Supreme Court Justice William H. Battle, and Judge Frederic Nash, who later became Chief Justice of the state Supreme Court.[84]

Perhaps the defects in Martin's *Collection* were attributable to his inexperience in the law and inability to master the English language. A modern source states about Martin's publications: "Both his newspaper and his books contained many errors, some attributable to his incomplete mastery of the English language, others to carelessness and poor proofreading."[85]

3.4. References to "the King" in Martin's *Collection* Should Have Alerted the *Antonyuk II* Court That the *Collection* Was Not a "Law" Passed by North Carolina

One of the English statutes that Martin printed in the *Collection* was Edward III's Statute of Northampton of 1328, which stated in part:

> ITEM, It is enacted, that no man great nor small, of what condition soever he be, except the King's servants in his presence, and his Ministers in executing of the King's precepts, of their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, and the same in such places where such acts happen, 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 peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere, upon pain to forfeit

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82 Commissioners of 1838, *supra* note 63, at xiii.

83 *Id.* at xiv.

84 *Id.*; *see* J.D. Lewis, *James Iredell, Jr.*, CAROLANA (2007), https://perma.cc/YL8H-7VBU; W. Conrad Gass, *Battle, William Horn*, NCPEDIA (1979), https://perma.cc/C3YH-V32H; Jacquelin Drane Nash, *Nash, Frederick*, NCPEDIA (Mar. 2023), https://perma.cc/FZ4Q-JQKF.

85 Jones, *supra* note 68.

> their armour to the King, and their bodies to prison at the King's pleasure.[86]

It should be a dead giveaway that the above was not a statute passed by the legislature of North Carolina, given its references to "the King's servants," "the King's precepts," "the King's Justices," "the King's Ministers," "the King," and "the King's pleasure." The legislature would have passed no such statutes once the Declaration of Independence declared in 1776 that "these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown . . . ."[87]

The Second Circuit in *Antonyuk II* repeatedly claims the Statute of Northampton from Martin's *Collection* to be a North Carolina "law,"[88] but meticulously avoids quoting any of the phrases referring to "the King." The court's only actual quotation from Martin's book is the selective, incomplete reference to the "North Carolina law prohibiting 'to go nor ride armed by night nor by day, in fairs, markets'"[89]

3.5. The Revised Statutes in the 19th Century Continued to Repeat the Constable's Oath to Arrest All Who "Ride or Go Armed Offensively," while the Statute of Northampton Was Never Approved as In Force

John Haywood, North Carolina Attorney General from 1791 to 1793 and then Superior Court Judge until 1800,[90] authored *The Duty and Office of Justices of Peace* (1800).[91] He wrote that while "riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land," the ordinary "[w]earing of arms, however, is not within the meaning of the statute, unless accompanied with such circumstances as are apt to terrify the people."[92]

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86 MARTIN, *supra* note 77, at 60–61.

87 THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

88 120 F.4th 941, 1019–20, 1037, 1039 n.114 (2d Cir. 2024).

89 *Id.* at 1020 (internal punctuation omitted).

90 Robert E. Corlew, *Haywood, John*, NCPEDIA (1988), https://perma.cc/NHC9-K84G.

91 JOHN HAYWOOD, THE DUTY AND OFFICE OF JUSTICES OF PEACE, AND OF SHERIFFS, CORONERS, CONSTABLES, &C. ACCORDING TO THE LAWS OF THE STATE OF NORTH CAROLINA (Halifax, Abraham & Hodge 1800).

92 *Id.* at 10.

A new edition of Iredell's *Laws*, as edited by none other than François-Xavier Martin, appeared in 1804.[93] It included the same constable's oath and the same prohibition on slaves going armed.[94] All other provisions about being "armed" were militia-related, including the following restriction enacted in 1793: "[I]t shall not be lawful to call or direct any regimental, battalion or company muster, or to assemble armed men, on the day of any election, at any place appointed by law to hold elections for Members of Congress or Members of the General Assembly within this State . . . ."[95] The volumes did not reprint or mention the Statute of Northampton or any other English statutes.

A volume of North Carolina laws published in 1821 also included what a three-man commission deemed to be "Statutes and Parts of Statutes of Great Britain, Reported as Being in Force in this State, by the Commissioners Appointed under the Act of 1817."[96] Among the statutes of Edward III, it listed: "2 Edward 3, 1328, Chap. 3. No man shall come before the justices, or go, or ride armed."[97] That is the same abbreviated title under which the statute originally appeared.[98]

The report stated that the commissioners specified the statutes of Great Britain that they deemed "in force in the state" and that they "hold it ready for inspection, and for such disposition of it as your honorable body may think proper to make."[99] The legislature did not approve or enact them into law. As shown below, the courts were free to disregard them.

Regardless of whether the Statute was considered to be in force, it was not read to apply to a person who went armed peaceably. One of the three above commissioners was Henry Potter,[100] who published a manual

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93 *See generally*, 1 JAMES IREDELL, The PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA (Francois-Xavier Martin ed., Newbern, Martin & Ogden 1804) (compiling the public acts of the North Carolina General Assembly).

94 An Act to Appoint Constables (1741), ch. 5, § 2, *reprinted* in IREDELL, *supra* note 93, at 47; An Act Concerning Servants and Slaves (1741), ch. 24, § 11, *reprinted in* IREDELL, *supra* note 93, at 64.

95 2 IREDELL, *supra* note 93, at 70.

96 1 LAWS OF THE STATE OF NORTH-CAROLINA, INCLUDING THE TITLES OF SUCH STATUTES AND PARTS OF STATUTES OF GREAT BRITAIN AS ARE IN FORCE IN SAID STATE 85 (Henry Potter et al. eds., 1821) [hereinafter LAWS OF THE STATE OF NORTH-CAROLINA].

97 *Id.* at 87.

98 *See* Statute of Northampton 1328, 2 Edw. 3. c. 3 (Eng.).

99 LAWS OF THE STATE OF NORTH-CAROLINA, *supra* note 96, at iii.

100 *Id.* at vi.

for justices of the peace in 1816 stating that a recognizance for keeping the peace may be required of a person for "riding or going armed with dangerous or unusual weapons, under such circumstances as are apt to terrify the people . . . ."[101] The manual also repeated the constable's oath to arrest all who "ride or go armed offensively."[102] However, as the law provided, a slave was prohibited from going armed with *any* weapon under *any* circumstances without a certificate from the master so permitting.[103] Potter served as a federal district court judge for North Carolina from 1802 until 1857.[104]

Another one of Edward III's statutes that the Commissioners of 1817 listed as being in force was 28 Edward 3, 1354, Chap. 13, stating that "An inquest shall be de medietate linguae[105] where an alien is party."[106] In his *Collection*, Martin had also listed that statute as being in force.[107] In *State v. Antonio* (1825), the North Carolina Supreme Court held that this statute was *not* in force, and thus an alien defendant convicted of murder was not entitled to a jury trial based on the statute.[108]

The *Antonio* court called "the report which has been made to the legislature by the commissioners, that the act of *Ed. 3.* is here in force" to be "nothing more than the opinions of professional gentlemen on the point," as the legislature had done nothing "to directly sanction or disapprove of the report."[109] The court added: "This subject was brought before the legislature by the report, and it was simply ordered that it should be published, without expressing any opinion thereon."[110]

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101 HENRY POTTER, THE OFFICE AND DUTIES OF A JUSTICE OF THE PEACE . . . ACCORDING TO THE LAWS OF NORTH-CAROLINA 39 (Raleigh, Henry Potter, 1816), https://perma.cc/BKT2-NZ8X.

102 *Id.* at 215.

103 *Id.* at 291–92.

104 *Potter, Henry*, FED. JUD. CTR., https://perma.cc/X23T-CM2H.

105 "MEDIETAS LINGUAE. Half tongue. This expression was used to signify that a jury for the trial of a foreigner or alien for a crime, was to be composed one half of natives and the other of foreigners." 2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES 154 (Philadelphia, T & J.W. Johnson 1860).

106 1 LAWS OF THE STATE OF NORTH-CAROLINA, *supra* note 96, at 88.

107 MARTIN, *supra* note 77, at 76–77.

108 11 N.C. (4 Hawks) 200, 203 (1825).

109 *Id.* at 203–04.

110 *Id.* at 208.

However, the actual statutes published in the same volumes—*Laws of the State of North-Carolina* (1821)—included the two 1741 statutes that appeared in every revision, *i.e.*, the directive to constables to "arrest all such persons as in your sight shalt ride or go armed offensively, or shall commit or make any riot, affray, or other breach of the peace" (it deleted "his Majesty's Peace"), and the prohibition that "no slave shall go armed with gun, sword, club or other weapon . . . ."[111] The source for the ban on going armed offensively was the common law, but even if linked to the English Statute, it was read to apply only to going armed "offensively."

To put the matter to rest and rid the state of any further reliance on the English statutes, in 1837 the legislature mandated that "all [of] the statutes of England or Great Britain heretofore in use in this State, are hereby declared to be repealed and of no force and effect from and after the first day of January next [1838] . . . ."[112] But the revised statutes still included the 1741 constable's oath to "arrest all such persons as, in my sight, shall ride or go armed offensively,"[113] again confirming the offense to be grounded in the common law. Also repeated was the prohibition that "No slave shall go armed with gun, sword, club, or other weapon . . . ."[114] The two provisions further reappeared in the revised code of 1855.[115]

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111 1 LAWS OF THE STATE OF NORTH-CAROLINA, *supra* note 96, at 132, 164.

112 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA, PASSED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1836-7, at 52–53 (Frederick Nash, James Iredell & William H. Battle eds., 1837).

113 *Id.* at 436.

114 *Id.* at 578.

115 REVISED CODE OF NORTH CAROLINA 437, 569 (Boston, Little, Brown & Company 1855), https://perma.cc/FM2R-QXNZ; *see* State v. Hannibal, 51 N.C. (6 Jones) 57, 58–59 (1858) ("In the act of 1741, which is the foundation of all our laws touching servants and slaves, it is enacted that no slave should go armed with a gun . . . .").

4. NORTH CAROLINA PRECEDENTS RECOGNIZED THE TERROR ELEMENT

4.1. 19th Century Judicial Decisions Recognized the Terror Element to the Offense of Going Armed

In *Antonyuk I* and *II*, the court should have done the research to understand the above statutory history and interpretations before making its sweeping conclusion that North Carolina banned the mere carrying of arms, at least in fairs and markets, without any offensiveness element. But this failing is worsened by the court's failure to acknowledge North Carolina's judicial precedents on the issue.

The Supreme Court of North Carolina recognized the common-law offense of going armed in a manner to terrorize others, and upheld indictments for that crime alleging that specific people were terrorized. None of the decisions relied on the Statute of Northampton.

In *State v. Langford*, the indictment for breach of the peace 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 . . . ."[116] 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* . . . ."[117] The court recalled the words of William 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 . . . ."[118]

Similarly, in *State v. Huntly*, 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," publicly threatened in the presence

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116 10 N.C. (3 Hawks) 381 (1824).

117 *Id.* at 383.

118 *Id.*

of various citizens "to beat, wound, kill and murder" other persons, causing citizens to be "terrified," all "to the terror of the people . . ."[119]

The court stated that the Statute of Northampton "did not *create* this offence" of "riding or going about armed with unusual and dangerous weapons, to the terror of the people"— apparently because it was always considered an offense at common law—"but provided only special penalties and modes of proceeding for its more effectual suppression . . . ."[120] At any rate, "whether this statute was or was not formerly in force in this State, it certainly has not been since the first of January, 1838 . . . ."[121]

Huntly 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."[122] It further quoted, as did the *Langford* court above, 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 . . . ."[123]

The court also noted the statement in *Sir John Knight's Case* that the Statute of Northampton "was made in affirmance of the common law."[124] As the court knew from the *Knight* decision, it was alleged that Sir John "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*."[125] "The Chief Justice said that the meaning of the statute of 2 Ew. 3, c. 3, was to punish people who go armed to terrify the King's subjects. It is likewise a great offence at the *common law* . . . ."[126]

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119 25 N.C. (3 Ired.) 418, 418–19 (1843).

120 *Id.* at 420.

121 *Id.*

122 *Id.* at 420–21 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149).

123 *Id.* at 421 (quoting 1 WILLIAM HAWKINS, PLEAS OF THE CROWN, ch. 28, § 1 (1716)).

124 *Id.* at 421 (citing *Sir John Knight's Case*, 3 Mod. Rep. 117 (further cited as 87 Eng. Rep. 75, 76 (K.B. 1686))).

125 *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686).

126 *Id.* For a detailed analysis of the law and facts in the Knight case, see STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? 38–58 (2021).

It did not suffice that Knight went armed in church—he did not do so in a manner to terrorize, which is why he was acquitted.[127] A church is a more confined space than a fair or market, where *Antonyuk I* claims that arms were forbidden per se.[128] As the Chief Justice said in another version of the *Knight* decision, going armed must be "*malo animo* [with evil intent]" to come within the Statute of Northampton.[129] If going armed peaceably in a divine service was not an offense, it would surely not be an offense to do so in places like public parks in urban areas, which *Antonyuk II* depicts as equivalent to fairs and markets.[130]

The *Huntly* court next turned to the guarantee of the North Carolina bill of rights declaring that the people have a "right to bear arms for the defence of the State."[131] "While [this] secures to him a *right* of which he cannot be deprived," he has no right to "employ [sic] those arms . . . to the annoyance and terror and danger of its citizens . . . ."[132] 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."[133] However, he may not carry a weapon "to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people."[134]

The *Antonyuk II* court would have been aware of the *Huntly* precedent, as *Bruen* discussed the case and its holding "that the carrying of a gun" for a lawful purpose "*per se* constitutes no offence."[135] *Bruen* also called attention to two of the justice of the peace treatises discussed above, both of which included the "terror" element as part of the common-law offense of going armed.[136] *Antonyuk* did not take that cue either.

Again, the Supreme Court in *Rahimi* cited *Huntly* in referring to the "conduct" of going armed with dangerous or unusual weapons to terrify

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127 *See id.*

128 89 F.4th 271, 357 (2d Cir. 2023).

129 Rex v. Knight, 1 Comb. 38, 39, 90 Eng. Rep. 330, 330 (K.B. 1686).

130 *See* 120 F.4th 941, 1019, 1020 n.82 (2d Cir. 2024).

131 State v. Huntly, 25 N.C. (3 Ired.) 418, 422 (N.C. 1843).

132 *Id.*

133 *Id.* at 422–23.

134 *Id.* at 423.

135 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 51 (2022) (quoting *Huntly*, 25 N.C. at 422–23).

136 *Id.* at 51–52 (citing HAYWOOD, *supra* note 91, at 10; POTTER, *supra* note 101, at 39).

others, adding, "In some instances, prohibitions on going armed and affrays were incorporated into American jurisprudence through the common law."[137] *Antonyuk II* paid no attention.

In 1855, the North Carolina court defined an affray as "a fighting of two or more persons in a public place to the terror of the citizens," but added that it may also be committed by one person "by publicly riding or going armed offensively, to the terror and alarm of the peaceable citizens of the State."[138] Thus, to be sufficient, an indictment "must charge a fighting or a being arrayed in a warlike manner in some public place, as in a public street or highway."[139]

Subsequent decisions by the North Carolina Supreme Court in the nineteenth century relied on the *Huntly* precedent. Noting that carrying arms openly was lawful, the court added: "If the privilege of so wearing arms should be abused, the public is protected by the common law. 'The offence of riding or going armed with unusual and dangerous weapons to the terror of the people, is an offence at common law . . . .'"[140] In another decision, it stated: "An affray may be committed by 'going armed with unusual and dangerous weapons, to the terror of the people.'"[141]

Yet neither *Antonyuk* decision cited a single North Carolina judicial opinion, just as it cited no actual North Carolina law. Its sole source of North Carolina "law" was Martin's self-published *Collection*, which was never approved by the General Assembly.

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137 United States v. Rahimi, 602 U.S. 680, 697 (2024).

138 State v. Woody, 47 N.C. (2 Jones) 335, 336–37 (1855) (citing 1 WILLIAM HAWKINS, PLEAS OF THE CROWN, ch. 63, §§ 2, 4 (1716)).

139 *Id.* at 337.

140 State v. Roten, 86 N.C. 701, 704 (1882) (citing *Huntly*, 25 N.C. at 418) (this is a paraphrase, not an exact quote, see 25 N.C. at 421); *see* State v. Lanier, 71 N.C. 288, 289 (1874) ("the offence of going armed with dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land, and this Court has declared the same to be the common law in *State v. Huntly*").

141 State v. Griffin, 34 S.E. 513, 513 (N.C. 1899) (quoting *Huntly*, 25 N.C. at 421).

4.2. In Modern Times, the Precedents Continue to Recognize the Terror Element of the Common-Law Crime of Going Armed

The state's high court decisions in modern times are consistent with the above. While invalidating a ban on open carry, it stated that it would not infringe the right to bear arms to prohibit the carrying of weapons "in a manner calculated to inspire terror, which was forbidden at common law."[142] In another case, upholding convictions against Klan members for inciting a riot, the court recalled *Huntly*'s words: "He shall not carry 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."[143]

"This Court adopted the views expressed in Sir John's Case" in *Huntly*, said the North Carolina Supreme Court in *State v. Dawson*.[144] Based on "the common law, which made it a crime to go armed to the terror of the people," *Dawson* upheld convictions where the defendants rode armed at night on the highways and fired shots into a store and into homes, concluding that "it is difficult to imagine facts which 'more unequivocally' constitute the common-law misdemeanor of going armed to the terror of the people."[145]

Most recently, in *State v. Lancaster* (2023), the state Supreme Court upheld an indictment where the defendant was allegedly "waving a gun and firing rounds off kind of aimlessly in the parking lot" of an apartment complex.[146] Following *Huntly*, the court read the Statute of Northampton as applying "the offense of going armed to the terror of the public . . . to those who were armed 'in fairs, markets,' and any other public location."[147] This is the only North Carolina "going armed" case to refer specifically to fairs and markets, and it was simply because it was quoting the Statute of Northampton. As stated, going armed to the terror of the public is a common-law offense in *any* public location, but it does not criminalize going armed peaceably in any location, including fairs and markets.

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142 State v. Kerner, 107 S.E. 222, 225 (N.C. 1921).

143 State v. Cole, 107 S.E.2d 732, 745 (N.C. 1959) (quoting *Huntly*, 25 N.C. at 423).

144 159 S.E.2d 1, 12 (N.C. 1968).

145 *Id.* at 11.

146 895 S.E.2d 337, 338 (N.C. 2023).

147 *Id.* at 343.

Lancaster thus concluded, emphasizing the terror element both as to the purpose and to the manner of terrifying others:

> Thus, the elements of the common law crime of going armed to the terror of the public are that the accused (1) went about armed with an unusual and dangerous weapon, (2) in a public place, (3) for the purpose of terrifying and alarming the peaceful people, and (4) in a manner which would naturally terrify and alarm the peaceful people.[148]

Rahimi cited state court decisions from as late as the 21st century to illustrate how American common law incorporated the prohibitions on going armed and affrays.[149] *Antonyuk II* did not bother to consult any North Carolina precedent, from the earliest in 1824 to the latest in 2023.

5. LATE 19TH CENTURY LAWS FIND NO ANALOGS IN FOUNDING-ERA LAWS

5.1. *Antonyuk II*'s Founding-Era Pillars—Virginia and North Carolina—Having Fallen, Late 19th Century Restrictions Did Not "Evolve" from Them

Antonyuk II thus steps into a void when it asserts, "Even if we accept that the Virginia law was solely aimed at people who terrorize, . . . the Founding-era North Carolina statute prohibited firearms in fairs and markets with no reference to terroristic conduct."[150] This tradition supposedly "evolved over the years between the Founding and Reconstruction toward the North Carolina model, *i.e.*, to prohibit firearms in quintessentially crowded places absolutely, without reference to behavior. . . . Thus, in the context of regulating firearms in discrete, crowded places, the Virginia law's 'terroristic' conduct requirement is the outlier among the national tradition."[151]

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148 *Id.*

149 United States v. Rahimi, 602 U.S. 680, 697 (2020) (citing Hickman v. State, 996 A.2d 974, 983 (2010)).

150 *Antonyuk II*, 120 F.4th 941, 1039 (2d Cir. 2024).

151 *Id.*

But in North Carolina, just as in Virginia, going armed was an offense only if done offensively, in a manner to terrorize others.[152] No North Carolina statute or judicial decision considered any special rule for fairs and markets.[153] Absolutely nothing in North Carolina's statutory or judicial tradition departs from the general rule for "crowded places," and *Antonyuk II* cites no such exception.[154]

Attempting to show the supposedly widespread tradition of banning arms in crowded places, *Antonyuk II* further asserts: "At the time in which they were passed in 1791, Virginia's and North Carolina's statutes prohibiting firearms in fairs and markets applied to over a quarter of the Nation's population."[155] But neither of these states, nor any other state, enacted any such per se prohibition.

As to other states, in 1795, Massachusetts directed justices of the peace to arrest "such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth . . . ."[156] In 1852, Delaware directed justices of the peace to arrest "all who go armed offensively to the terror of the people, or are otherwise disorderly and dangerous."[157] *Antonyuk II* fails to mention such other laws, which also cut against its argument.

As to the non-existent North Carolina model "evolving" into Reconstruction laws, *Antonyuk II* refers to gun bans at certain confined places, including a "fair, race course, or other public assembly of people" (Tennessee 1869); assemblies for "educational, literary or scientific purposes, or into a ball room, social party or other social gathering" (Texas 1870); and "where people are assembled for educational, literary or social purposes" (Missouri 1883).[158] These are all organized events, some indoors and some outdoors, in confined spaces.

Antonyuk II further claims that the state courts upheld these provisions as constitutional,[159] but with one exception, the cited cases did

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152 *See supra* Section 2.2.
153 *See supra* Section 2.2.
154 *See supra* Section 2.2.
155 *Antonyuk II*, 120 F.4th at 1021.
156 1795 Mass. Acts 436, ch. 2.
157 Del. Rev. Stat. ch. 97, § 13 (1852).
158 *Antonyuk II*, 120 F.4th at 1020.
159 *Id.* at 1021.

not concern places where firearms may be banned. The Tennessee case of *Andrews v. State* upheld a ban on carrying a small belt pistol or certain other weapons, but held the law unconstitutional as applied to an army-type revolver.[160] The Texas case of *English v. State* upheld convictions for wearing a pistol while intoxicated and for carrying a butcher knife in a religious assembly; as to the latter, the court held such a knife not to be a constitutionally protected "arm."[161] The Missouri case of *State v. Shelby* addressed carrying concealed and carrying while intoxicated.[162]

In short, other than the Texas case involving a butcher knife in church, none of these decisions considered and upheld the constitutionality of any of the prohibitions on possession of arms at specific places, such as those listed by *Antonyuk II*.

Antonyuk II further cites laws of the territories of Arizona (in 1889) and Oklahoma (in 1890) as showing the tradition of banning firearms in "quintessentially crowded places."[163] But *Bruen* cited another 1889 Arizona law, and another section of the same 1890 Oklahoma law, in explaining that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."[164] The Court pointed to the facts that the territorial populations were "miniscule," "territorial laws were rarely subject to judicial scrutiny," and the territorial governments were "short lived."[165]

Antonyuk II also points to mostly late nineteenth century restrictions in some cities, such as regulations banning firearms in urban public parks.[166] However, recognizing the need for some foundation in the Founding era, it claims that such restrictions were "enshrined in the law books" of Virginia and North Carolina,[167] which simply is not accurate. As with the state laws, no Founding-era cities enacted any such restrictions.

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160 50 Tenn. 165, 186–87 (1871).
161 35 Tex. 473, 475–80 (1871).
162 2 S.W. 468, 468–69 (Mo. 1886).
163 *Antonyuk II*, 120 F.4th 941, 1020 (2d Cir. 2024).
164 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 66 (2022).
165 *Id.* at 67–69.
166 *Antonyuk II*, 120 F.4th at 1023.
167 *Id.*

5.2. Without a Founding-Era Analog, Laws from the 2nd Half of the 19th Century Do Not Inform the Scope of the Second Amendment

Absent a Founding-era analog, *Bruen* does not allow courts to rely on restrictions adopted at or after the ratification of the Fourteenth Amendment to define modern "sensitive places" or to justify other current Second Amendment restrictions. *Bruen* flatly states that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government," and that "the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."[168] The Court noted "an ongoing scholarly debate" on whether the understanding in 1868 defined the scope of the right, but stated that it "need not address this issue" because the public understanding of the right to carry in public was the same in 1791 and 1868.[169]

Justice Amy Coney Barrett stated in her concurrence: "But if 1791 is the benchmark, then New York's appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little)."[170] As the Court had recently held in *Espinoza v. Montana Dept. of Revenue*, a practice that "arose in the second half of the 19th century . . . cannot by itself establish an early American tradition" to inform the meaning of the First Amendment.[171] The Court's *Bruen* decision thus does not "endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights."[172]

Antonyuk II takes notice of above discussion in the *Bruen* majority's opinion, but changes *Bruen*'s statement that it "need not address this issue"

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168 *Bruen*, 597 U.S. at 37.

169 *Id.* at 37–38.

170 *Id.* at 82 (Barrett, J., concurring).

171 *Id.* (alteration in original) (quoting Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2258–59 (2020)).

172 *Id.* at 83; *see* Mark W. Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 31 HARV. J.L. & PUB. POL'Y, 1 (2022).

of the scholarly debate to say that *Bruen* "expressly declined to decide" whether courts should rely on the understanding in 1868.[173] But as quoted above, *Bruen* expressly stated that "the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."[174]

To the contrary, *Antonyuk II* stretches the time period for determining the understanding of the scope of the Second Amendment to 1868 and beyond, stating: "It would be incongruous to deem the right to keep and bear arms fully applicable to the States by Reconstruction standards but then define its scope and limitations exclusively by 1791 standards."[175] There is nothing incongruous about that at all, given that the Supreme Court has relied on Founding-era understandings to interpret the scope of other incorporated provisions of the Bill of Rights, including the First,[176] Fourth,[177] Fifth,[178] Sixth,[179] and Eighth Amendments.[180]

At any rate, *Antonyuk II* does not suggest that the understanding of the Second Amendment may be based solely on 1868 and thereafter, and instead seeks to trace that understanding to the Founding-era Virginia and North Carolina laws, but then dropping the Virginia law with its "terror" element as "the outlier among the national tradition."[181] But as shown above, the actual Virginia and North Carolina laws are feet of clay for *Antonyuk II*, and there are no other relevant Founding-era laws.

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173 *Compare* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 38 (2022), *with Antonyuk II*, 120 F.4th 941, 972 (2d Cir. 2024).

174 *Bruen*, 597 U.S. at 37.

175 *Antonyuk II*, 120 F.4th at 973.

176 *E.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181–85 (2012) (Establishment Clause and Free Exercise Clause); Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 122–25 (2011) (freedom of speech); Near v. Minnesota, 283 U.S. 697, 713–19 (1931) (freedom of the press).

177 *E.g.*, Virginia v. Moore, 553 U.S. 164, 168–69 (2008) (warrantless arrests of misdemeanants).

178 *E.g.*, Gamble v. United States, 139 S. Ct. 1960, 1965–66 (2019) (Double Jeopardy Clause).

179 *E.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (Jury Trial Clause); Klopfer v. North Carolina, 386 U.S. 213, 223–26 (1967) (right to speedy trial).

180 *E.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687–90 (2019) (Excessive Fines Clause).

181 *Antonyuk II*, 120 F.4th 941, 1039 (2d Cir. 2024).

6. HOW THE RUMOR SPREAD THAT MARTIN'S BOOK WAS A "LAW"

6.1. The Historiography of the Claim that Martin's *Collection* Expressed North Carolina "Law"

Antonyuk is not the first decision to rely on François-Xavier Martin's *A Collection of Statutes* for the proposition that in 1792, North Carolina enacted a statute with the same language as the Statute of Northampton. As discussed below, this "law" was cited in support of the proposition that going armed anywhere in public, even peaceably, was not part of the historical tradition of the Second Amendment and could be prohibited. But once *Bruen* rejected that argument, it was no longer feasible to claim that the Second Amendment protects no right to bear arms in public.

What *Antonyuk II* did was to refine the argument to support banning arms not everywhere in public, but in expansive "sensitive places." This refinement is captured in its claim that "at least two states—Virginia and North Carolina—passed statutes at the Founding that replicated the medieval English law prohibiting firearms in fairs and markets, *i.e.*, the traditional, crowded public forum."[182] The court then had to admit that the Virginia statute applied only if a person went armed "in terror of the county,"[183] but thought it saved the day by claiming that the tradition "evolved over the years between the Founding and Reconstruction toward the North Carolina model, *i.e.*, to prohibit firearms in quintessentially crowded places absolutely, without reference to behavior."[184] That leaves the "North Carolina model" as providing the *only* Founding-era "law" to prohibit firearms in "crowded places."

Now that the "North Carolina model" has been elevated to such decisive importance, it would be worthwhile to examine the historiography of the claim that North Carolina banned carrying firearms in public. It is unclear where the mistake originated that the Statute of Northampton as printed by François-Xavier Martin in his *A Collection of Statutes* was actually a "law" enacted by the legislature of North Carolina.

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182 *Id.* at 1019–20.

183 *Id.* at 1020 n.82.

184 *Id.* at 1039.

The Statute and its source in the *Collection* appears in the Repository of Historical Gun Laws, Duke Center for Firearms Law, under the citation "No Man Shall Come Before the Justices, or Go or Ride Armed, ch. 3, N.C. Gen. Stat. (Francois X. Martin 1792)."[185] It cites the pages numbers as 60–61.[186] As explained below, the reference to N.C. Gen. Stat., Ch. 3, 60–61, is fake.[187] No such enactment appears in the N.C. General Statutes. The Repository describes itself as "a resource for scholars and practitioners interested in historical laws concerning firearms and other similar weapons."[188] The Duke Center should remove the item from its website or at least insert a cautionary statement explaining that it was not a law enacted by the legislature of North Carolina.

The Duke Repository has been cited as the source of historical laws by several courts on Second Amendment issues.[189] In *Antonyuk* itself, the district court relied on the Repository to locate laws not cited by the defendants,[190] including the purported North Carolina "law" from Martin's *Collection*.[191] Other courts have cited the Repository as the source for the Martin "law."[192]

Courts have been misled by the citation of Martin's *Collection* as a "law" at the highest level. Dissenting in *Bruen*, Justice Breyer wrote that "North Carolina enacted a law whose language was lifted from the Statute of Northampton virtually verbatim (vestigial references to the King

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185 *Historical Gun Laws*, DUKE CTR. FOR FIREARMS L.: REPOSITORY HIST. GUN L. (Feb. 3, 2026), https://perma.cc/S3YU-HD3D.

186 *Id.*

187 *See infra* text accompanying notes 201–203.

188 *Historical Gun Laws*, *supra* note 185.

189 *E.g.*, Lara v. Comm'r Pa. State Police, 91 F.4th 122, 134–36 nn.15–17 (3d Cir. 2024); United States v. Daniels, 77 F.4th 337, 344 n.8 (5th Cir. 2023).

190 Antonyuk v. Hochul, 639 F. Supp. 3d 232, 297 n.72 (N.D.N.Y. 2022).

191 *Id.* at 292 n.66, 334 n.117.

192 *See e.g.*, United States v. Power, No. 20-po-331-GLS, 2023 WL 131050, at *10 (D. Md. Jan. 9, 2023) (citing the Repository); *see also* Range v. Att'y Gen., 124 F.4th 218, 242 n.18 (3d Cir. 2024) (Matey, J., concurring); Frey v. Nigrelli, 661 F. Supp. 3d 176, 201 (S.D.N.Y. 2023); United States v. Ayala, 711 F. Supp. 3d 1333, 1345, 1356 (M.D. Fla. 2024), *appeal filed* (11th Cir. Feb. 14, 2024) (all three calling the *Collection* a "law" or "statute" but not citing the Repository).

included)."[193] For that proposition, Breyer cited Martin's *Collection* and referenced a law review article by Patrick Charles.[194] It boggles the imagination to think that the state would enact a law with references to "the King" sixteen years after the Declaration of Independence.

Charles, in turn, cites Martin for the claim that North Carolina "expressly incorporated" the Statute of Northampton, and that its "statute read almost verbatim" to the latter.[195] Charles also refers to "the constable oath" from the 1791 edition of North Carolina's laws, but neglects that the wording of the oath directed the constable to "arrest all Persons as, in your Sight, shall ride or go armed *offensively* . . . ."[196] Other law review articles cite Martin as if the Statute was part of the state's "legal code."[197]

6.2. A Fake Session Law Citation is Invented for Martin's *Collection*

The Ninth Circuit, in *Young v. Hawaii*, claimed that "North Carolina adopted, nearly verbatim, the Statute of Northampton," finding it ironic that

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193 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 122 (2022) (Breyer, J., dissenting); *see* Brief for Professors of History and Law as Amici Curiae Supporting Respondents at 1, *Bruen*, 597 U.S. 122 (2022) (No. 20-843) (filing on behalf of Saul Cornell, Jack Rakove, and other "preeminent professors of English and American history and law" claiming that "North Carolina regarded the Statute of Northampton as remaining in full force."); *id.* at 12 (citing Martin's *Collection*).

194 *Id.* (citing *Collection of Statutes*, pp. 60–61, ch. 3 (F. Martin ed. 1792)); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 40 n.213 (2012) (collecting sources). Charles' law review article was also cited similarly in *Moore v. Madigan*, 702 F.3d 933, 944 (7th Cir. 2012) (Williams, J., dissenting). The majority in that case held that the Second Amendment protects the right to carry arms outside the home. *Id.* at 942.

195 Charles, *supra* note 194, at 31–32 & n.167.

196 *Id.* at 32 n.178 (citing JAMES IREDELL, LAWS OF THE STATE OF NORTH-CAROLINA 70 (1791) (emphasis added)). Charles also cites James Davis, *id.* at 35, but ignores that on that page Davis referred to going "armed with unusual and offensive Weapons," and Davis's further reference to going "offensively armed, in Terror of the People." DAVIS, *supra* note 55, at 13, 119.

197 *E.g.*, Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What it Tells Us about Firearm Regionalism*, 40 CAMPBELL L. REV. 335, 338–39 & n.14 (2018); *see also* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 113 & n.163 (2013) (albeit not claiming the *Collection* was a "law").

"notwithstanding its recent independence, North Carolina did not even remove the references to the king . . . ."[198] Anxious to find any historical precedent it could for its holding that the Second Amendment guarantees no right to carry arms in public, the court even provided the citation "1792 N.C. Laws 60, 61 ch. 3," for this supposed North Carolina law.[199]

Some enterprising advocate invented the citation to "1792 N.C. Laws 60, 61 ch. 3," as if it was chapter 3 of the 1792 session laws enacted by the General Assembly found on pages 60-61. As noted above, Duke's Repository of Historical Gun Laws identifies the source as "N.C. Gen. Stat." with the same chapter and page numbers.[200] To the contrary, the *Laws of North Carolina* enacted in 1792 ends on page 42, and does not extend to page 60.[201] Chapter 3 concerns public monies.[202] The only reference to "armed" is in the militia act.[203]

Then what did the numbers in "1792 N.C. Laws 60, 61 ch. 3," represent? Martin's *Collection* was published in 1792, the Statute of Northampton is on pages 60–61, and chapter 3 was part of the cite to the Statute.[204] Correct legal citation to state session laws not currently in force includes the abbreviation of the state followed by the word "Laws," *e.g.*, "Fla. Laws" or, here, "N.C. Laws."[205] Whoever changed "Martin, *A Collection*" to "N.C. Laws" or "N.C. Gen. Stat." simply made it up.

Yet this misleading citation keeps being repeated, such as in the *amici curiae* brief by former Fourth Circuit Judge J. Michael Luttig in *Bruen*.[206]

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198 Young v. Hawaii, 992 F.3d 765, 798 (9th Cir. 2021) (en banc), *cert. granted, vacated, & remanded*, 142 S. Ct. 2895 (2022) (remanded for further consideration in light of *Bruen*).

199 *Id.*

200 *See No Man Shall Come Before the Justices, or Go or Ride Armed, ch. 3, N.C. GEN. STAT. (Francois X. Martin 1792) (Law Passed 1328)*, DUKE CTR. FOR FIREARMS L: REPOSITORY HIST. GUN L., https://perma.cc/5ENV-7HJP.

201 LAWS OF NORTH CAROLINA 42 (Halifax, Hodge & Wills 1792); *id.* at 33–35 (Militia Act).

202 *Id.* at 2–3.

203 *Id.* at 33–35 (Militia Act).

204 *See* MARTIN, *supra* note 77, at 60–61.

205 *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12.4(a)–(b) (Columbia L. Rev. Ass'n et al. eds., 22d ed. 2025).

206 Brief of J. Michael Luttig et al., as Amici Curiae Supporting Respondents, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 122 (2022) (No. 20-843), 2021 WL 4198019, at *12.

Robert J. Spitzer, who acts as an expert witness in support of restrictive laws,[207] uses the citation in a law review article claiming that North Carolina "criminalized public arms carrying."[208] *Antonyuk II* simply cites Martin's book as "law" and does not include the fake citation.[209]

7. THE NINTH AND THIRD CIRCUITS FALL INTO THE *ANTONYUK* TRAP

Once one appellate court resolves a novel issue a certain way, other like-minded appellate courts find it easy to follow suit. Being able to cite another judicial decision may provide cover for a shaky opinion and relieves a court of coming up with a rigorous analysis. It becomes a game of leapfrog in which the first precedent keeps moving forward. In the Second Amendment space, that occurred with the invention of the "collective rights" theory which abrogated the right of "the people," *i.e.*, actual individuals, to keep and bear arms.[210] As *Heller* pointed out, courts doing that "overread" a prior Supreme Court decision that had no support for that view.[211]

That process has now begun with courts that uphold wide restrictions on where firearms may be carried that were enacted to counter the holding in *Bruen*. The following analyzes how the Ninth and the Third Circuits have followed the same basic flawed Second Circuit decision.

7.1. The Ninth Circuit Upholds "Sensitive Place" Restrictions in Hawaii and California

In response to *Bruen*'s decision that firearm carry permits must be issued to members of the public without a showing of special need, Hawaii and California enacted laws banning possession of firearms in most public locations.[212] The U.S. District Court for the District of Hawaii issued a

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207 Expert Report and Declaration of Robert J. Spitzer, Baird v. Bonta, No. 2:19-cv-00617-KJM-AC, at 6 n.5, 12 n.29 (E.D. Ca. Aug. 18, 2023), https://perma.cc/LQ7N-WSBQ (citing Martin's *Collection* as a "law" passed by North Carolina).

208 Robert J. Spitzer, *Understanding Gun Law History after* Bruen, 51 FORDHAM URB. L.J. 57, 88 & n.181 (2023).

209 *See Antonyuk II*, 120 F.4th 941, 1019 (2d Cir. 2024).

210 D.C. v. Heller, 554 U.S. 570, 622–23 (2008).

211 *Id.* at 624 n.24.

212 CAL. PENAL CODE § 26230; HAW. REV. STAT. §134-9.1.

preliminary injunction against enforcement based on its finding that the state had not presented valid evidence of a historical tradition of banning firearms at a number of locations, including parks, beaches, restaurants that serve alcohol, and private property open to the public unless the owner consented.[213] For the same reasons, the U.S. District Court for the Central District of California enjoined the enforcement of that state's similar prohibitions.[214]

The Ninth Circuit consolidated the cases on appeal and rendered its decision as *Wolford v. Lopez*.[215] Regarding almost all places where firearms were banned, it found that the state met its burden for the same reasons articulated by the Second Circuit:

> Throughout this opinion, we cite the Second Circuit's pre-*Rahimi* decision in *Antonyuk* for its persuasive value. Except as specifically noted otherwise, we conclude that the reasoning of *Antonyuk* is consistent with the Supreme Court's decision in *Rahimi* and therefore retains its persuasive worth.[216]

Antonyuk (both I and II) found the required Founding-era analogs in the going armed prohibitions of Virginia and North Carolina.[217] It then admitted that Virginia had a "terror" element, but North Carolina did not,[218] and the North Carolina model became the basis for other state laws later in the nineteenth century.[219] But as explained above, actual North Carolina law also had the "terror" element, undercutting any Founding-era analog for New York's firearm prohibitions.[220]

And that's where even *Wolford* recognized that *Antonyuk I* got it wrong, based on its clear reading of Supreme Court precedent. Referring to "colonial laws in Virginia and North Carolina that were successors to the Statute of Northampton," the court acknowledged that "the Supreme Court has explained that those laws prohibited the carry of firearms only to the

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213 Wolford v. Lopez, 686 F. Supp. 3d 1034, 1076–77 (D. Haw. 2023).

214 May v. Bonta, 709 F. Supp. 3d 940, 949–50, 970–71 (C.D. Cal. 2023).

215 Wolford v. Lopez, 116 F.4th 959 (9th Cir. 2024).

216 *Id.* at 979 n.1.

217 *Antonyuk I*, 89 F.4th 271, 357 (2d Cir. 2023); *Antonyuk II*, 120 F.4th 941, 1019–20 (2d Cir. 2024).

218 *Antonyuk I*, 89 F.4th at 357 n.74; *Antonyuk II*, 120 F.4th at 1020 n.82.

219 *Antonyuk I*, 89 F.4th at 376; *Antonyuk II*, 120 F.4th at 1039.

220 *See supra* Part 2.

'terror' of the people or for a 'wicked purpose'; lawful carry was permitted."[221]

On those pages, *Bruen* discusses Virginia's 1786 statute and other laws with their explicit "terror" element.[222] And on the cited page, *Rahimi* describes laws against going armed "[to] terrify[ ] the good people of the land," including a citation to North Carolina's 1741 law.[223] Both *Antonyuk* decisions ignore that North Carolina law and all of the other North Carolina laws cited in this article.

Despite having no Founding-era analog for Hawaii's and California's "sensitive place" restrictions, *Wolford* upheld virtually all of them, with one exception. It found a 1771 New Jersey law focusing on hunting that prohibited going on the lands of another armed without consent, and an 1865 Louisiana law that prohibited carrying firearms on the premises or plantation of another without consent.[224] On that flimsy historical basis, it upheld Hawaii's ban on entering private property open to the public armed unless a sign is posted or oral consent is given.[225] But it found California's law likely unconstitutional because it required a posted sign and did not offer the alternative of oral consent.[226]

The Ninth Circuit denied a petition for rehearing en banc, with a total of eight judges joining in two dissents from the denial.[227] One of the dissents stated that "the panel largely vitiated the 'the right to bear commonly used arms in public' that the Supreme Court recognized in *Bruen*."[228] The other dissent pointed out the two laws cited to justify the gun ban on private property open to the public: the 1771 New Jersey law was "an antipoaching and antitrespassing ordinance," while the 1865 Louisiana law was one of the "notorious Black Codes that sought to deprive African Americans of their

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221 *Wolford*, 116 F.4th at 998 n.12 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 49–51 (2022); United States v. Rahimi, 144 S. Ct. 1889, 1901 (2024)).

222 *Bruen*, 597 U.S. at 49.

223 *Rahimi*, 144 S. Ct. at 1901 (citing, inter alia, COLLECTION OF ALL OF THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA: NOW IN FORCE AND USE 131 (1751) (1741 statute)).

224 *Wolford*, 116 F.4th at 994.

225 *Id.* at 995.

226 *Id.*

227 Wolford v. Lopez, 125 F.4th 1230 (9th Cir. 2025).

228 *Id.* at 1231 (Collins, J., dissenting from denial of rehearing).

rights, including the right to keep and bear arms otherwise protected by state law."[229]

7.2. The Third Circuit Upholds "Sensitive Place" Restrictions in New Jersey

New Jersey reacted to *Bruen* by banning firearms in most public places.[230] The U.S. District Court for the District of New Jersey rendered an extensive historical analysis holding the provisions likely to be unconstitutional and issuing a preliminary injunction. [231] Mirroring *Antonyuk II* and *Wolford*, the Third Circuit upheld most of the restrictions,[232] with the exceptions of the ban on carrying a firearm on private property open to the public without express consent or a posted sign,[233] and the ban on carrying a firearm in a private vehicle. [234] When this article was being prepared for publication, the Third Circuit granted rehearing en banc and vacated the *Koons* panel decision.[235]

While mostly a "me too" opinion echoing *Antonyuk II* and *Wolford*, *Koons*' analysis of supposed Founding-era analogs is curious. First, it correctly describes the Statute of Northampton as meaning that "a person could not bear arms anywhere that the King or his Ministers were physically present; going armed *offensively* was prohibited in fairs, markets, in the presence of justices or ministers, or in similar places."[236]

Koons then adds: "Several states relied on English legal roots by enacting versions of the Statute of Northampton . . . ."[237] For that it cites the 1786 Virginia statute with its "terror" element and "A Collection of Statutes of Parliament of England in Force in the State of North Carolina 60–61 (François-Xavier Martin ed., 1792) [hereinafter N.C. Statute of

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229 *Id.* at 1238, 1239 (VanDyke, J., dissenting from denial of rehearing).
230 2022 N.J. Laws ch. 131, § 1(g).
231 Koons v. Platkin, 673 F. Supp.3d 515, 600–57 (D.N.J. 2023).
232 Koons v. Att'y Gen. N.J., 156 F.4th 210 (3d Cir. 2025).
233 *Id.* at 251–52.
234 *Id.* at 269–70.
235 *See* Koons v. Att'y Gen. N.J., 162 F.4th 100 (3d Cir. 2025) (granting rehearing en banc).
236 *Koons*, 156 F.4th at 229 n.14 (emphasis added).
237 *Id.* at 234.

Northampton] . . . ." [238] Citing Justice Breyer's dissent in *Bruen*, *Koons* continues, "North Carolina's 1792 statute was so traditional that it retained references to the King."[239] References to "the King" is a clue that no such "law" existed that even Inspector Clouseau of the *Pink Panther* would recognize.[240]

Koons labors on with references to late nineteenth century and early twentieth century restrictions, which "are nevertheless probative of the American tradition of firearm restrictions, as they developed out of earlier statutes regulating the carrying of arms . . . at older sites of recreation like fairs and markets . . . ."[241] For support, once again the 1786 Virginia law and "N.C. Statute of Northampton 60–61" come to the rescue.[242]

Pertinent to the focus here, the dissenting opinion says it all: "Northampton-inspired going-armed laws were about dangerous and threatening conduct, not general prohibitions on public carry in sensitive places."[243] Citing the same early laws with terror elements that the majority cited—excluding, of course, Martin's non-law—the dissent pointed out: "Even among the handful of States that enacted versions of the Statute in the Founding era, half of them expressly excised the language about fairs and markets because the target was dangerous conduct rather than allegedly sensitive places."[244]

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238 *Id.* at 234 n.43. The court also cites four other laws, all of which had terror elements: 1795 Mass. Acts 436 (prohibiting going "armed offensively, to the fear or terror" without reference to fairs and markets); 1801 Tenn. Pub. Acts 260 (same); 1821 Me. Laws 353 (same); An Act for the Punishment of Certain Crimes and Offences, Within the District of Columbia, *reprinted in* CODE OF LAWS FOR THE DISTRICT OF COLUMBIA 235, 254 (Davis & Force eds., 1819) (prohibiting going or riding "armed by night nor day, in fairs or markets, or in other places, in terror of the country").

239 Koons v. Att'y Gen. N.J., 156 F.4th 210, 234 n.44 (3d Cir. 2025) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 122 (2022) (Breyer, J., dissenting)).

240 "Inspector Clouseau is a bumbling, accident-prone Parisian detective who lurches from crisis to crisis, bumping into furniture and stumbling blindly over carpets and clues." *Jacques Clouseau*, BRITANNICA, https://perma.cc/4LJ6-7564.

241 *Koons*, 156 F.4th at 258.

242 *Id.* at 258 n.128.

243 *Id.* at 287 (Porter, J., concurring in the judgment) (citing STEPHEN P. HALBROOK, GOING ARMED WITH DANGEROUS AND UNUSUAL WEAPONS TO THE TERROR OF THE PEOPLE (2016)).

244 *Id.* at 288 & n.36.

7.3. The Second Circuit Redux

In *Frey v. City of New York*, the Second Circuit returned to the subject of "sensitive places" to uphold gun bans in New York City in Times Square, the subway system, and the rail system.[245] Summarizing *Antonyuk II*, the court cited Virginia's 1786 law against going armed "in terror of the country" and what it thought to be a North Carolina "law" printed in Martin's *Collection of Statutes of the Parliament of England in Force in the State of North Carolina*.[246] Next came the usual references to the Reconstruction laws of three states (Texas, Missouri, and Tennessee) and two territories (Oklahoma and Arizona).[247]

Supposedly, "that robust historical tradition against the prohibition of firearms in urban parks and theaters at issue in *Antonyuk*" burdened "Second Amendment rights in a distinctly similar way (*i.e.*, by prohibiting carriage) and for a distinctly similar reason (*i.e.*, maintaining order in often-crowded public squares) as do the plethora of regulations provided by the State."[248] Then follows a curious footnote conceding that *Antonyuk II* got its history completely wrong, which began: "We are not so certain that the Northampton statute, or the Virginia and North Carolina laws that replicated it, prohibited carriage altogether."[249]

While *Antonyuk II* read the Northampton and North Carolina statutes as prohibiting firearms in fairs and markets regardless of conduct, the *Frey* court continued, "*Bruen* undermines that interpretation."[250] *Bruen* quoted *Sir John Knight*'s Case as holding that arms carrying came within Northampton "*only* 'where the crime shall appear to be *malo animo*.'"[251] By the 18th century, the Northampton statute was read to apply to arms

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245 157 F.4th 118, 136 (2d Cir. 2025).

246 *Id.* at 132. The citation is COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 60–61, ch. 3 (F. Martin ed. 1792) (stating that "no man great nor small," except ministers of justice, shall "bring no force in an affray of peace, nor to go nor ride armed by night nor by day, in fairs, markets").

247 *Frey*, 157 F.4th at 132.

248 *Id.* at 133.

249 *Id.* at 133 n.6.

250 *Id.*

251 *Id.* at 133 n.6 (emphasis added) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 43–44 (2022)).

carrying only if done so to terrify others.[252] Finally, as *Bruen* continued, the North Carolina Supreme Court in *State v. Huntly*, held that "'the carrying of a gun' for a lawful purpose '*per se* constitutes no offence,' and '[o]nly carrying for a 'wicked purpose' with a "mischievous result . . . constitute[d a] crime.'"[253]

Given the above, *Frey* continues with an understatement: "It therefore *may be* that those statutes, just like the Virginia law, did not ban carriage without malintent."[254] It quotes the Ninth Circuit's decision in *Wolford v. Lopez* (which is discussed above) that the Virginia and North Carolina laws "prohibited the carry of firearms only to the 'terror' of the people or for a 'wicked purpose'; lawful carry was permitted."[255] That should have resolved the issue against the government, but instead, *Frey* doubles down and argues that "even assuming that *Antonyuk* does not have the better reading of these statutes, we remain confident in *Antonyuk*'s conclusion that we have a well-established tradition of banning firearms in quintessentially crowded places."[256] It refers to the "Founding-era Virginia and North Carolina laws" as evincing sensitivity to potential violence "in crowded locations," disregarding Virginia's "terror" element and wrongly identifying North Carolina's law."[257]

But several centuries of interpretation cumulating in the Founding-era laws *did* provide clarity—peaceably carrying arms was lawful, and going armed in a manner to terrorize others was criminal. The *Frey* court's mistaken claim that "the Founding-era history is inconclusive" in no way justifies its pivot to "Reconstruction-era statutes," which were not "similar."[258] The court concludes that "we can use 19th century evidence to discern our American tradition—at least where it does not conflict with Founding-era evidence."[259] But the evidence it conjures up sharply conflicts with Founding-era evidence.

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252 *Frey*, 157 F.4th at 133 n.6.

253 *Id.* (alteration in original) (quoting *Bruen*, 597 U.S. at 51).

254 *Frey*, 157 F.4th at 133 n.6 (emphasis added).

255 *Id.* (quoting Wolford v. Lopez, 116 F.4th 959, 998 n.12 (9th Cir. 2024)).

256 *Frey*, 157 F.4th at 133 n.6

257 *Id.*

258 *Id.*

259 *Id.* at 143.

8. CONCLUSION

Antonyuk II made a grave error when it attempted to find Founding-era analogs in a Virginia law and a North Carolina "law," dropped the Virginia law because of its "terror" element, based the North Carolina "law" on a publication by a private citizen never approved by the legislature, ignored actual North Carolina statutes, disregarded North Carolina judicial precedents, and then *voilà*—found the North Carolina "law" to be the basis for a handful of late nineteenth century laws. To say that these historical contortions demonstrate that New York's prohibition on possession of firearms at many public places "is consistent with the Nation's historical tradition of firearm regulation" is seriously mistaken.[260]

The same made-up history is being peddled to unsuspecting courts in other circuits—indeed to the Supreme Court itself, in the form of Justice Breyer's *Bruen* dissent. Ironically, the Ninth Circuit conceded that the Founding-era laws of both Virginia and North Carolina provided no support for *Antonyuk*'s claim, but was satisfied to find a historical tradition of firearm regulation in late nineteenth-century laws.[261] By contrast, the Third Circuit swallowed *Antonyuk II*'s narrative about North Carolina "law" hook-and-sinker.[262] Finally, a different panel of the Second Circuit conceded that the panel in *Antonyuk II* got the history wrong, but doubled down to uphold the same result.[263]

This matter is not about a single, erroneous citation with no consequence. In *Antonyuk II*, the Second Circuit built its entire theory of Founding-era analogs on sand in order to comply with *Bruen*'s directive to find a historical tradition of regulation that supported New York's wide restrictions. The decision has influenced two other circuits covering three states to do the same, and more are sure to follow. The fake citation even appears in the Repository of Historical Gun Laws of the Duke Center for Firearms Law, influencing scholars, litigants, and judges. In an age where artificial intelligence is cranking out hallucinated case citations by attorneys

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260 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

261 *See supra* Section 7.1.

262 *See supra* Section 7.2.

263 *See supra* Section 7.3.

and even courts, a return to honest, accurate cite-checking and legal reasoning is in order.