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Firearms Policy and the Black Community: Rejecting the “Wouldn’t You Want a Gun if Attacked?” Argument

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The gun lobby has succeeded in focusing the gun debate on a narrow, oversimplified question: “If a criminal attacked you, wouldn’t you prefer to have a gun to protect yourself?” This Article asserts that the question—which correlates with a “more guns” argument—is a red herring, a diversion that leads us off track and blinds us to the need for comprehensive strategies to address the complex, polycentric issues of gun violence in America.

In his article, Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy, Professor Nicholas Johnson pursues a version of the “Wouldn’t you want a gun if attacked?” argument particularized to black communities. Johnson uses the article as a platform for opposing black leaders who support gun regulation while essentially advocating for a “more guns” approach to violence in black communities.

This reply Article highlights structural and rhetorical issues in Johnson’s arguments, but focuses on the reasoning fallacy inherent in concentrating the gun debate on a single, exaggerated utility of guns (i.e., the “Wouldn’t you want a gun if attacked?” argument) without fairly considering the offsetting risks or costs. It also asserts we should act quickly as a nation to invest in more research and data collection pertaining to the causes and prevention of firearms deaths and injuries, including the efficacy of guns for self-defense. Only with current, accurate information—which does not exist due in large part to efforts by the gun lobby to stifle gun research—can governments and individuals make rational firearms choices. The Article concludes with a detour from the academic, theoretical world of gun debating to Memphis, Tennessee, one of America’s most violent cities.

ARTICLE CONTENTS

I. INTRODUCTION 1775

II. THE PAST IS HORRIFIC, BUT NOT DIRECTLY RELEVANT 1778

III. EXAGGERATING THE MODERN ORTHODOXY AND
FEARS OF EXTREME GUN CONTROL 1782

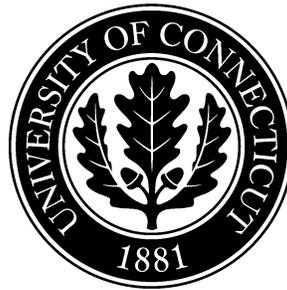
 A. THE “MODERN ORTHODOXY” DOES NOT SUPPORT DISARMING
 BLACK CITIZENS..... 1782

 B. GUN BANS ARE UNCONSTITUTIONAL..... 1786

 C. EXTREME GUN REGULATION IS POLITICALLY UNFEASIBLE 1787

IV. THE FALLACY OF THE “WOULDN’T YOU WANT A GUN
IF ATTACKED?” ARGUMENT AND NEED FOR MORE
FIREARMS RESEARCH 1790

V. LONG DISTANCE INFORMATION: MEMPHIS, TENNESSEE 1801



Firearms Policy and the Black Community: Rejecting the “Wouldn’t You Want a Gun if Attacked?” Argument

ANDREW JAY MCCLURG*

I. INTRODUCTION

The gun lobby¹ has succeeded in focusing the gun debate on a narrow, oversimplified question: “If a criminal attacked you, wouldn’t you prefer to have a gun to protect yourself?” The easy answer, for all but the most devoted pacifist, would be an emphatic “Yes!” A prominent example of what I call in this Article the “Wouldn’t you want a gun if attacked?” argument was the gun lobby’s response to the Sandy Hook Elementary School mass shooting in Newtown, Connecticut in 2012.² The National Rifle Association (“NRA”) held a press conference shortly after the attack in which it called on the federal government to put armed guards in every school, with Executive Vice President Wayne LaPierre stating, “The only thing that stops a bad guy with a gun is a good guy with a gun.”³

The argument is a red herring, a diversion that leads us off track and blinds us to the need for comprehensive strategies to address the complex,

* Professor and Herbert Herff Chair of Excellence in Law, University of Memphis Cecil C. Humphreys School of Law. Thanks to Professors Alena Allen and Richard Janikowski and to research assistant Elizabeth Rogers for their help. I am indebted to three University of Memphis first-year law students—Jerrick Murrell, Joe Smith, and Jarrett Spence—for their eye-opening insights about guns and gun violence in Memphis. This Article is a reply to Professor Nicholas Johnson’s excellent article, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*. Readers should know up front that I am a longtime supporter of reasonable gun regulations. Professor Johnson is a strong supporter of gun rights. Unsurprisingly, we disagree on some points, but nothing in this reply Article should be taken as anything other than spirited engagement of the issues. Although I address several specific matters raised by Professor Johnson, my principal arguments are directed at the gun debate as a whole.

¹ As used in this Article, “gun lobby” refers to any organization devoted to promoting the ownership and carrying of firearms, which includes not only the National Rifle Association, but state, local, and other organizations.

² See James Barron, *Pupils Were All Shot Multiple Times with a Semiautomatic, Officials Say*, N.Y. TIMES, Dec. 16, 2012, at A1 (describing mass shooting attack on December 14, 2012, in which twenty-year-old Adam Lanza shot and killed twenty children and six adults at Sandy Hook Elementary School in Newtown, Connecticut).

³ David Nakamura & Tom Hamburger, *NRA: Put Armed Police in Schools*, WASH. POST, Dec. 22, 2012, at A1 (quoting LaPierre). Another gun lobbying group, Gun Owners of America, took the same approach. Days after the shootings, Larry Pratt, the organization’s executive director, asserted that “[g]un control supporters have the blood of little children on their hands” because “[f]ederal and state laws combined to insure that no teacher, no administrator, no adult had a gun at the Newtown school where the children were murdered.” Andrew Rosenthal, *The ‘More Guns’ Argument*, N.Y. TIMES EDITORIAL PAGE EDITOR’S BLOG (Dec. 21, 2012, 11:29 AM), <http://takingnote.blogs.nytimes.com/2012/12/21/the-more-guns-argument/> (quoting Pratt).

polycentric issues of gun violence in America. Even setting aside the crucial distinction between having a gun and being able to access and use it effectively in response to an imminent attack,⁴ whether one would prefer to have a gun if attacked by a criminal is not the real question, any more than would be, “If a criminal shot you with a gun stolen from your neighbor’s car, would you prefer your neighbor didn’t store an unsecured gun in his car?” Put differently, these are but two of many questions relevant to rationally weighing the risks and utilities of guns and formulating gun policy in America.

In his article, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*,⁵ Professor Nicholas Johnson pursues a version of the “Wouldn’t you want a gun if attacked?” argument particularized to black communities. The article weaves a rich historical tapestry of more than a century of terror in which black Americans were subjugated by armed whites under the sanction of *de jure* or *de facto* law.⁶ Along with Cottrol and Diamond’s work,⁷ it is a definitive account of how an armed, white-controlled state used violence to subjugate a largely disarmed black population, as well as notable instances where blacks⁸ used firearms to successfully defend themselves against that violence. The article is elegantly written and exhaustively researched.⁹

Johnson uses his powerful narrative as a platform for opposing black leaders who support gun regulation¹⁰ while essentially advocating for a

⁴ There was, for example, an armed guard present at Columbine High School when Eric Harris and Dylan Klebold murdered twelve students and a teacher. See Amanda Terkel, *Columbine High School Had Armed Guard During Massacre in 1999*, HUFFINGTON POST (Dec. 23, 2012, 11:07 PM), http://www.huffingtonpost.com/2012/12/21/columbine-armed-guards_n_2347096.html (quoting police report explaining that Deputy Neil Gardner, a fifteen-year police veteran assigned as the uniformed officer at the school, fired on Harris but missed and that another nearby officer arrived on the scene and fired at Harris, but also missed); see also *infra* text accompanying notes 118–20 (questioning the assumption that most people are capable of using guns effectively for immediate self-defense).

⁵ Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013).

⁶ *Id.* at 1497–1515.

⁷ See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) (discussing the Second Amendment as integral to self-defense for African Americans).

⁸ For simplicity and convenience, this Article follows Johnson’s lead and uses “blacks” and “whites” rather than African-Americans and Caucasians.

⁹ One omitted relevant historical point is Carl Bogus’s argument that the Second Amendment was adopted primarily for the purpose of assisting white slave owners in suppressing slave revolts. See Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 335–37 (1998) (presenting historical case that the Second Amendment was created to assure Southerners that the federal government would not undermine slave control by disarming white state militias).

¹⁰ It is not clear whether Johnson objects to black leaders supporting only gun bans or other forms of gun regulation as well. The distinction is important in interpreting his article. His arguments appear to be limited to gun bans and other strict supply-side gun control that amount to gun bans. See, e.g., Johnson, *supra* note 5, at 1493–94 n.5 (asserting that black leaders overwhelmingly support aggressive gun control, including gun bans, and citing examples); *id.* at 1577 (stating that the modern orthodoxy supports a policy of using legislation to “push[] the gun inventory toward zero”); *id.* at 1586 (stating

“more guns” approach to violence in black communities. The “more guns” argument has two distinct strands: the deterrence argument that more guns result in less crime because criminals wish to avoid confronting armed citizens¹¹ and the immediate self-defense argument.¹² Johnson discusses and endorses the deterrence strand,¹³ but focuses on the argument that residents of black communities would benefit from owning and carrying guns to protect themselves against imminent threats.¹⁴

Parts II and III of this reply Article highlight structural and rhetorical issues in Johnson’s arguments.¹⁵ Part IV addresses the reasoning fallacy inherent in concentrating the gun debate on a single, exaggerated utility of guns (i.e., the “Wouldn’t you want a gun if attacked?” argument) without fairly considering the offsetting risks or costs.¹⁶ This section also asserts

that “blanket gun bans” are “urged as core policy under the modern orthodoxy”). But he also speaks about “stringent” or “aggressive” gun control generally without specifically mentioning gun bans or by differentiating it from gun bans. See, e.g., *id.* at 1493 (referring to black leaders backing “stringent gun control measures”); *id.* at 1496–97 (discussing “[b]lack support for stringent gun control”); *id.* at 1495 (discussing both “[g]un bans and other aggressive control measures”). To the extent Johnson’s argument is limited to gun bans or regulations that amount to gun bans, some of his arguments (e.g., his historical argument and that black leaders want to disarm black populations and leave them helpless to protect themselves) are strengthened, but other arguments are substantially weakened. As explained in this Article, it is questionable whether a modern orthodoxy to ban guns exists among leaders of any race, and, even if it did, gun bans cannot and will not happen. See *infra* Part III.

¹¹ See JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (3d ed. 2010) (presenting a statistical analysis purporting to show that the more guns people possess, the less crime that will occur). Johnson cites Lott, but does not place primary weight on the deterrence argument. Johnson, *supra* note 5, at 1597.

¹² In recent years, the immediate self-defense argument appears to have dislodged the statistical deterrence argument as the most favored among gun-rights advocates. The NRA’s response to the Newtown, Connecticut shootings, for example, was not that armed guards should be put in schools to deter attacks, but that guns are needed to respond to imminent or in-progress attacks. See *supra* note 3 and accompanying text. Similarly, the NRA’s push for so-called “Safe Commute” laws—laws to allow gun owners to bring firearms onto the property of others, even against the property owners’ wishes—are justified, as the name suggests, by the argument that they are needed to allow gun carriers to act in self-defense when they are outside of their dwellings. See *What Is the Safe Commute Act and Why Is It Important*, NRA POL. VICTORY FUND, <http://www.nrapvf.org/defeat/what-is-the-safe-commute-act-and-why-is-it-important.aspx> (last visited Mar. 30, 2013) (“[F]irearm possession prohibitions in vehicles in parking lots have consequences that extend far beyond the property boundaries. They effectively prohibit vehicle owners from possessing firearms for self-defense for the duration of the entire commute away from home.”). No mention is made of the deterrent effect of gun carrying. *Id.*; see also *infra* note 86 and accompanying text (discussing the fierce fight to pass such a law in Tennessee).

¹³ See Johnson, *supra* note 5, at 1597–1603 (discussing the deterrence benefits of having more guns in black communities).

¹⁴ Johnson’s article is reminiscent to me of Joyce Lee Malcolm’s book, *Guns and Violence: The English Experience*, which I reviewed several years ago. See Andrew J. McClurg, *Book Review: Joyce Lee Malcolm, Guns and Violence: The English Experience*, 46 AM. J. LEGAL HIST. 507 (2004). Like Johnson, Malcolm composed a valuable, comprehensive firearms-related history, in her case, of guns in England. But, in my opinion as a reviewer, the history suffered when she forced it into double duty as a pro-gun rights polemical, arguing that English history shows fewer guns cause more crime. *Id.*

¹⁵ See *infra* Parts II and III.

¹⁶ See *infra* notes 88–126 and accompanying text.

that we should act quickly as a nation to invest in more research and data-collection pertaining to the causes and prevention of firearms deaths and injuries, including the efficacy of guns for self-defense.¹⁷ Only with current, accurate information—which does not exist due in large part to efforts by the gun lobby to stifle gun research¹⁸—can governments and individuals make rational firearms choices. The Article concludes in Part V with a detour from the academic, theoretical world of gun debating to Memphis, Tennessee, one of America’s most violent cities.¹⁹

II. THE PAST IS HORRIFIC, BUT NOT DIRECTLY RELEVANT

Johnson opposes what he calls the “modern orthodoxy” of black leaders to favor gun regulation, at least regulations that would preclude law-abiding citizens from possessing firearms,²⁰ arguing that residents of black communities would benefit from arming themselves in self-defense against imminent attacks by criminals.²¹ But this argument is not primarily racially based and is divorced from the bulk of his article, which focuses on the history of armed white, state-sanctioned violence against blacks.²² Johnson acknowledges that threat no longer exists for the most part,²³ but navigates around the obstacle by arguing that although the state is no longer an active doer of physical harm against blacks, it cannot be trusted to protect them from physical attacks by others.²⁴ In making this pivot from history to the present, he urges that the reasons supporting the benefits of armed self-defense in the past—to which he devotes most of the article—are not important in crafting present policy.²⁵

¹⁷ See *infra* notes 128–35 and accompanying text.

¹⁸ See *infra* notes 127–40 and accompanying text.

¹⁹ See *infra* notes 141–94 and accompanying text. The bulk of the Memphis discussion is in Part V, but the Article makes a few references to Memphis at earlier points.

²⁰ Johnson, *supra* note 5, at 1597–1601, 1603.

²¹ See *id.* at 1568–72 (explaining the need to carry a weapon as a result of the state’s failure to protect a victim in a certain window of time).

²² See *id.* 1515 (discussing instances of state-sanctioned violence against black communities).

²³ See, e.g., *id.* at 1572 (“Today, state failure is less pernicious and more in the nature of inherent limitations. . . . [T]he most egregious renditions of state failure have passed.”).

²⁴ See *infra* notes 25–26, 30–32 and accompanying text.

²⁵ Johnson writes:

Even if it is true that Blacks no longer have to worry about racist violence and malevolent governments (or more contestably their agents) the objection ignores that the Black self-defense tradition is fundamentally a response to the *failure and limitations* of government. It is true, that the Black self-defense tradition emerged in a context where much of the *reason* for this failure was overt hostility and official neglect. But it is a mistake to presume that the *reason* for failure of government is pivotal. From the perspective of people at risk, the *reason* is secondary. The central thing is that they face a physical threat within a window of state failure. The reasons for the state’s failure to protect these people may have changed. But the core private interest in self-preservation within that window and the tools to facilitate it have not.

In modern times, “[t]he central thing is that [black citizens] face a physical threat within a window of state failure.”²⁶ The window to which he refers is the moment of imminent threat during an attack in which the police are not likely to be there to help.²⁷ This window most definitely exists, but that the police cannot intervene to prevent criminal attacks in all but the most fortunate of coincidences is the same argument made by white and other gun-rights proponents.²⁸ As pro-gun rights criminologist Gary Kleck asserted in 1991:

[The idea] that citizens can depend on police for effective protection is simply untrue. It implies that police can serve the same function as a gun in disrupting a crime in progress, before the victim is hurt or loses property. Police cannot do this, and indeed do not themselves even claim to be able to do so.²⁹

This is not to say that the probabilistic need for a gun for self-defense is identical for all races or all people. There is no doubting that if one were to set aside the potentially large costs of introducing additional firearms into high-crime neighborhoods (as Johnson largely does) and look only at the statistical probability of needing a gun for immediate self-defense, an indisputable argument exists that residents of any high-crime community have a more compelling need to possess guns than people who live and work in safe neighborhoods.

Additionally, black citizens have greater reasons—tied to the history Johnson describes so well—to distrust the state’s willingness or ability to protect them.³⁰ Traditionally, one cause of this distrust has been under-policing; that is, law enforcement policies that deprive black neighborhoods of adequate police resources to combat and deter crime.³¹ Johnson discusses under-policing as a continuing concern, although he asserts that modern issues involving the proper allocation of police services to black neighborhoods are attributable more to a lack of resources than “racist neglect.”³²

Later in this Article, I turn to Memphis, Tennessee as a landscape for considering whether introducing more guns into high-crime neighborhoods

Johnson, *supra* note 5, at 1568–70 (footnotes omitted). A footnote to this paragraph cogently notes that hate crimes still occur, but Johnson does not pin his argument that blacks should arm themselves to the possibility of hate crimes. *Id.* at 1568 n.461.

²⁶ *Id.* at 1569.

²⁷ *See id.* at 1571–74 (describing the window of imminence).

²⁸ *See, e.g., infra* notes 97–102 and accompanying text.

²⁹ GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 121 (1991).

³⁰ *See* Johnson, *supra* note 5, at 1495 (“The modern orthodoxy is very difficult to square with the historic and well-earned Black distrust of the state.”).

³¹ *See id.* at 1574–76 (discussing how finite resources prevent sufficient protection of black communities).

³² *Id.* at 1575.

would be beneficial or harmful.³³ In writing that portion, I interviewed three African-American first-year law students at the University of Memphis. On the policing issue, all three students identified *over*-policing of black communities as a bigger issue, at least in Memphis, than under-policing.³⁴ As one student put it, “Policing isn’t the answer to the gun problem. You could have a hundred police [officers] driving around and it wouldn’t make any difference.”³⁵ Another said that distrust of police is real, but not attributable to a failure to respond to calls:

It’s not a matter of response time. My aunt calls the police for everything. If the neighbor’s radio is too loud, she’ll call the police. They come every time. Also, in Memphis, a lot of the police are African-American, so that’s not the problem. We have plenty of police, but it’s the wrong kind of policing. We need more community policing.³⁶

While the students did not see under-policing as the problem, they readily agreed with Johnson that black citizens do not feel they can trust the police to protect them. Said one:

African-Americans in Memphis do not view police the same way as people in Cordova [a mostly white suburban enclave outside of the city]. I never got in any trouble as a kid, but I learned to stay as far away from the police as possible. We have a saying, “You are the wrong color to call the police.”³⁷

Although the students confirmed a widespread distrust of police in black communities, as discussed in Part V, they rejected increased gun ownership as a response to that distrust.³⁸

Ironically, although Johnson’s article vividly establishes that blacks traditionally have had much better reasons to fear government than whites, it appears clear that larger percentages of whites than blacks own guns, in part because of distrust of government. While empirical evidence is unavailable,³⁹ strong anecdotal support can be found in the extreme anti-

³³ See *infra* Part V.

³⁴ Interview with Jerrick Murrell, Joe Smith, & Jarrett Spence, Law Students, in Memphis, Tenn., with Author (Feb. 1, 2013) [hereinafter “Law Student Interview”] (notes on file with Author).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *infra* notes 173–94 and accompanying text (discussing the law students’ views on guns in Memphis).

³⁹ One study did suggest that people who own guns are more likely to distrust government, but it did not include enough data to draw conclusions regarding racial breakdowns. See Robert M. Jiobu & Timothy J. Curry, *Lack of Confidence in the Federal Government and the Ownership of Firearms*, 82 SOC. SCI. Q. 77, 84 (2001) (finding that 23.3% of respondents who said they had a great deal of faith in all three branches of government owned firearms compared to 37.2% of respondents who said they lacked faith in any branch of government).

Obama rhetoric by some white pro-gun rights advocates⁴⁰ and the fact that a central tenet of the armed white militia movement is that government cannot be trusted.⁴¹ After President Barack Obama proposed new gun regulations in 2013 in the wake of the Newtown, Connecticut mass shooting, several politicians and local law enforcement officers around the nation vowed to defy them.⁴² In some states, politicians proposed state legislation that would make it a crime to enforce federal gun laws.⁴³ As far as could be gleaned from news reports, all of the potential obstructionists were white.

In the end, Johnson acknowledges that the question of whether it is better or not to own a gun depends on cost-benefit weighing in the present rather than the past. The last portion of his article is a standard cost-benefit argument that the benefits of owning guns for self-defense outweigh the costs. It relies largely on race-neutral research and assertions that have been part of the firearms policy debate for a long time, such as surveys regarding the number of annual defensive gun uses, John Lott’s “more guns, less crime” study, and surveys showing that criminals fear confronting armed citizens.⁴⁴

⁴⁰ See, e.g., Wade Goodwyn, *Smoke Cleared, Texas Gun Owners Remain Wary* (NPR radio broadcast Sept. 19, 2012, 3:21 PM), available at www.npr.org/2012/09/19/161029822/smoke-cleared-texas-gun-owners-remain-wary?device=iphone (quoting white gun owners expressing opinions that the Obama administration “is using the United Nations as a back-door channel to restrict American gun rights through proposed small arms treaties,” and reporting that some of them are stocking up on thousands of rounds of ammunition); Sean Lengell, *NRA Official: Obama Wants to Outlaw Guns in 2nd Term*, WASH. TIMES INSIDE POL. BLOG (Feb. 10, 2012, 3:41 PM), <http://www.washingtontimes.com/blog/inside-politics/2012/feb/10/nra-official-obama-wants-outlaw-guns-2nd-term/> (quoting NRA Executive Vice-President Wayne LaPierre, stating: “All that first term, lip service to gun owners is just part of a massive Obama conspiracy to deceive voters and hide his true intentions to destroy the Second Amendment during his second term.”); Nick Wing, *Tom Head, Texas Judge: Obama Reelection Could Lead to ‘Civil War,’ I’m Ready to ‘Take Up Arms’*, HUFFINGTON POST (Aug. 23, 2012), http://www.huffingtonpost.com/2012/08/22/tom-head-texas-obama_n_1822003.html (quoting Texas judge asserting that President Obama would “try to hand over the sovereignty of the United States to the U.N.” if reelected for a second term and suggesting there may be a need to take up arms to resist the President).

⁴¹ Cf. S. POVERTY L. CTR., INTELLIGENCE REP., ACTIVE ‘PATRIOT’ GROUPS IN THE UNITED STATES IN 2011 (Spring 2012), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/active-patriot-groups-in-the-united-states> (listing 1,274 U.S. antigovernment ‘Patriot’ groups in 2011, including 334 militias, which “define themselves as opposed to the ‘New World Order,’ engage in groundless conspiracy theorizing, or advocate or adhere to extreme antigovernment doctrines”).

⁴² See Jeff Barnard, *Rural Lawmen Take on Obama—Say Gun Control Is Illegal*, COM. APPEAL, Jan. 18, 2013, at 1A–2A, for a description of Mississippi Governor Phil Bryant’s call to make it illegal to enforce any executive order by the president deemed violative of the Constitution, Tennessee State Representative Joe Carr’s call to make it a state crime for a federal agent to enforce any ban on guns or ammunition, a Wyoming bill that would make federal limitations on guns unenforceable and make it a felony for a federal agent to attempt enforcement, a Utah bill that would purport to exempt the state from federal gun laws, and an Alaska bill that would make it a misdemeanor for federal agents to enforce gun laws.

⁴³ *Id.* at 2A.

⁴⁴ See Johnson, *supra* note 5, at 1597. By necessity, all firearms policy commentators are forced

While the legacy of black violent oppression by armed whites informs the present in complex, important ways that should never be forgotten, it does not appear to be directly relevant to the formulation of modern gun policy in black communities.

III. EXAGGERATING THE MODERN ORTHODOXY AND FEARS OF EXTREME GUN CONTROL

This section assumes that the terrible history of white armed violence against blacks is a persuasive guide to determining present gun policy. Even with this assumption, to make Johnson's argument work, one must exaggerate both the modern orthodoxy and the implicit ride-along fear that black citizens are at risk of being denied their right to lawful armed self-defense.

Johnson asserts that the modern orthodoxy of black leaders is to ban guns and reject self-defense as an option for protection.⁴⁵ For example, he asks "how do we explain the shift of the modern orthodoxy away from the traditional support of self-defense?"⁴⁶ After recounting a story about a black citizen whose home was broken into, followed by a three-hour delay by the police in responding, he asks "how do we justify denying the standard tools of civilian self-defense to people who live under such conditions?"⁴⁷ He concludes his article with the assertion that "the glib assumption that the modern orthodoxy is the only authentically Black viewpoint on the gun issue is unsustainable."⁴⁸

As discussed below, the argument is rhetorically questionable for two reasons: (1) there does not appear to be a unified movement or orthodoxy among black or other leaders to ban guns or deny black or other citizens the right of lawful armed self-defense; and (2) even if there was, gun bans cannot happen, either constitutionally or politically.

A. *The "Modern Orthodoxy" Does Not Support Disarming Black Citizens*

Johnson's argument depends on accepting several premises regarding the modern orthodoxy: (1) that black leaders overwhelmingly support gun bans or other strict supply-side gun control; (2) that they reject the right of self-defense and believe black citizens should surrender their fate to state protection; and (3) that there is a realistic chance of the foregoing positions manifesting themselves as law.⁴⁹ But none of these appears to be true.

to rely mostly on dated research and data due to a dearth of current information. *See infra* notes 127–40 (identifying this deficiency and advocating for more research and data regarding firearms issues).

⁴⁵ *See infra* note 50 and accompanying text.

⁴⁶ Johnson, *supra* note 5, at 1572.

⁴⁷ *Id.* at 1575.

⁴⁸ *Id.* at 1604.

⁴⁹ Johnson does not expressly argue that support by black leaders for gun bans will result in gun bans, but the possible fruition of their alleged advocacy—the third premise listed in text—is a

Some black leaders and commentators have advocated gun bans, as have some white leaders and commentators, but there is no cognizable orthodoxy or movement to that effect. Most of the calls for gun bans cited by Johnson occurred several years ago,⁵⁰ predating the Supreme Court’s two crucial gun rulings that gun bans are unconstitutional, *District of Columbia v. Heller*,⁵¹ and that the Second Amendment applies to the states, *McDonald v. City of Chicago*.⁵² Mayors Against Illegal Guns, a coalition of more than 700 mayors, including many black mayors, “support[s] the Second Amendment and the rights of citizens to own guns.”⁵³ The organization embraces a variety of reasonable federal⁵⁴ and state⁵⁵ gun initiatives aimed at curtailing crime guns, none of which include blanket gun bans. In a post-2012 election letter congratulating President Obama on reelection, the president of the National Urban League raised the issue of the “scourge of gun violence,” stating that it “cries out for a comprehensive new approach to community safety and crime reduction,” but the only specific measures raised in the letter were stronger enforcement of existing gun laws, reinstatement of the assault weapons ban, and an examination of

constituent component of his argument. Absent a reasonable fear that the asserted modern orthodoxy would actually result in extreme forms of gun control, the issue would not appear to warrant such extensive treatment.

⁵⁰ See Johnson, *supra* note 5, at 1494 n.5 (citing, as support for the argument that the modern orthodoxy of black leaders is to overwhelmingly push for gun bans and other forms of aggressive supply-side gun control, statements made by New York Congressman Major Owens in 1992 and 1993, Illinois Congressman Bobby Rush in 1999, and Gary, Indiana Mayor Richard Hatcher in 1979, as well as a 2000 lawsuit against the gun industry supported by Detroit Mayor Dennis Archer); see also *id.* at 1494 n.6 (citing membership by the National Urban League in the Coalition to Stop Gun Violence); *id.* at 1494 n.7 (citing lawsuit filed against the gun industry by the NAACP in 2003); *id.* at 1494 n.8 (citing a 2007 incident in which Jesse Jackson was arrested for participating in a protest at a Chicago gun store); *id.* at 1494–95 (discussing the NAACP’s amicus brief filed in support of the District of Columbia’s handgun ban in *Heller v. District of Columbia*, 554 U.S. 570 (2008)).

⁵¹ 554 U.S. 570, 635 (2008).

⁵² 130 S. Ct. 3020, 3050 (2010). For a discussion of *Heller* and *McDonald*, see *infra* Part III.B.

⁵³ *About the Coalition: Message from the Co-Chairs*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/home/home.shtml> (last visited Mar. 25, 2013).

⁵⁴ See *Federal Legislation*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/federal/federal.shtml> (last visited Mar. 28, 2013) (listing federal gun initiatives supported by the organization, including closing the private sale loophole for background checks of gun purchasers, opposing a national right-to-carry reciprocity law that would infringe on the ability of states and cities to control gun carrying within their jurisdictions, preventing people on terror-watch lists from purchasing firearms, and opposing proposed legislation that would further hinder the ability of the ATF to trace and analyze crime gun data and to terminate or prosecute federal firearms licensees engaged in illegal practices).

⁵⁵ See *State & Local Initiatives*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/local/local.shtml> (last visited Mar. 28, 2013) (listing state gun initiatives supported by the organization, including requiring the reporting of stolen guns, creating registries of convicted gun criminals, encouraging regional gun crime data sharing, implementing micro-stamp technology that would facilitate tracing bullets used in crimes to their guns of origin, filling gaps in background checks with respect to people who have been adjudicated mentally incompetent or involuntarily committed, restricting guns in sensitive locations, and establishing illegal gun tip hotlines and gun buyback programs).

disparities in the criminal justice system.⁵⁶ Johnson's assertion that black community "support for stringent gun laws can be inferred roughly from [Democratic] party allegiance"⁵⁷ is oversimplified. Contrary to gun-rights supporters, few gun-regulation supporters vote based principally on that issue. Blacks align with Democrats on many issues apart from firearms policy. In any event, gun bans are not part of the Democratic agenda.

In the second presidential debate preceding President Obama's 2012 reelection, Obama endorsed Second Amendment rights, stating: "We're a nation that believes in the Second Amendment, and I believe in the Second Amendment. We've got a long tradition of hunting and sportsmen and people who want to make sure they can protect themselves."⁵⁸ He reaffirmed his commitment to Second Amendment rights in the emotional days following the Newtown elementary school shootings, stating that "like the majority of Americans, I believe that the Second Amendment guarantees an individual a right to bear arms."⁵⁹ As the nation's supreme black leader, Obama's expressed support for gun rights would appear to undercut Johnson's theory of the modern orthodoxy.

But gun-rights supporters have never believed Obama's commitment to Second Amendment rights.⁶⁰ His reactions to the Newtown shootings were seen by many as confirming their fears of him as a closet gun-grabber. I sized up his response much differently. First, I join gun-rights supporters in doubting the bona fides of Obama's heart-of-heart beliefs regarding the Second Amendment. Nevertheless, in the aftermath of one of the most heart-wrenching gun tragedies in the nation's history, with a newly engaged media and public opinion aligned behind him in a way not

⁵⁶ Letter from Marc H. Morial, President & Chief Exec. Officer, Nat'l Urban League, to President Obama, Representative Pelosi, & Speaker Boehner (Nov. 7, 2012), available at <http://www.iampowered.com/node/30800>. The relevant passage states in full:

Third, the scourge of gun violence cries out for a comprehensive new approach to community safety and crime reduction. This requires stronger enforcement of existing gun laws, re-enactment of the assault weapons ban, and a thoughtful examination of criminal justice system disparities which have created an exploding prison population at great expense to the taxpayers at both the state and federal level.

Id.

⁵⁷ Johnson, *supra* note 5, at 1495.

⁵⁸ President Barack Obama, Presidential Debate at Hofstra University (Oct. 16, 2012), available at <http://www.debates.org/index.php?page=october-1-2012-the-second-obama-romney-presidential-debate>.

⁵⁹ President Barack Obama, Remarks on Gun Control, Fiscal Cliff (Dec. 19, 2012), available at http://articles.washingtonpost.com/2012-12-19/politics/35929025_1_gun-violence-gun-control-fiscal-cliff.

⁶⁰ Their lack of faith was reflected in the substantial surges in gun and ammunition purchases that occurred during both the 2008 and 2012 election cycles. See Shelly Banjo, *Gun Sales Hinge on Obama Re-Election: Cabela's, Other Retailers Prepare for Surge in Demand*, WALL ST. J. (Sept. 14, 2012, 5:19 PM), <http://online.wsj.com/article/SB1000087239639044433504577651393759726660.html> (discussing the substantial increases in gun sales that occurred in the 2008 and 2012 election cycles).

seen perhaps since the Gun Control Act of 1968 was passed in response to the assassinations of Robert F. Kennedy and Martin Luther King, Jr., the president’s actions ranged from modest to tepid. His only legislative proposals were to impose universal background checks for gun purchases and renew the federal ban on assault weapons and high-capacity magazines.⁶¹ He also issued twenty-three executive orders calling for, among other things, improvements to the national instant background check system for gun purchases, increased tracing of crime guns, making available ATF data on lost and stolen guns, and ending the freeze on gun research.⁶²

As of this writing, no action has been taken on Obama’s legislative gun proposals, but let us assume (over optimistically) that all of the President’s proposals succeed in becoming law. Even in that “worst case” scenario for gun-rights advocates, none of the provisions would prevent citizens of any race from purchasing and owning firearms for self-defense.

In short, the evidence does not appear to support the existence of the modern orthodoxy. Black leaders *do* generally support gun regulation in greater percentages than white leaders. Why is that? Johnson does not fully address this important question. If his article were directed against white leaders, perhaps racism could be ascribed as a motivation,⁶³ but his arguments are aimed at black leaders only. The simple answer would seem to be that many black leaders live daily with the consequences of gun violence in their communities and believe based on the evidence they see that guns, especially illegal guns, are a big part of the problem.

Memphis Mayor AC Wharton, a black urban leader, summed up the city’s gun problem tersely: “There are too many doggone guns on our streets. . . . All you have to do is watch the news, read the newspapers and in some neighborhoods walk out on the front porch to know (teenagers with guns) is the No. 1 problem.”⁶⁴ Wharton’s responses to gun violence may represent the true orthodoxy of modern black leaders. He pushes creative, multi-pronged strategies.⁶⁵ Reasonable gun regulations are one—

⁶¹ See Dana Bash, Jessica Yellin & Tom Cohen, *Pushback on Obama’s Plan to Stem Gun Violence*, CNN.COM (Jan. 17, 2013, 10:02 AM), http://www.cnn.com/2013/01/16/politics/gun-laws-battle/index.html?hpt=hp_c1 (discussing a White House event in which Obama called for these measures and signed executive orders addressing guns and gun violence).

⁶² *Id.*; see also WHITEHOUSE.GOV, NOW IS THE TIME: THE PRESIDENT’S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 4, 6–8 (Jan. 16, 2013), available at http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf (describing the Obama gun law proposals).

⁶³ Johnson does not accuse black leaders who favor gun regulation of doing so for racist reasons. See Johnson, *supra* note 5, at 1574 (“It is fair to expect that racism will not be the reason that Black administrations fail to fully protect Black citizens.”).

⁶⁴ Amos Maki, *Gunfire Battle Injures 2 Teens*, COM. APPEAL, Jan. 26, 2013, at 1A (quoting Wharton).

⁶⁵ See Beth Warren, *Memphis Mayor Wharton’s Initiative Targets Young Guns*, COM. APPEAL, available at <http://www.acwharton.com/news/196-memphis-mayor-whartons-initiative-targets-young->

but only one—prong. As a member of Mayors Against Illegal Guns, Wharton endorses a variety of regulations aimed at cutting into the supply of crime guns.⁶⁶ Some would be more effective than others, but none of them would infringe the right of self-defense. Notably, “more guns” is not one of the prongs. A majority of black citizens—consistently higher percentages than whites—also support greater gun regulation as at least one answer to gun violence.⁶⁷

B. *Gun Bans Are Unconstitutional*

Assuming Johnson is correct that there is a modern orthodoxy among black leaders to ban guns, the movement would be unsuccessful. In 2008, the U.S. Supreme Court decided *District of Columbia v. Heller*, holding that the Second Amendment protects an individual right to possess firearms in the home for self-defense.⁶⁸ The Court struck down the District of Columbia’s handgun ban.⁶⁹ In 2010, the Court followed up on *Heller* with *McDonald v. City of Chicago*, holding for the first time that Second Amendment rights are fundamental and, as such, incorporated into the Due Process Clause of the Fourteenth Amendment and binding on the states.⁷⁰ In the wake of *McDonald*, Chicago Mayor Richard M. Daley conceded that the ruling, which did not specifically address the merits of the challenge to Chicago’s strict gun laws, made the city’s handgun ban

guns (last visited Mar. 28, 2013) (discussing Wharton’s new strategies for combating youth gun violence in Memphis); see also Amos Maki, *Vice President Biden Calls Memphis Mayor Wharton*, COM. APPEAL, Dec. 22, 2012, at 2A (stating that Wharton’s grant-supported Innovation Delivery Team has targeted the Memphis neighborhoods of Frayser and South Memphis in a campaign to reduce youth gun crime by 20%). Wharton’s approach includes aggressively prosecuting gang leaders and repeat offenders, setting higher bail for persons accused of gun crimes, employing former gang members to help mediate gang disputes, and working with church leaders and other nonprofit organizations to mentor teens. *Id.*; see also Beth Warren, *Tutors Sought to Train Teens*, COM. APPEAL, Jan. 7, 2013, at B1 (describing Wharton’s tutoring of at-risk teens program and crime data-tracking initiative as two additional strategies to reduce gun violence in targeted high-crime neighborhoods of Memphis).

⁶⁶ See *supra* notes 54–55 (listing gun regulation initiatives of Mayors Against Illegal Guns).

⁶⁷ While the percentage of citizens of all races supporting gun regulation over gun rights has declined in recent years, a 2012 Pew Research Center survey showed that blacks favor gun regulation over the protection of gun rights by a 73% to 23% margin. Comparatively, whites elevate protecting gun rights over gun regulation by a 56% to 38% margin. *Views on Gun Laws Unchanged After Aurora Shooting*, PEW RES. CTR. (July 30, 2012), <http://www.people-press.org/2012/07/30/views-on-gun-laws-unchanged-after-aurora-shooting/>. Upward movement in the percentage of people supporting gun regulation appeared to occur immediately after the Newtown, Connecticut shootings. See Paul Steinhauser, *New Polls Suggest Elementary School Shootings May Be Changing Public Opinion*, CNN POL. TICKER (Dec. 17, 2012, 2:15 PM), <http://politicalticker.blogs.cnn.com/2012/12/17/new-poll-suggests-elementary-school-shootings-may-be-changing-public-opinion/?iref=obinsite> (discussing several polls taken in the days following the Newtown shootings which suggested increased support for gun regulation).

⁶⁸ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

⁶⁹ *Id.*

⁷⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

“unenforceable.”⁷¹

Much has been written about *Heller* and *McDonald* and no useful purpose would be served by belaboring the cases here other than to note that the law is clear: blanket guns bans are unconstitutional. Any government attempt—federal, state, or local—to disarm the citizenry of any race would be unlawful. Absent an argument that *Heller* and *McDonald* are in danger of being revisited and overruled,⁷² the threat of broad-based gun bans is illusory. Johnson discusses *Heller* and *McDonald*, but does not explain why they fail to lessen concerns about gun bans.⁷³

C. Extreme Gun Regulation Is Politically Unfeasible

Even without *Heller* and *McDonald*, the specter of aggressive gun control has long been only that: a mere apparition. This has been especially true at the federal level.⁷⁴ As noted, even after the Newtown mass shooting, the legislative gun proposals that emerged were far from extreme: a ban on assault weapons and high-capacity magazines and universal background checks for gun purchasers. An assault weapons and high-capacity magazine ban was *already* part of federal law from 1994 to 2004, when the ban was allowed to expire.⁷⁵ Proposing to move gun

⁷¹ See Adam Liptak, *Justices Extend Firearm Rights in 5-to-4 Ruling*, N.Y. TIMES, June 29, 2010, at A1 (quoting Daley).

⁷² The argument would not be implausible given that *Heller* and *McDonald* were 5–4 decisions, *McDonald*, 130 S. Ct. at 2787; *Heller*, 554 U.S. at 572, and the speculation that President Obama may get at least one more Court appointment in his second term. But reversing Supreme Court precedent, especially new precedent, is a relatively rare event.

⁷³ After the Newtown, Connecticut mass shootings, proposals to ban assault weapons were introduced in Congress. An assault weapon ban would be, of course, a type of gun ban, but Johnson’s arguments are addressed to blanket gun bans, especially handgun bans. Johnson mentions assault weapons only once in a footnote. See Johnson, *supra* note 5, at 1495 n.13 (mentioning assault weapons).

⁷⁴ See, e.g., Andrew J. McClurg, *Sound-Bite Gun Fights: Three Decades of Presidential Debating About Firearms*, 73 UMKC L. REV. 1015, 1042 (2005) (analyzing presidential and vice-presidential debates regarding the issue of gun control between 1976 and 2004 and noting that, during that twenty-eight year period, the only gun control measures discussed were gun registration (1976); waiting periods and background checks for gun purchases (1992, 1996, and 2000); an assault weapons ban (1992, 1996, 2000, and 2004); a photo identification license for purchasers of new handguns (2000); and greater punishment for criminals (1976, 1992, 2000, and 2004)).

Prior to *Heller* and *McDonald*, a few municipalities, most notably Washington, D.C. and Chicago, had aggressive gun laws amounting to handgun bans. After *Heller* declared Washington, D.C.’s gun laws unconstitutional, the city passed the Firearms Registration Amendment Act of 2008, requiring that guns be registered and owners pass a firearms training and vision test, and also limiting the capacity of magazines and prohibiting assault weapons. Gary Fields, *Washington’s New Gun Rules Shift Constitutional Debate*, WALL ST. J., May 17, 2010, at A1. The laws have been challenged as unconstitutional. Their ultimate fate was not determined as of this writing.

⁷⁵ The 1994 federal assault weapons and high-capacity magazine ban was, in fact, the last significant federal gun control measure before the Newtown elementary school shootings reignited the moribund gun debate. President George W. Bush and Congress allowed the legislation to expire in 2004. Some, including then-President Bill Clinton, said that Democratic support for the assault weapons legislation was a major factor in the Republicans taking control of the House of Representatives in 1994. See Evelyn Theiss, *Clinton Blames Losses on NRA*, CLEVELAND PLAIN-DEALER, Jan. 14, 1995, at A1 (quoting Clinton asserting that Democratic support for the assault

policy back in time by a decade hardly would constitute a flying leap down the slippery slope toward gun prohibition.

Meanwhile, with the nation's attention on proposed federal measures, overlooked has been the ongoing radical expansion of gun rights at the state level. The list of state legislative accomplishments in recent years by the gun lobby and its constituents is long. Forty-one states have "shall issue" right-to-carry laws that require the issuance of a concealed handgun permit to any lawful applicant.⁷⁶ Only Illinois has refused to allow any carrying of guns in public, but that ban was declared unconstitutional by the U.S. Court of Appeals for the Seventh Circuit in 2012.⁷⁷ The gun lobby constantly pushes to expand gun-carrying rights into sensitive locations such as bars, schools, churches, and parks. Make no mistake: the goal of many who advance the "Wouldn't you want a gun if attacked?" argument is that citizens be permitted to carry a gun whenever and wherever they want to carry it.

A substantial majority of states have right-to-carry reciprocity laws allowing concealed weapons permit holders in one state to carry their guns in other states.⁷⁸ Fourteen states have enshrined the right to hunt in their constitutions since 2000,⁷⁹ even though no one has questioned a right to hunt. Since 2005, more than thirty states have passed "Stand Your Ground" statutes that dramatically enlarge the circumstances in which one is permitted to use deadly force.⁸⁰

weapons ban "cost 20 members their seats in Congress" in 1994 Congressional races, and blaming the losses on the NRA). Meanwhile, conventional wisdom has it that Al Gore lost the close 2000 presidential election, including his home state of Tennessee, in part because of his support for gun control. Alex Koppleman, *Why Democrats Dumped Gun Control*, SALON.COM (Apr. 18, 2007, 8:00 AM), http://www.salon.com/2007/04/18/dems_and_guns/ (discussing generally the Democrats' retreat from publicly supporting gun control and stating that "many Democrats blamed [Gore's] defeat on previous pro-gun control positions Gore had taken").

⁷⁶ See James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 910–14 (2012) (explaining different types of right-to-carry laws and stating that forty-one states have "shall issue" permit laws).

⁷⁷ *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (striking down Illinois's restrictive gun-carrying ban on the basis that the court was bound by the Supreme Court's historical analysis in *Heller* and finding that the right to "bear" arms under the Second Amendment implies a right to carry guns outside the home). The fact that Judge Richard Posner authored the 2–1 decision is perhaps surprising, and should give comfort to gun-rights advocates given that Posner severely criticized Justice Scalia's majority opinion in *Heller*, calling it a "snow job[]." Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32 (characterizing *Heller* as "evidence of the ability of well-staffed courts to produce snow jobs"). Posner said Scalia's opinion in *Heller* was "questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology." *Id.*

⁷⁸ See generally STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK, App. A: State Firearm Laws (2012) (summarizing the firearms laws of all fifty states, including reciprocity laws in more than thirty states that recognize carry permits issued in other states).

⁷⁹ Douglas Shinkle, *State Constitutional Right to Hunt and Fish*, NAT'L CONF. ST. LEGISLATURES (Dec. 2012), <http://www.ncsl.org/issues-research/env-res/state-constitutional-right-to-hunt-and-fish.aspx> (listing states that recognize a constitutional right to hunt and fish and the year in which each state incorporated such a provision in the state constitution).

⁸⁰ See 'Stand Your Ground' Laws Nationwide, WASH. POST (Apr. 7, 2012, 2:35 PM), http://www.washingtonpost.com/2012/04/07/gIQA82t61S_graphic.html (map of states that have passed

These and other expanded gun rights bills often sail through state legislatures with little opposition, scrutiny, or even debate. Florida’s extremely permissive Stand Your Ground statute passed the Florida legislature unanimously and became controversial only after a neighborhood watch patroller shot a teenager.⁸¹ A 2011 Mississippi law provides a startling example of the haste and lack of careful consideration with which some states are seeking to grant blanket gun carrying rights. In early 2011, legislators proposed a bill to allow prosecutors to carry guns into courthouses.⁸² An amendment expanded the right to public defenders.⁸³ Then, three legislators slipped in another “amendment” that transformed the bill into a sweeping law granting *any* lawful purchaser with eight hours of firearms training the right to obtain a permit to carry guns into *all* locations in which gun carrying was previously illegal, including polling places, government meeting places, elementary and secondary schools, colleges, professional athletic events, churches, and airport terminals.⁸⁴ Because the law, which conflicts with other laws, was not debated, the public and even some law enforcement officers were unaware of it until after the fact.⁸⁵

The expansion of gun rights at the state level is unlikely to be swayed or slowed by mass shooting events such as what occurred in Newtown, at least in the southern and western parts of the country. The biggest gun issue in Tennessee in the months following the Newtown tragedy was a

or expanded Stand Your Ground statutes since 2005). Stand Your Ground statutes are laws that allow the use of deadly force in self-defense in any place where the person using such force has a lawful right to be, a dramatic extension of the common law “castle doctrine,” which limited the right to use deadly force without an obligation to retreat in homes. See Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries* 32 (Nat’l Bureau of Econ. Res., Working Paper No. 18187, 2012), available at http://www.nber.org/papers/w18187.pdf?new_window=1 (explaining Stand Your Ground statutes and reporting the results of an empirical analysis purporting to show that Stand Your Ground laws are associated with an increase in the number of homicides among whites).

⁸¹ Toluse Olorunnipa, *Stand Your Ground Law’s Impact Needs More Study, Task Force Told*, MIAMI HERALD (Sept. 12, 2012), <http://www.miamiherald.com/2012/09/12/2999202/stand-your-ground-laws-impact.html> (describing state task force examining Florida’s “controversial” Stand Your Ground statute, which was put in the public spotlight after teenager Trayvon Martin was shot by neighborhood watch patroller George Zimmerman).

⁸² H.B. 506, 111th Leg., 126th Sess. (Miss. 2011). For a well-researched history and explanation of the bill, see generally Sarah Atkinson, *Enhanced Carry or Enhanced Crazy? An Argument to Repeal Mississippi’s Enhanced Right to Carry Law* (Spring 2012) (unpublished seminar paper, University of Memphis Cecil C. Humphreys School of Law) (on file with Author).

⁸³ Atkinson, *supra* note 82, at 4.

⁸⁴ H.B. 506 2d amend., 111th Leg., 126th Sess. (Miss. 2011); see also Atkinson, *supra* note 82, at 5–11 (explaining the expansion of the law described in text). This sweeping law, which comprised only a single opaque paragraph, left it to others to determine its meaning. The Mississippi Department of Public Safety and Attorney General subsequently construed the bill as establishing an “enhanced carry permit” requiring eight hours of firearms training to obtain. Unlike many states, Mississippi residents can obtain a regular concealed weapons permit without any training. Atkinson, *supra* note 82, at 7–8 (explaining these provisions of Mississippi law).

⁸⁵ See Elizabeth Crisp, *Gun Law Quietly Eases Limits*, CLARION–LEDGER, Dec. 4, 2011, at A1 (stating that the Mississippi law appeared “to have largely slipped under the radar” and that neither the Lee County sheriff nor the University of Mississippi police chief were aware of the law until after it took effect).

continuing fight to pass a bill allowing concealed weapon permit holders to bring guns, if kept locked in cars, onto the private property of others, including employers and schools and universities.⁸⁶

This section has argued that advocating for blanket gun bans does not appear to be part of a modern orthodoxy among black leaders, that gun bans would be unconstitutional, and that extreme gun regulation is politically unfeasible. To gun-rights supporters everywhere, I say: relax. The politics of guns in America and an estimated 300 million privately owned firearms already in circulation⁸⁷ guarantee that citizens of all races will always find plenty of guns at their disposal.

IV. THE FALLACY OF THE “WOULDN’T YOU WANT A GUN IF ATTACKED?” ARGUMENT AND NEED FOR MORE FIREARMS RESEARCH

Firearms are sometimes used effectively for immediate self-defense. Citizens do—and should⁸⁸—have a right to possess a gun, in accordance with the law, for that purpose. No issue is taken with these basic points. (When successful defensive gun use incidents do occur, one can feel confident that the gun-rights movement will get the word out about them. Anecdotes involving instances of people using guns in self-defense are

⁸⁶ The debate over this “Safe Commute” legislation has been ongoing and reflects the tremendous power of the gun lobby over state and local gun laws. In Tennessee, the NRA and Tennessee Firearms Association spent \$100,000 in 2012 to defeat Representative Debra Maggart, the number three-ranking Republican in the Tennessee House of Representatives, because she declined to push through an NRA-written version of the law. Amanda Terkel, *NRA Sparks Backlash from Local Members After Involvement in Tennessee Election*, HUFFINGTON POST POL. (Aug. 5, 2012, 8:38 PM), http://www.huffingtonpost.com/2012/08/04/nra-tennessee-election_n_1738078.html. The NRA purchased a billboard in Maggart’s district with a manipulated photo showing Maggart (a conservative Republican with a previous A+ rating from the NRA) standing shoulder-to-shoulder with President Obama. The billboard said: “Representative Debra Maggart Says She Supports Your Gun Rights. Of Course, He Says the Same Thing. Defend Freedom—Defeat Maggart . . .” *Id.* Although the gun lobby’s attack on a conservative Republican generated support for Maggart from other prominent state Republicans, she lost reelection to an NRA-backed candidate. *Id.*

⁸⁷ See, e.g., Robert Bernat, *A Reluctant Vote in Favor of Armed School Guards*, WALL ST. J., Dec. 29, 2012, at A13 (stating that Americans own an estimated 300 million guns); Ezra Klein, *A Better Target for Gun Control*, WASH. POST WONKBLOG (Dec. 18, 2012, 9:12 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/18/a-better-target-for-gun-control/> (stating “[t]here are 300 million or so guns in the United States”). Although it is commonly estimated that Americans own 300 million guns, no one really knows the accurate figure because we have never bothered to try to keep even a rough count. Gun-rights supporters use the large inventory of guns in America to support the “Wouldn’t you want a gun if attacked?” argument, asserting that all attempts to restrict guns will fail because too many guns already exist. The bad guys, they assert, will always have guns. Thus, brilliantly and perversely, the argument for “more guns”—when it succeeds—is used as a basis to argue for even more guns. A decade ago the estimate of privately owned firearms in America stood at 200 million. See Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 CRIME & JUST. 319, 319 (2002) (stating that “[t]here are more than 200 million privately owned firearms in the United States”). Perhaps in another decade the number will be 400 million, and we will *really* need more guns.

⁸⁸ I do not currently own a firearm, but believe it is my Second Amendment right to do so and would not want the government telling me otherwise. The primary difference between my views and those of many gun-rights advocates is that I would gladly accept many more restrictions of my Second Amendment right in return for a safer society, so long as the core right remained protected.

among the most pervasively circulated items of information in the gun debate.)⁸⁹

The objection in this Article is with the single-minded focus on one benefit of guns without considering the many offsetting costs, both tangible and intangible, imposed by guns in American society and individual communities. Volumes could and in many cases have been written about each of these costs. Here I resort to listing: more than thirty thousand lives lost each year through criminal acts, suicides, and accidents;⁹⁰ roughly eighty thousand annual nonfatal, often disabling, injuries;⁹¹ lost productivity and earnings of gunshot victims;⁹² extraordinary medical costs borne largely by government (and, hence, taxpayers),⁹³ fear;⁹⁴ grief;⁹⁵ and depleted police and other emergency

⁸⁹ One example is a YouTube channel called *The Armed Citizen*, which is devoted to “[b]roadcasting the stories of everyday citizens defending life and limb against burglars, rapists and robbers.” THEARMEDCITIZEN, <http://www.youtube.com/user/thearmedcitizen> (last visited May 24, 2013). As of May 24, 2013, the channel featured seventy-seven videos, had 12,742 subscribers, and had 12,509,232 views. *Id.*

⁹⁰ See Kenneth D. Kochanek et al., *Deaths: Final Data for 2009*, 60 NAT’L VITAL STAT. REP. 1, 11 (Dec. 29, 2011), available at http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_03.pdf (stating that 31,347 firearms deaths occurred in the United States in 2009, 58.9% of which were suicides and 36.7% of which were homicides). These figures have been relatively stable for several years. See *id.* at 11 (stating the numbers had not changed significantly compared to prior years).

I have previously argued that gun deaths by suicide are the great overlooked statistic in the U.S. gun regulation debate. See generally Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More ‘Smoking Gun,’* 51 HASTINGS L.J. 953, 956–60, 967, 987, 993 (2000) (discussing that forty-six persons commit suicide in the United States with guns every twenty-four hours; that the firearm suicide rate in the United States for children under age fifteen is eleven times higher than that of any industrialized nation; that while the overall suicide rate in the United States has remained relatively stable since 1950, the rate of suicide for adolescents has more than tripled; that the escalation in adolescent suicide rates is accounted for almost entirely by an increase in the use of firearms as the method of suicide attempt; that public health studies show an association between suicides and guns in the home; and that gun storage studies show as many as 50% of the nation’s handguns are stored unlocked and that nearly seven million households contain guns that are both unlocked and loaded).

⁹¹ See Karen E. Gotsch et al., *Surveillance for Fatal and Nonfatal Firearm-Related Injuries—United States, 1993–1998*, 50 SURVEILLANCE SUMMARIES, at fig. 1 (Apr. 13, 2001), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5002a1.htm> (showing an average annual number of 79,258 nonfatal firearms injuries for 1993–1998); see also *id.* at fig. 2, 3 (showing that black males between ages fifteen and twenty-four are at the highest risk of sustaining both fatal and nonfatal firearm injuries). The gun debate focuses too heavily on fatalities in talking about the costs of guns, largely ignoring the much larger number of nonfatal injuries. Due to tremendous advances in trauma care, many gunshot victims who would have died in the past now survive, but often with disabling injuries.

⁹² Looking only at fatal shootings, firearms researchers Philip Cook and Jens Ludwig estimated the lost lifetime earnings and value of household services for each person killed to be between \$460,000 and \$580,000 after adjusting for race and educational attainment. PHILIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* 77 (2000).

⁹³ See *id.* at 65 (estimating the lifetime medical expenses for treating the 113,000 gunshot victims in 1997 to be \$1.9 billion).

⁹⁴ See generally Mark Warr, *Fear of Crime in the United States: Avenues for Research and Policy*, 4 MEASUREMENT & ANALYSIS OF CRIME & JUST. 451, 452 (2000), available at https://www.ncjrs.gov/criminal_justice2000/vol_4/04i.pdf (quoting, in a study of crime fear, an assertion by the President’s Commission on Law Enforcement and Administration of Justice that “[t]he most damaging of the effects of violent crime is fear, and that fear must not be belittled”).

⁹⁵ See Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 9–15 (2005) (discussing studies showing the disabling

services. Johnson discusses some of the costs, but uses the cost discussion principally as a means to promote the perceived benefits of guns for self-defense.⁹⁶

The “Wouldn’t you want a gun if attacked?” argument is pernicious not only because it ignores these costs, but because it diverts attention from the need to address gun violence from a broad multi-pronged perspective. It keeps people stuck in an all-or-nothing mode of thinking that prevents them from considering the possibility that a middle-ground exists in which gun ownership for self-defense and reasonable restrictions on guns can coexist. After many years in the gun debate, I am still surprised by how many people, on learning that I favor reasonable gun regulations, automatically assume that includes banning guns.

Examples of the “Wouldn’t you want a gun if attacked?” argument being abused for rhetorical purposes are abundant. One instance, among many to choose from, occurred at a post-Newtown CNN town-hall discussion.⁹⁷ The issue under discussion was universal background checks for all gun purchasers⁹⁸ (as compared to the current federal system where only purchases from federally licensed dealers require background checks).⁹⁹ Dan Gross, president of the Brady Campaign to Prevent Gun Violence, had just endorsed universal checks.¹⁰⁰ Host Anderson Cooper turned to guest Gayle Trotter, a fellow with the Independent Women’s Forum, and asked whether she supported universal background checks:

[TROTTER]: No, and it’s funny that you would say that we should for economic reasons violate our fundamental constitutional right to choose for self-defense.

GROSS: What does it have to do with a constitutional right?
. . . What is doing a background check on gun shows have to do with taking away the Second Amendment right? That’s why 74 percent of NRA members support them.

TROTTER: It’s an uncomfortable fact that guns make women safer.¹⁰¹

Following some cross-talk, she continued:

consequences of grief resulting from the traumatic death of a loved one).

⁹⁶ See Johnson, *supra* note 5, at 1590–1603 (discussing the costs and benefits of gun control). In fairness, Johnson expressly notes that he was not attempting a full cost-benefit analysis. *Id.* at 1603.

⁹⁷ Anderson Cooper 360 Degrees: *Guns Under Fire Town Hall* (CNN television broadcast Jan. 31, 2013), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/130131/acd.01.html>.

⁹⁸ *Id.*

⁹⁹ *Gun Show Loophole*, COAL. TO STOP GUN VIOLENCE, <http://www.csgv.org/issues-and-campaigns/gun-show-loophole> (last visited Mar. 22, 2013).

¹⁰⁰ See Anderson Cooper 360 Degrees: *Guns Under Fire Town Hall*, *supra* note 97 (“Every day in our country, there are guns being purchased by dangerous people and we can stop that just by extending background checks.”).

¹⁰¹ *Id.*

TROTTER: Guns who—women who choose to carry guns are safer. The people who are in their households are safer. And the women who choose not to carry are safer because some women choose to carry. In my appendix to my Senate judiciary testimony yesterday, I had 21 examples of women defending themselves from violent attacks. Fifteen of those 21 cases involved a woman having to fire the weapon. So guns reverse the balance of power.

COOPER: But is anyone talking about taking the guns away from the hands of responsible women?¹⁰²

No one was. The guest’s “Women need guns if attacked” version of the standard argument was a non-sequitur to the question asked. Whether women should own, can own, or would benefit from owning guns for self-defense bears no connection to the issue of universal background checks. Such checks would not deny a gun to any woman legally entitled to purchase and possess one, and would deny a gun only to women already prohibited under federal law from purchasing or possessing one (e.g., convicted felons, persons who have been adjudicated mentally incompetent).

Fallacious appeals to emotion are a hallmark of the gun debate on both sides.¹⁰³ Framing the gun debate in terms of whether it would be better to have a gun when confronted by a criminal is effective because it plays on primal fears and evokes visceral images of helpless victims being robbed, raped, or killed—effective, but fallacious because emotions are not a substitute for reason. The “Wouldn’t you want a gun if attacked?” argument also commits the fallacy of one-sided assessment.¹⁰⁴ Any argument can be made to sound persuasive if one enjoys the luxury of touting only the benefits of a position while ignoring the costs. To be valid, cost-benefit analysis requires fair consideration of all benefits and risks, including the relative magnitude and probability of each.

Unfortunately, no one is able to conduct an informed evaluation of the risks and benefits of guns because we live in almost complete darkness with respect to having accurate, complete, and current data regarding the issues.¹⁰⁵ This is true even as to the few issues that have been the subject of study. A relevant example with regard to the “Wouldn’t you want a gun if attacked?” argument is the extent and effectiveness of defensive gun use (“DGU”). Several survey studies relied on by gun-rights proponents

¹⁰² *Id.*

¹⁰³ See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 65–80 (1992) (describing fallacies of emotion and explaining how they are frequently used in the gun debate).

¹⁰⁴ See *id.* at 96–102 (describing the argumentation fallacy known as one-sided assessment and giving examples of how it has been used in the gun debate).

¹⁰⁵ See *infra* notes 128–40 and accompanying text (discussing legislative impositions on gun research and the need for more research and data).

suggest that guns are successfully used millions of times each year in self-defense.¹⁰⁶ The most well-known and oft-cited DGU study was conducted by Gary Kleck and Marc Gertz in 1995, and is cited by Johnson.¹⁰⁷ The study estimated that U.S. residents use guns for self-protection between 2.2–2.5 million times per year.¹⁰⁸

Pro-regulation researchers refute these numbers, arguing that telephone surveys result in gross overestimation of the number of DGUs because when estimating rare events even a small number of false positives can skew the results.¹⁰⁹ Clues they might be correct can be found in the Kleck-Gertz survey. The survey was a well-constructed research project using valid telephone survey and sampling methodology. The 2.5 million annual DGUs estimate was arrived at by extrapolating from a sample of sixty-six persons who told researchers over the telephone about a DGU incident the researchers considered to be reliable.¹¹⁰

If one accepts the general conclusion regarding the number of annual DGUs, one must also confront some fantastic sub-conclusions. For example, respondents to the Kleck-Gertz survey reported wounding a criminal adversary in 8.3% of encounters,¹¹¹ which, applied to the 2.5

¹⁰⁶ See generally GUN CONTROL & GUN RIGHTS 12–33 (Andrew J. McClurg, David B. Kopel & Brannon P. Denning eds., 2002) (describing and analyzing DGU surveys).

¹⁰⁷ Johnson, *supra* note 5, at 1575–76 n.491.

¹⁰⁸ Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995) (stating the principal conclusion of study that “there are about 2.2 to 2.5 million DGUs of all types by civilians against humans[]” each year). Other telephone survey studies have reached similarly high DGU numbers, including one conducted by pro-regulation researchers. See GUN CONTROL & GUN RIGHTS, *supra* note 106, at 26–27, 31–32 (discussing the Cook-Ludwig 1997 National Survey of Private Ownership of Firearms, which also reached annual DGU estimates in the millions).

¹⁰⁹ See David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1431, 1438 (1997) (asserting that phenomena such as personal presentation bias—wanting to look good, important, or heroic—and other factors risk false positives in surveying DGU use and that, when estimating rare events, even a small number of false positives can grossly skew the results). Hemenway noted, for example, that if only 1% of the Kleck-Gertz respondents who reported a reliable DGU counted in the study were misclassified (e.g., because they exaggerated, lied, misremembered the incident or time frame, or for other reasons), the estimated 2.5 million DGUs in the study would drop to 600,000. *Id.* at 1436; see also Philip J. Cook et al., *The Gun Debate’s New Mythical Number: How Many Defensive Uses per Year?*, 16 J. POL’Y ANALYSIS & MGMT. 463, 464 (1997) (arguing that a variety of factors may result in false positives in DGU surveys, which, because DGUs are relatively rare events by any measure, will substantially inflate the results). Kleck responded that pro-regulation researchers began attacking telephone survey methodologies for estimating annual DGUs only after the survey evidence against their position mounted. Gary Kleck, *Degrading Scientific Standards to Get the Defensive Gun Use Estimate Down*, 11 J. FIREARMS & PUB. POL’Y 77, 87 (1999). None of this discussion should be construed as criticism of Kleck. To the contrary, he is one of the nation’s most reliable and rigorous firearms researchers.

¹¹⁰ See GUN CONTROL & GUN RIGHTS, *supra* note 106, at 32 (discussing this point). As an aside, it is always interesting to discuss firearms statistics of any type with people who have not actually read the studies, which includes most non-academics with opinions on the subject, such as politicians, pundits, and letter-to-the-editor writers. With regard to the Kleck-Gertz DGU study, I regularly encounter people, both inside and outside of my law school firearms policy seminars, who recite the 2.5 million estimated annual DGUs figure under the mistaken belief that someone actually documented 2.5 million defensive gun use incidents in one year.

¹¹¹ Kleck & Gertz, *supra* note 108, at 185 tbl.3.

million annual DGUs estimate, would mean that 207,000 criminals were being shot in self-defense each year.¹¹² During the survey years, however, approximately 100,000 nonfatal gunshot victims were treated annually in hospital emergency rooms, with nearly all of them classified as victims of assaults, suicide attempts, or accidental shootings—not wounded criminals.¹¹³

Similarly, 15.7% of survey respondents who reported a DGU claimed that they or someone else “almost certainly would have” been killed had they not used their gun defensively.¹¹⁴ This yields a national estimate of 392,000 lives saved each year due to defensive gun use, yet fewer than 30,000 annual homicides occurred in the United States during the survey years.¹¹⁵ Is it reasonable to believe that defensive gun uses during the survey period prevented our national murder rate from being thirteen times higher?

If the respondents to the Kleck-Gertz telephone survey so grossly overestimated these aspects of using their guns in self-defense, can we be confident they did not overestimate other aspects, including whether the incidents occurred at all? At the other end of the DGU-estimate spectrum, the U.S. Census Bureau’s National Criminal Victimization Study (“NCVS”) estimates the number of annual DGUs at around 80,000, millions of DGUs apart from the Kleck-Gertz and other telephone survey studies.¹¹⁶ Kleck and others have pointed out flaws in the NCVS surveys.¹¹⁷ The point here is not who is right, but only that we need additional, current research.

Another valuable avenue of defensive gun use research would be to study the degree to which humans are effective at accessing and using a gun in response to an imminent threat, a factor largely overlooked but highly relevant to evaluating the utility of guns for self-defense. Most criminal attackers do not show the courtesy of pausing to allow victims to find and ready their gun. Thus, unless one is walking or driving around with gun in hand and finger on trigger, guns will be useless in response to some percentage, possibly a large percentage, of sudden attacks.

Many gun owners pursue no training at all, but even those who do usually shoot at fixed targets at gun ranges, rather than practice defensive

¹¹² See Hemenway, *supra* note 109, at 1442 (extrapolating the Kleck-Gertz survey data). Kleck-Gertz acknowledged that the 8.3% wounding rate was probably too high. Kleck & Gertz, *supra* note 108, at 173.

¹¹³ Hemenway, *supra* note 109, at 1142–43.

¹¹⁴ Kleck & Gertz, *supra* note 108, at 185–86 tbl.3.

¹¹⁵ See Hemenway, *supra* note 109, at 1443 (calculating that, extrapolated nationally, respondents to the Kleck-Gertz survey said that they “probably” saved a life in an additional 355,000 instances and “might” have saved a life in another 405,000 instances). Adding the figures, we are now well over one million possible saved lives per year from defensive gun use, which, of course, is absurd.

¹¹⁶ Kleck & Gertz, *supra* note 108, at 153–57 (describing the contours of the NCVS and its findings).

¹¹⁷ See *id.* (discussing assorted flaws with the survey, including aspects of its methodology).

strategies. Preparing, aiming, and shooting a gun at a stationary target on a well-lit gun range is quite different from responding to an imminent attack under more challenging conditions, which may include the element of surprise, moving targets, dim lighting, panicked reactions, and a lack of time to focus, aim, or make the correct decision.¹¹⁸

Even assuming that one could locate and ready a weapon in time to react, most citizens lack the skill or training necessary to use a gun defensively. Most DGUs reported to surveyors involve only brandishing, rather than shooting, a gun, but 24% of the Kleck-Gertz DGU respondents reported discharging their weapons at the perceived criminal.¹¹⁹ Kleck and Gertz discussed reports showing that even trained police officers have an incident hit rate of only 37% (meaning that when they intentionally fired their weapons at a person, at least one of their bullets hit the person 37% of the time), while criminals had a hit rate of only 18% when shooting at victims.¹²⁰

Researchers should design projects involving realistic simulations of imminent criminal attacks in different settings (e.g., home invasions, carjackings, parking lot attacks, mass assaults in public places) and study response times, decision-making, and results. Such research would not only shed light on the efficacy of owning or carrying guns for self-defense, but would be useful to firearms trainers in teaching gun owners and security officers how to improve their situational responses to attacks.¹²¹ The research might lead to a conclusion that more training for gun owners (which should include additional safe-handling and safe-storage education) would be one effective response to gun violence.

Another chasm in our firearms knowledge exists with regard to community-specific research. Applying national figures to specific localities may lead to wildly inaccurate and wholly meaningless conclusions. Public health researchers have called the collection of reliable community-specific data “[t]he first step” in reducing firearms injuries.¹²²

What *would* be the costs and benefits of adding more guns to high-

¹¹⁸ See Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1212 (2000) [hereinafter McClurg, *Armed and Dangerous*] (“[S]imply ‘having’ a gun does not make it useful for self-defense. Effective self-defense using a firearm requires, like every other skill in life, an organized plan and practice to implement it.” (footnote omitted)).

¹¹⁹ See *id.* at 185 tbl.3 (showing that 23.9% of survey respondents reported firing their guns during their DGU encounter).

¹²⁰ *Id.* at 173.

¹²¹ See McClurg, *Armed and Dangerous*, *supra* note 118, at 1213 (arguing, in an article calling for tort liability for the negligent storage of firearms, that rehearsing self-defense drills with a properly secured gun would result in quicker response times than most gun owners could achieve with their unsecured guns).

¹²² See FIREARM & INJURY CTR. AT PENN, FIREARM INJURY IN THE U.S. 44 (2011), available at <http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf> (noting the relative dearth of localized data and discussing deficiencies in available data).

crime urban communities? Would gun violence go down because of the deterrent effect of more guns? Would lives be saved because of defensive gun use incidents? How many? Alternatively, would gun violence go up because more crime guns would be acquired by theft from cars and households unable to afford garages, gated communities, gun safes, or exterior hardening of doors and windows? Stolen guns are a significant source of crime guns.¹²³ With more guns, would gun accidents and suicides increase in crowded households and densely populated neighborhoods because of easier access to unsecured weapons?

Would altercations lead to more deadly results because more people are armed? If an altercation occurs between two people and one of them pulls out a gun, is that a DGU or an assault? If they both pull out guns, are those two DGUs or two assaults? In their study of defensive gun use, Kleck and Gertz reported that 30% of the crimes defended against were assaults and that just how many of those were of incidents of “mutual combat” is unknown.¹²⁴

Criminals are also entitled to use guns in self-defense, and often do.¹²⁵ Many homicides in high-crime black communities are gang-related or gang-motivated.¹²⁶ Would Johnson’s immediate self-defense advocacy for more guns extend to gang members? Probabilistically, they may need guns for self-defense more than any other citizen group. Part V touches on several of these questions in the context of gun violence in the city of Memphis.

These are just some of the important cost-benefit questions we should be trying to answer before calling for more guns in already vulnerable

¹²³ President Bill Clinton’s 1995 Youth Crime Gun Initiative, involving 76,260 traced gun crimes in 27 cities, showed that 35% of the crime guns had been stolen. McClurg, *Armed and Dangerous*, *supra* note 118, at 1208. Analyzing data pertaining to how criminals obtain guns, Gary Kleck and Shun-Yung Kevin Wang concluded that “[t]heft is central to criminal gun acquisition,” that interviews with felons show “most guns acquired by criminals were probably stolen at some time in the past,” and that “[m]ost gun theft is a by-product of residential burglary and other thefts from private owners.” Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233, 1293 (2009).

Survey research by Philip Cook and Jens Ludwig estimated that in 1994 close to 600,000 guns were stolen. PHILIP J. COOK & JENS LUDWIG, NAT’L INST. OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 2 (May 1997), available at <https://www.ncjrs.gov/pdffiles/165476.pdf>. Pinning down the number of guns stolen annually is difficult because many victims do not report stolen guns. This can happen for a variety of reasons: the gun they owned may have been illegal to begin with, they might have been carrying the gun illegally (for example, in their car while lacking a permit), they may be uncertain whether they were violating any laws in storing or carrying the gun, they may worry about liability or other legal ramifications, or they might be embarrassed or worry about being stigmatized. No federal law requires the reporting of stolen guns and only a handful of state laws do.

¹²⁴ Kleck & Gertz, *supra* note 108, at 174.

¹²⁵ Gary Kleck has made the point that criminals tend to be at much higher risk than non-criminals of being criminally attacked. This may be due to the situations they place themselves in, the idea that people with criminal records often live in high-crime neighborhoods, or a combination thereof. See GUN CONTROL & GUN RIGHTS, *supra* note 106, at 25 (discussing this point).

¹²⁶ See *infra* text accompanying notes 159–60 (addressing this point in the context of the city of Memphis).

high-crime urban communities, but the absence of necessary research and data makes it impossible to do so. Amidst all of Professor Johnson's quite stylish prose, one of the sentences that resonated most strongly with me was a prosaic one in the final paragraph: "Empirical work on the risks and utilities of gun ownership in the Black community is incomplete."¹²⁷ That could be expanded to say that empirical work on the risks and utilities of gun ownership in *all* communities and nationally is not only incomplete, but staggeringly deficient.

Those unfamiliar with the gun debate might find the assertion that we would benefit from more firearms research and knowledge acquisition to be overly obvious, but that is not the case. A principal reason we do not have more data and empirical research is because the gun lobby and many gun-rights supporters want it that way.¹²⁸

In 1996, gun supporters successfully lobbied Congress to terminate funding of research into the causes and prevention of gun violence by the U.S. Centers for Disease Control,¹²⁹ an unfortunate result that has put us decades behind where we should be in terms of injury surveillance and prevention protocols that are common for other types of injuries. Congress acted similarly toward firearms research by the National Institutes of Health in the 2000s.¹³⁰

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act that largely immunizes gun sellers and manufacturers from civil liability for negligent conduct.¹³¹ No other industry enjoys the privilege of broad tort immunity for their activities. As in the tobacco litigation, much previously unknown information about gun-trafficking and gun industry practices came to light only through discovery in tort litigation against gun makers and sellers. That avenue of data and knowledge acquisition has been cut off.

Meanwhile, contrary to the "enforce existing laws" ethos of the gun-rights movement—second as a mantra only to "more guns"—the gun lobby fights continually to stifle the funding, staffing, and operations of the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"), hindering the agency's efforts to trace the origins of crime guns and identify and

¹²⁷ Johnson, *supra* note 5, at 1604.

¹²⁸ See Allison Brennan, *Analysis: Fewer U.S. Gun Owners Own More Guns*, CNN.COM (July 31, 2012, 8:05 PM), <http://www.cnn.com/2012/07/31/politics/gun-ownership-declining/index.html> (quoting David Hemenway, director of the Harvard Injury Control Research Center, stating that "[t]he federal government doesn't have good data on anything on guns and that's been done on purpose").

¹²⁹ See Tom Watkins, *How the NRA Wields Its Influence*, CNN.COM (Jan. 10, 2013, 7:35 AM), <http://www.cnn.com/2013/01/09/us/nra-gun-research/index.html> (explaining how Congress stopped the CDC from pursuing firearms research in 1996 by attaching a funding limitation to the agency's appropriation and how Congress acted similarly with respect to firearms research by the National Institutes of Health in the 2000s).

¹³⁰ *Id.* These restrictions may change. President Obama issued an executive order in January 2013 directing the CDC and other scientific agencies to conduct research into the causes and prevention of gun violence. See NOW IS THE TIME, *supra* note 62, at 8 (describing this executive order).

¹³¹ 15 U.S.C. §§ 7901–03 (2006).

prosecute federal firearms licensees who operate illegally.¹³² The agency has been without a director for six years.¹³³ One of the agency’s responsibilities is to respond to crime gun trace requests from law enforcement agencies through its National Tracing Center, but that job is made much more difficult because Congress has interfered with the agency’s ability to computerize firearms transactions records.¹³⁴ About one-third of trace requests require ATF employees to sift through paper or microfiche records in boxes and filing cabinets.¹³⁵ Imagine you bought a company that depended on data and arrived to find much of that data stacked in boxes in a warehouse instead of organized in a searchable computer database. You would fire everyone in charge, right? The gun lobby’s repeated calls for the enforcement of existing laws as a solution to gun violence—with which gun-regulation supporters would agree on as *one* solution—while fighting to prevent the primary agency charged with enforcing many federal gun laws from doing its job is hypocritical.

All guns start out as legal products. How do legal guns end up as crime guns? ATF crime gun-tracing data in the 1990s revealed a trove of insights about how guns are diverted into the criminal trafficking market.¹³⁶ Interrupting the supply of crime guns is a primary goal of many

¹³² As of this writing, gun-rights advocates are pressing H.R. 1093, a self-styled “reform” of the ATF that would further hamper the ability of the agency to prosecute law-breaking gun dealers in several ways. Bureau of Alcohol, Tobacco, Firearms, and Explosives Reform Act of 2011, H.R. 1093, 112th Cong. (2011); *ATF “Reform” Act*, MAYORS AGAINST ILLEGAL GUNS, http://www.mayorsagainstillegalguns.org/html/federal/atf_mod.shtml (last visited Mar. 27, 2013) (characterizing H.R. 1093 as a law that would: lessen penalties for certain gun dealer violations, including losing track of guns and failing to record the names of gun buyers; impose a difficult-to-meet burden of proof for sanctioning law breaking gun dealers; give extra protection to gun dealers who violate the law repeatedly; reduce Department of Justice authority to inspect records of gun transactions; allow dealers whose license has been revoked to continue selling guns for sixty days (which risks large numbers of guns being “dumped” into the secondary market); prohibit the ATF from updating gun transaction records from microfiche to searchable computer databases; eliminate the requirement that dealers report multiple handgun sales—one indicator of gun-trafficking—to state or local law enforcement (but still require reporting to the ATF); and enact other restrictions on the agency’s ability and efforts to enforce existing gun laws and reduce gun-trafficking).

¹³³ Erica Goode & Sheryl Gay Stolberg, *Legal Curbs Said to Hamper A.T.F. in Gun Inquiries*, N.Y. TIMES, Dec. 26, 2012, at A1 (attributing the absence of an agency director to Congress, lobbied by the NRA, having reclassified the position as one requiring Senate confirmation).

¹³⁴ *Id.* The gun lobby opposes a computerized database of gun sales out of fear that it would create a central gun owner registry that could lead to the federal government confiscating all guns. *Id.* This argument has always struck me as unwarranted paranoia, but Cook and Braga have pointed out that the current cumbersome tracing process could be streamlined without creating a national registry of gun owners by requiring firearms licensees to report the serial numbers of all guns sold to the National Tracing Center. Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277, 283 (2001).

¹³⁵ Goode & Stolberg, *supra* note 133.

¹³⁶ For example, using ATF trace data, a 1995 report found that nearly 50% of traced crime guns in a particular year came from less than 1% of the nation’s federal firearms dealers. GLENN L. PIERCE ET AL., THE IDENTIFICATION OF PATTERNS IN FIREARMS TRAFFICKING: IMPLICATIONS FOR FOCUSED ENFORCEMENT STRATEGIES: REPORT TO THE U.S. DEP’T OF TREASURY & BUREAU OF ATF OFFICE OF ENFORCEMENT 11 & tbl.5 (showing that 49.4% of 121,110 crime guns in the study were traced back to federal firearms licensees comprising less than 1% of the total number of licensed gun sellers). *But see* Kleck & Wang, *supra* note 123, at 1252–71 (analyzing data regarding how criminals obtain guns and

black urban leaders. It should be a goal shared by everyone (except criminals, of course)—whatever their race, rich or poor, gun lovers and haters alike. But crime gun trace data stopped flowing to researchers, journalists, and the public when Congress began attaching the “Tiahrt Amendment”¹³⁷ to appropriations acts in 2003.¹³⁸ As amended, the Tiarht Amendment prohibits the ATF from releasing crime gun trace data pursuant to Freedom of Information Act requests and purports to ban (perhaps unconstitutionally¹³⁹) its admissibility in all state and federal judicial proceedings.

If gun-rights and gun-regulation supporters could agree on the need to remove the barriers to and fund the acquisition of more research of the issues, it would be a large step forward. In the past, both gun-rights supporters and gun-regulation supporters have attacked the methodologies and quality of the other side’s research, sometimes with justification (some research is deficient precisely because researchers have only old or incomplete data to work with).¹⁴⁰ Even accepting that some of the critiques are accurate, the answer to low-quality research is not to terminate research. Let us agree to demand and fund only high-quality research. This should be true whatever the issue, whether it is the association between guns in the home and firearm fatalities and injuries or the deterrent effect of more guns. Perhaps a formal or informal national firearms research peer review rating panel could be established made up of credible scholars from both sides, such as Gary Kleck on the pro-rights side and Cook and Ludwig on the pro-regulation side. Only reliable

critiquing the “myth” that large numbers of crime guns originate in large-scale gun-trafficking operations by licensed firearms dealers). For an interesting, albeit partisan history of crime gun-tracing in the United States, see BRADY CTR. TO PREVENT GUN VIOLENCE, WITHOUT A TRACE: HOW THE GUN LOBBY AND THE GOVERNMENT SUPPRESS THE TRUTH ABOUT GUNS AND CRIME (2006). The report discusses the benefits of gun-tracing in identifying patterns of how guns are diverted from lawful primary markets to criminals and the alleged involvement of the gun lobby, gun industry, and government in suppressing the release of crime gun trace data. *But see* Kleck & Wang, *supra* note 123, at 1253–54 (analyzing data regarding how criminals obtain guns and identifying and explaining flaws in some of the inferences drawn from crime gun tracing).

¹³⁷ The amendment is named after its sponsor, U.S. Representative Todd Tiahrt, a Kansas Republican. *The “Tiahrt Amendment” on Firearms Traces: Protecting Gun Owners’ Privacy and Law Enforcement Safety*, NRA-ILA (Jan. 15, 2013), <http://www.nraila.org/news-issues/fact-sheets/2013/tiahrt.aspx>.

¹³⁸ See Colin Miller, *Lawyers, Guns, and Money: Why the Tiahrt Amendment’s Ban on the Admissibility of ATF Trace Data in State Court Actions Violates the Commerce Clause and the Tenth Amendment*, 2010 UTAH L. REV. 665, 676–82 (2010) (explaining and tracing the history of the Tiarht Amendment).

¹³⁹ See *id.* at 680–82, 702–03, 716 (arguing that the Tiarht Amendment’s ban on admitting gun-tracing data as evidence in state courts violates the Commerce Clause and the Tenth Amendment).

¹⁴⁰ See, e.g., Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209 (1998) (critiquing John Lott’s well-known study purporting to show that more guns result in less crime, noting geographic and crime-specific inconsistencies in the data); Don B. Kates, *Public Health Pot Shots: How the CDC Succumbed to the Gun “Epidemic,”* REASON, Apr. 1997, at 24 (critiquing various CDC-sponsored firearms studies, each of which reached conclusions supporting reduced gun ownership or enhanced gun control).

information has value to policy makers and individual citizens in making rational decisions regarding firearms and firearms policy.

V. LONG DISTANCE INFORMATION: MEMPHIS, TENNESSEE¹⁴¹

To add a human dimension to the abstract assertions in this article, this concluding part briefly explores the terrible toll that racially disproportionate gun violence takes in a real place: Memphis, Tennessee, where I live and work. Being white and having a good job, I am fortunate to reside in a nice house on an affluent block in Midtown, in the center of the city. Other Memphians are not so lucky. In addition to being the home of terrific barbecue, blues music, the National Civil Rights Museum, and all-things-Elvis, Memphis has a reputation for being a violent, dangerous place. Perform an Internet search for the phrase “most dangerous cities” and Memphis will be on every list, whether the source is *Forbes*,¹⁴² *U.S. News*,¹⁴³ *The Atlantic*,¹⁴⁴ or any other compiler of “most-[something]” city lists. As is true of all cities reputed to be violent, however, only parts of Memphis are unusually dangerous. Memphis gun violence occurs predominantly in black,¹⁴⁵ poverty-ridden¹⁴⁶ neighborhoods with names like Frayser, Hickory Hill, North Memphis, Orange Mound, and Whitehaven.¹⁴⁷

Memphis homicide statistics show staggeringly disproportionate racial

¹⁴¹ See CHUCK BERRY, MEMPHIS (Chess 1959) (Berry’s oft-covered song that includes the lyric “Long distance information, give me Memphis Tennessee”).

¹⁴² See Daniel Fisher, *Detroit Tops the 2012 List of America’s Most Dangerous Cities*, FORBES (Oct. 18, 2012, 1:26 PM), <http://www.forbes.com/sites/danielfisher/2012/10/18/detroit-tops-the-2012-list-of-americas-most-dangerous-cities/> (asserting that Memphis is the fourth most dangerous city in the United States among cities with populations exceeding 200,000 based on an analysis of data in the FBI Uniform Crime Report for 2011).

¹⁴³ See Danielle Kurtzleben, *The 11 Most Dangerous Cities*, U.S. NEWS & WORLD REP. (Feb. 16, 2011), <http://www.usnews.com/news/articles/2011/02/16/the-11-most-dangerous-cities> (listing Memphis as America’s sixth most dangerous city).

¹⁴⁴ See *The 10 Most Dangerous Cities in America*, ATLANTIC (May 26, 2011, 12:14 PM), <http://www.theatlantic.com/national/archive/2011/05/the-10-most-dangerous-cities-in-america/239513/#slide6> (listing Memphis as America’s fifth most dangerous city).

¹⁴⁵ The population of Memphis is 63.3% black, 29.4% white, 6.5% Hispanic, and 1.6% Asian according to 2010 U.S. Census data. *State & County QuickFacts, Memphis*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/47/4748000.html> (last updated Jan. 10, 2013).

¹⁴⁶ Roughly 26% of the population in Memphis lives below the poverty level. *Id.* Broken down by race, 32.7% of black Memphians live below the poverty level compared to 13.8% of whites. *Memphis, Tennessee (TN) Poverty Rate Data—Information About Poor and Low Income Residents*, CITY-DATA.COM, <http://www.city-data.com/poverty/poverty-Memphis-Tennessee.html> (last visited Mar. 28, 2013).

¹⁴⁷ See Bill Dries, *New Efforts Target Youth Gun Violence*, MEMPHIS DAILY NEWS (June 1, 2012, 2:07 PM), <http://www.memphisdailynews.com/news/2012/jun/1/new-efforts-target-youth-gun-violence/> (noting the high level of gun violence in Hickory Hill); Joy Lambert, *Reducing Youth Violence a Top Priority for 2012*, ABC NEWS (Dec. 29, 2011, 6:19 PM), <http://www.abc24.com/news/local/story/Reducing-Youth-Violence-a-Top-Priority-for-2012/1R4hdtQBo0qXJ9xwcWozbA.csp> (stating that gun violence is one of the largest issues in Shelby County); Marc Peters, *How One City Is Fighting Gun Violence by Engaging Young Americans*, CAMPUS PROGRESS (Feb. 12, 2013, 1:57 PM), http://campusprogress.org/articles/how_one_city_is_fighting_gun_violence_by_engaging_young_amerians/ (stating that violence is widespread in South Memphis and Frayser).

costs of gun violence. In 2011, the University of Memphis, in conjunction with the Memphis Police Department, prepared a report regarding youth gun violence in the city.¹⁴⁸ The report showed 410 homicides happened in Memphis between January 2008 and April 2011.¹⁴⁹ Of those, about 84% of the victims were black; 8.5% were white.¹⁵⁰ Following a consistent trend in homicides, most Memphis homicides are intraracial; in this case, black residents hurting other black residents.¹⁵¹ Guns were the weapons used in 75% of all homicides.¹⁵² Homicides increased by nearly 7% in 2012, an increase that Memphis Police Director Toney Armstrong attributed to easy access to firearms.¹⁵³

This disparate gun victimization pattern is also reflected in national data. The 2011 FBI Uniform Crime Report showed that 50% of homicide victims were black.¹⁵⁴ In contrast, only 13% of the U.S. population is black.¹⁵⁵ About 68% of the 12,664 homicides nationwide in 2011 were committed with firearms.¹⁵⁶

Many Memphis homicide victims are young. In 2012, an average of three people per day between the ages of fourteen and twenty-four were the victims of aggravated assault with a firearm.¹⁵⁷ From 2008 to 2011, roughly 11% of homicide victims were age seventeen or younger, and an

¹⁴⁸ MEMPHIS POLICE DEP'T & UNIV. OF MEMPHIS, REPORT TO MAYOR A.C. WHARTON, JR.: PRELIMINARY ANALYSIS OF YOUTH GUN VIOLENCE IN THE CITY OF MEMPHIS 3 (2011) [hereinafter YOUTH GUN VIOLENCE IN MEMPHIS] (on file with Author).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 5. Among the homicide victims, 5.9% were Hispanic and 1.7% were Asian. *Id.* In the same period, 86.7% of homicide suspects were black and 7.6% were white. *Id.* at 10. Roughly 5% of homicide suspects were Hispanic and 1% Asian. *Id.*

¹⁵¹ Although the Youth Gun Violence report does not match the races of victims and offenders, it is well-established that most homicides are intraracial. Professor Johnson notes the striking pattern of intraracial homicide, citing Justice Department data showing that in 1998, 94% of black murder victims were killed by black offenders and 87% of white murder victims were killed by white offenders. Johnson, *supra* note 5, at 1576–77 n.499 and accompanying text. In discussing a 7% increased murder rate in Memphis for 2012, Police Director Toney Armstrong said that when a homicide victim in Memphis is a black male, the suspect is usually black as well. See Kevin McKenzie, *Gun Access Cited in Homicides Rise in Memphis*, COM. APPEAL (Dec. 31, 2012, 7:50 PM), <http://www.commercialappeal.com/news/2012/dec/31/homicides-rise-in-memphis/?partner=RSS> [hereinafter McKenzie, *Gun Access*] (paraphrasing comments from Armstrong).

¹⁵² YOUTH GUN VIOLENCE IN MEMPHIS, *supra* note 148, at 6.

¹⁵³ McKenzie, *Gun Access*, *supra* note 151.

¹⁵⁴ U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2011, EXPANDED HOMICIDE DATA 1 (2012), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offenses-known-to-law-enforcement/expanded/expandhomicidemain.pdf>. In 2011, 52.4% of known homicide offenders were black. *Id.* at 2.

¹⁵⁵ *State & County QuickFacts, USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/stat es/00000.html> (last updated Mar. 14, 2013) (reporting that the U.S. population is 13.1% black).

¹⁵⁶ U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2011, EXPANDED HOMICIDE DATA TABLE 8, MURDER VICTIMS BY WEAPON, 2007–2011 (2012), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-8> (last visited Mar. 14, 2013) (stating that of the 12,664 homicide victims, 8,583 were attributable to firearms).

¹⁵⁷ Kevin McKenzie, *Young Guns: Rising Violence Showing Its Age*, COM. APPEAL, Jan. 31, 2013, at 1B.

additional 23.4% were between the ages of eighteen and twenty-four.¹⁵⁸

During the same period, at least 19% of Memphis homicides were classified as “gang-motivated,”¹⁵⁹ not simply “gang-related.” The distinction is worth noting. Gang-motivated means “murders on behalf of some purpose of the gang, i.e., retaliation, turf disputes, etc.” as opposed to “homicides which involve a gang member as a victim or a suspect and may or may not have been committed on behalf of the gang.”¹⁶⁰ Police Director Armstrong said most Memphis homicides occur between people who know each other and often arise because of altercations.¹⁶¹

Shootings are such common events in Memphis that it is easy to become numb to them. As Memphis Mayor AC Wharton explains: “Every Sunday evening instead of calling and giving me ball scores, [Police Director Armstrong] gives me the body count. . . . Every weekend, we do a body count. This is why we say, ‘Enough is enough.’”¹⁶² On receiving an invitation in October 2012 to write this reply Article, I stopped to collect shooting reports from the *Commercial Appeal*, the city’s daily newspaper. Over a three-day period, news reports featured these dispiriting headlines: “Triple Shooting Brings Charges”;¹⁶³ “Police Work to ID Shooting Victim”;¹⁶⁴ “Shootings Leave Woman Dead, Pregnant Woman Wounded”;¹⁶⁵ “Man Shot Inside Beale Nightclub”;¹⁶⁶ “Man Shoots at Woman, Cops, Self”;¹⁶⁷ “Shooting Leaves One in Critical Condition.”¹⁶⁸

The stories had not changed when I was finishing the Article in early February 2013. On February 2, a woman shot five people, including four other women, inside a nightclub.¹⁶⁹ The next day, four men were shot during an argument.¹⁷⁰ Two died and two lived.¹⁷¹ One would expect shooting events involving four or five victims to receive prominent news coverage, but the two incidents appeared in the newspaper as blurbs in the “Briefly” section.¹⁷²

¹⁵⁸ YOUTH GUN VIOLENCE IN MEMPHIS, *supra* note 148, at 3.

¹⁵⁹ *Id.* at 7.

¹⁶⁰ *Id.* at 7 & n.1.

¹⁶¹ “[Y]ou’ve got people who are getting into altercations with each other and during which they have firearms readily available to them,” Armstrong told a reporter. “Rather than defuse the situation, they tend to escalate and they escalate with severe violence resulting in homicide.” McKenzie, *Gun Access*, *supra* note 151.

¹⁶² Jody Callahan, *Stolen Gun Crimes Anger Wharton*, COM. APPEAL, Jan. 17, 2013, at 2A (quoting Wharton).

¹⁶³ Scott Carroll, *Triple Shooting Brings Charges*, COM. APPEAL, Oct. 27, 2012, at 5B.

¹⁶⁴ Scott Carroll, *Police Work to ID Shooting Victim*, COM. APPEAL, Oct. 27, 2012, at 5B.

¹⁶⁵ Sara Patterson, *Shootings Leave Woman Dead, Pregnant Woman Wounded*, COM. APPEAL, Oct. 28, 2012, at 6.

¹⁶⁶ Timberly Moore, *Man Shot Inside Beale Nightclub*, COM. APPEAL, Oct. 29, 2012, at 2.

¹⁶⁷ Timberly Moore, *Man Shoots at Woman, Cops, Self*, COM. APPEAL, Oct. 29, 2012, at 2.

¹⁶⁸ Timberly Moore, *Shooting Leaves One in Critical Condition*, COM. APPEAL, Oct. 29, 2012, at 2.

¹⁶⁹ *Nightclub Shooting Leaves Five Wounded*, COM. APPEAL, Feb. 3, 2013, at 2B.

¹⁷⁰ Jody Callahan, *Shooting Leaves Two Dead, Two Wounded*, COM. APPEAL, Feb. 4, 2013, at 2B.

¹⁷¹ *Id.*

¹⁷² *Id.*; *Nightclub Shooting Leaves Five Wounded*, *supra* note 169.

The above statistics and background raise several questions about the conventional gun-rights wisdom regarding the deterrent effect of guns and their usefulness for self-defense as applied to high-crime urban communities. For insight in composing this section, I interviewed three African-American first-year law students: Jerrick Murrell, Joe Smith, and Jarrett Spence.¹⁷³ Jerrick grew up in the “Hollywood” section of North Memphis, a high-crime area. Jarrett grew up in Hickory Hill and attended school in the ironically named Whitehaven—also high-crime neighborhoods. Joe grew up in a similar type of neighborhood in Nashville and has lived in Memphis for several years. All three have intimate knowledge of gun violence in Memphis. Asked whether they had experienced firsthand encounters with gun violence, they nodded in a way suggesting the question was naïve.

They dismissed the deterrence argument. “Have you heard of the code of the street?” Jerrick asked. “In the hood, if you’re disrespected, you have to respond. Whether the other person has a gun isn’t going to make a bit of difference.”¹⁷⁴ Jarrett described an incident in a living room with a friend:

We were sitting there and he said, “I’m going to go shoot this person.” He would not have been deterred at all if I told him the person had a gun. He would just bring two guns. Or instead of shooting at him two times, he would shoot at him twenty times. They’re going to do it regardless. The idea of deterrence is not in touch with reality. The people we live with don’t care if you have a gun. They’re not going to sit there and rationally think, “Oh, he has a gun, I won’t attack him.” They don’t think like that.¹⁷⁵

The students also were skeptical of the efficacy of guns for self-defense, in part because, as the gang-motivated homicide statistics quoted above suggest, many gun attacks in Memphis occur because of retaliation, a recurring theme in our conversation. People who live in safe neighborhoods may picture neat and tidy self-defense scenarios where, for example, a night prowler is repelled by an alerted dweller who retrieves his or her firearm and apprehends or frightens the person away. These are not the kinds of scenes described by the students. Jarrett said, “I’ve known many people who were shot at or shot. I’m trying to think of even one situation where if the person who was attacked had a gun, it would have made a difference. People get shot sleeping, in drive-bys, wherever.”¹⁷⁶

As the students’ experiences and some of the news reports discussed above indicate, many shootings in Memphis occur not in isolated places

¹⁷³ Law Student Interview, *supra* note 34. The student comments are offered only as anecdotal insight, not to prove anything.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

like dark allies or parking lots, but at crowded, public gatherings such as clubs or parties.¹⁷⁷ These shootings do not resemble the traditional image of individual armed self-defense in which a person alone, isolated, and vulnerable turns to a gun as his or her last chance for repelling an attacker.

Jarrett: In high school, we’d have parties where someone would get a big building and they would be big gatherings. I was standing next to a friend one night and he got shot—just a few feet away. I just ran as fast as I could. It never even occurred to me that I would want a gun. Once I was jumped and—

Me: Stop there. So you were jumped? Wouldn’t you have wanted a gun to protect yourself in that situation? Even I would want one in that case.

Jarrett: No, because even if I could use it, they would just retaliate. If I could shoot three people that day, I’d go to school the next day and get shot by twenty.¹⁷⁸

Jarrett added that if citizens do want guns, they can be easily obtained. “I could get a gun in thirty minutes if I wanted one.”¹⁷⁹ I said, “Seriously, if you decided right this second [from this office in downtown Memphis] you wanted a gun, how long would it take you to get one?” “Thirty minutes,” he confirmed.¹⁸⁰

Trying to fairly represent the opposing side, I pressed them on the self-defense issue, suggesting that guns could be used successfully in home-defense scenarios. Jerrick, who has a Master’s degree in criminology from the University of Memphis, said: “Most violent crime is by people between sixteen and twenty-four and most of the victims are also in that age range. How many of those people are protecting their property?”¹⁸¹ This is a particularly thoughtful insight given that so much of the self-defense edifice is constructed on home defense (as reflected in the common law “castle doctrine,” allowing home dwellers to use deadly force in self-defense without a duty to retreat).¹⁸² I kept pressing:

Me: Okay, suppose instead of young males, your grandmother is home alone and someone breaks in the house. Wouldn’t she benefit from having a gun to protect herself?

Jerrick: If they come to your house, they’ll just take your gun and there will be more guns. But even if you could use it

¹⁷⁷ See *supra* notes 166 and 169 and accompanying text.

¹⁷⁸ Law Student Interview, *supra* note 34.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Modern “Stand Your Ground” statutes have greatly expanded the right to use deadly force. See *supra* note 80 (explaining the castle doctrine and discussing Stand Your Ground statutes).

successfully, their friends would just retaliate.

Me: Even against a grandmother?

Jarrett: Well, not if it was some isolated crackhead who broke in, but if it was gang-related, yes.¹⁸³

None of the students saw a benefit to adding more guns to black communities. “What’s the benefit? Where’s the benefit?”¹⁸⁴ Jerrick asked. “It’s not like the old days, KKK and all that stuff. Those things just don’t exist anymore.”¹⁸⁵ Jarrett added: “If there were more legal guns, there would just be more guns overall and the police would be even more afraid to police the neighborhood. Everything would just be a shootout. It’s irresponsible to call for more guns.”¹⁸⁶

Joe mentioned an incident illustrating the collateral risks of guns: “We were at a party and we thought we were going to get jumped. My friends ran to get their straps.¹⁸⁷ When they got back, the security guards had already got the other guys, so we took off running and my friend’s gun went off. He accidentally shot himself in the shoulder.”¹⁸⁸

He also noted that self-defense is not necessarily what motivates African-Americans to carry guns, even legal guns: “I have friends who carry legal guns. ‘Oh, I have a .40 and a concealed holster.’ They have permits. They don’t carry them for self-defense. They just like to say they have a gun. It’s like a hobby.”¹⁸⁹ Similarly, many white gun owners (I know some) carry guns more because they like carrying guns than because they think they will need them for self-defense.¹⁹⁰ If substantial numbers of people regardless of race carry guns primarily because of a fondness for them or a sense of machismo or power derived from them, this may warrant reexamining the push for the continued expansion of gun-carrying rights at the state level. The enormous collateral costs of gun proliferation (e.g., suicides, accidents, stolen guns, altercation escalation) do not justify over indulging such a dangerous hobby under the guise of a constitutional right. The crucial game-changing constitutional issue that remains outstanding regarding guns in America will be whether *Heller*, which could be construed as limited to protecting a right to possess guns in the

¹⁸³ Law Student Interview, *supra* note 34.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ “Strap” is a slang term for a handgun. I had to ask.

¹⁸⁸ Law Student Interview, *supra* note 34; *see also* Sherri Drake Silence et al., *Mother Slept as 4-Year-Old Accidentally Shot Himself*, COM. APPEAL, Feb. 13, 2013, at 2 (describing accidental fatal shooting of four-year-old and stating that in the previous ten months the Memphis area has experienced at least seven accidental shootings of children or teens).

¹⁸⁹ Law Student Interview, *supra* note 34.

¹⁹⁰ *See, e.g.*, Mary Bruce, *Biden: Gun Owners ‘Like the Way It Feels . . . Like Driving a Ferrari,’* ABC NEWS (Apr. 11, 2013, 9:58 AM), <http://abcnews.go.com/blogs/politics/2013/04/biden-gun-owners-like-the-way-it-feels-like-driving-a-ferrari/> (describing how the cultural norm about gun ownership has changed according to Vice President Biden).

home, is extended to cover carrying guns in public.¹⁹¹

But while the three students rejected more guns as a solution, neither did they have much faith in gun regulation. So much for my side. “Gun control isn’t the answer either,” Jerrick said. Jarrett agreed: “Gun regulation isn’t going to fix the problem. It would just be a band-aid.”¹⁹² Joe said that “[g]un control could help manage the problem,” but would not be a complete fix.¹⁹³

I asked what they thought could be done to address gun violence in black communities:

Jerrick: It’s a lot of things. It’s about repairing relationships with police. It’s about poverty. I don’t want to sound like a politician, but nothing stops a bullet like a job. You have to reduce poverty and increase education. You also have to rehabilitate people. If you put a drug dealer who is making a thousand dollars a day and eating steak in prison, he is not going to come out and take a job for six or seven dollars an hour.

Jarrett: You can’t fix the problem with a piece of legislation. Just like you can’t cram for a law school exam in one night. It takes steady work throughout the semester. That’s the way to address gun violence. It takes time and steady effort.

Joe: We gotta get people to care about other people and take color out of the picture. What happened in Newtown was a terrible tragedy, but kids are also dying in places like Chicago and Memphis. We need to get people to care about all lives and feel like they all have skin in the game.¹⁹⁴

And with that last comment, we find ourselves back where the article started: perplexed as a nation with how to respond to the gun violence that plagues us. One can readily agree with Professor Johnson that gun bans would be an oversimplified, guaranteed-to-fail strategy (even assuming they would be constitutional) for addressing gun violence. But on the other side, simply arming more citizens for self-defense—i.e., the “Wouldn’t you want a gun if attacked?” argument—is also an oversimplified, guaranteed-to-fail strategy. Reducing gun violence—in black communities, in white communities, in *all* communities—requires comprehensive, multi-pronged strategies that recognize that gun policy is a polycentric problem where changes in any one part affect all of the others. Many elements must be incorporated: effective and smarter policing and

¹⁹¹ See *supra* note 77 (discussing the 2012 Seventh Circuit U.S. Court of Appeals case holding that the right to bear arms implies a right to carry them in public).

¹⁹² Law Student Interview, *supra* note 34.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

law enforcement, poverty reduction, education, substance abuse and mental health programs, reformation of drug laws, family strengthening, and, yes, reasonable gun regulations—particularly those aimed at keeping guns from dangerous, illegal, or other unauthorized users.

There is room for meeting in the middle, but only if we abandon the antagonistic positions that drive us apart and divert our attention from seeking real solutions. As called for in this Article, the best first step for identifying and fashioning those solutions would be to acquire “more data,” not “more guns.”