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## Let Us Talk Past Each Other for a While: A Brief Response to Professor Johnson Commentary: Gun Control Policy and the Second Amendment: Responses

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## Article

### Let Us Talk Past Each Other for a While: A Brief Response to Professor Johnson

MICHAEL DE LEEUW

*This Article is a brief response to Professor Johnson's excellent lead article, Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy. Professor Johnson has (I would say unfairly) counted me among the "orthodoxy" that believes that any and all gun control measures are good for communities of color. He accuses me (and the rest of those who hew to the modern orthodoxy) of ignoring the clear and present danger faced by what he calls the "Parker/MacDonald class"—law-abiding citizens who live in dangerous neighborhoods that are (perhaps) not well served by law enforcement. Professor Johnson urges that members of the Parker/MacDonald class should be allowed to protect themselves in their homes and (presumably) on their streets.*

*I admit that Professor Johnson's anecdotal argument is persuasive, and I agree with him. But I also point out that the Supreme Court has already held that the Second Amendment guarantees the Parker/MacDonald class the right—subject to reasonable restrictions—to protect itself with certain classes of firearms—so that part of the debate is over. On that score, the Parker/MacDonald Class has won. But that does not scratch the surface of today's gun rights/gun control divide—a divide that is bitter and will be difficult to bridge.*

*I then lament the lack of good empirical data that could help inform the gun rights/gun control debate—a deficit that has led both sides of the debate to rely on obsolete data to support their arguments. I urge both sides to embrace new peer-reviewed empirical studies, for example, on defensive gun use and gun trafficking, that could help guide us toward a sane middle ground that would allow permissible restrictions that can actually save innocent lives, what I call the "Newtown/Pendleton/Harbour class." I then turn the tables and ask Professor Johnson what gun control measures he would favor so long as the basic right to keep and bear arms for self-defense is guaranteed.*

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# Let Us Talk Past Each Other for a While: A Brief Response to Professor Johnson

MICHAEL DE LEEUW\*

## I. INTRODUCTION

It is a distinct honor to have been asked to submit an essay that (hopefully) will complement Professor Johnson's definitive work on firearm policy and the black community.<sup>1</sup> It is also an honor to be mentioned early (and often) in the article as one of the proponents of the "orthodoxy" that Professor Johnson critiques, despite the fact that my name is oft-times taken in vain.<sup>2</sup>

Professor Johnson's article covers the complex history of the relationship between the black community and firearms in a unique way (at least for a law review article). It is fueled by exquisitely sourced and powerful anecdotal evidence that left this author thinking (temporarily), "*what else can I write? I don't have the right.*"<sup>3</sup> After all, while I have written articles on gun control, including co-authoring an article on gun control and communities of color,<sup>4</sup> I am not myself a member of the black community, and I have not been in the same position as any of the heroes or villains in Professor Johnson's stories. So how do I answer his (in my mind) central question about what he calls the "Parker/McDonald class": If communities of color are (1) the most dangerous hotbeds of illegal firearm activity, and (2) relatively ill-served by traditional police forces, are they not the places that require the most effective self-defense?

It is a great question, and it is particularly powerful in light of the evidence that Professor Johnson presents. Part II of this Article is my attempt at responding to this question, but, to be clear, I believe that in the

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\* Litigation Partner, Cozen, O'Connor. Many thanks to Jesse Ryan Loffler and David S. Yellin, both of whom are extraordinary young lawyers and both of whom are genuinely engaged and interested in these issues. (I must, however, give Jesse the edge as a marksman after watching him absolutely decimate the bullseye of his targets.) I also want to thank Sara McCollum and the other editors of the *Connecticut Law Review*, who did a superb job seeing this article through to publication and have put together a terrific volume.

<sup>1</sup> Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013).

<sup>2</sup> See *id.* (citing to Johnson's mentions of "de Leeuw").

<sup>3</sup> NIRVANA, ALL APOLOGIES (DGC Records 1993).

<sup>4</sup> Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller and Communities of Color, 25 HARV. BLACKLETTER L.J. 133 (2009) [hereinafter de Leeuw et al., *Ready, Aim, Fire?*].

wake of *District of Columbia v. Heller*,<sup>5</sup> the question has a fairly obvious answer. Part III of this Article emerges out of the second part; it is a brief exploration of what I consider the core problem with the gun control debate(s): the multitude of voices speaking on gun-related issues might as well be speaking in different languages—proponents of one position or another seem to start from premises that lead quite logically to conclusions that are diametrically opposed to (or at least at right angles with) the conclusions offered by proponents of other positions. Helping to fuel this Babel-esque cacophony is the utter lack of reliable, up-to-date data and studies that can be analyzed and used to support a rational discourse on the appropriate contours of gun rights and gun control.

Part IV of this Article is a question directed back at Professor Johnson. Putting aside (for a moment) the rich history he has described and given the current state of Second Amendment jurisprudence, it is clear that outright bans on certain (though not all) weapons are unconstitutional, but it is also clear that significant firearm regulation *is* permissible. So, my question is: what is an acceptable regime of gun control laws? While this question is rhetorically pointed at Professor Johnson, I will offer my own answer to it.

## II. MEMBERS OF THE “PARKER/MCDONALD CLASS” HAVE THE RIGHT TO USE FIREARMS TO DEFEND THEMSELVES—SUBJECT TO REASONABLE RESTRICTIONS

The question that Professor Johnson’s article poses that I have always found most challenging relates to what he calls the “Parker/McDonald class,” after Shelly Parker, an African-American woman who was one of the plaintiffs who challenged Washington D.C.’s outright ban on handguns, and Otis McDonald, an African-American man from Chicago who challenged Chicago’s *de facto* ban on handguns.<sup>6</sup> The “Parker/McDonald class,” which Professor Johnson defines as “the class of law abiding adults,”<sup>7</sup> is, perhaps, more precisely defined as “law abiding adults living in dangerous neighborhoods.” How can it possibly make sense to keep Parker and McDonald unarmed in an environment where there is a significant presence of armed criminals and relatively ineffectual policing?

Those hewing to the “modern orthodoxy,” according to Professor

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<sup>5</sup> 554 U.S. 570, 581 (2008) (“We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”).

<sup>6</sup> Johnson, *supra* note 1, at 1574.

<sup>7</sup> *Id.* at 1589 n.566.

Johnson, desire—or at least will countenance—that perverse result.<sup>8</sup>

I am certainly not going to speak for all of the “modern orthodoxy” (especially with our sporadic, ill-attended meetings and the failure of some of our members to keep current with their dues),<sup>9</sup> but I will respond for myself. I fear that Professor Johnson has, to a large degree, miscast my prior writings as exemplars of his “modern orthodoxy.”

The main point of our article *Ready, Aim, Fire?*<sup>10</sup> was to address the arguments made by the Congress of Racial Equality (“CORE”) in its amicus brief in *Heller*, which was co-authored by Professors Robert Cottrol and Raymond Diamond, as well as to respond to contentions in articles by these two professors.<sup>11</sup> The historical bases for those arguments as Professor Johnson also makes clear—that many gun control laws were originally racially motivated, and that gun control laws have been applied in a discriminatory manner—are, generally speaking, correct. The historical evidence is fairly overwhelming. In *Ready, Aim, Fire?* we asked whether that history alone was reason enough to abandon long-standing gun control measures.<sup>12</sup> We concluded that it was not; *i.e.*, the taint of the racism that led to gun control measures and the discriminatory enforcement of gun laws was an insufficient reason for tossing the baby with the bathwater.<sup>13</sup> We also concluded that, in light of the disproportionate number of minorities who are the victims of firearm violence, and the uncertainty created by *Heller*,<sup>14</sup> it was important as part of a civil rights agenda for people of color to be actively involved in the discussion of gun

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<sup>8</sup> See *id.* at 1553 (“Though the stakes have been tremendous, the community traditionally did not ask individuals to surrender the self-defense resource to advance group goals. The modern orthodoxy on the other hand does exactly that . . .”).

<sup>9</sup> Whether there is, in fact, a “modern orthodoxy” at all is an interesting question. Professor Johnson’s point in labeling it as such is to imply that there is something approaching a consensus among African American leaders that strict gun control measures are desirable and will affect the unacceptably high homicide rate for young African Americans.

<sup>10</sup> de Leeuw et al., *Ready, Aim, Fire?*, *supra* note 4.

<sup>11</sup> Brief for Congress of Racial Equality as Amici Curiae Supporting Respondents, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 345004; see also Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to Be Applied to the White Population*”: *Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1309 (1995) (examining the connection between racial conflict, especially in the post-Civil War period, and the jurisprudence of the right to bear arms); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 319 (1991) (exploring the Second Amendment in light of the African American experience).

<sup>12</sup> de Leeuw et al., *Ready, Aim, Fire?*, *supra* note 4, at 137–38.

<sup>13</sup> *Id.* at 176.

<sup>14</sup> The uncertainty stems from the fact that the *Heller* Court gave little guidance as to what laws would ultimately pass constitutional muster—failing even to set forth the standard of review for analyzing the constitutionality of a gun control measure. See *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (stating simply that the right of self-defense is central to the Second Amendment right and, therefore, a law banning the possession of handguns in one’s home is unconstitutional).

rights and gun control.<sup>15</sup> We also argued that—within the constitutionally permissible range of gun control measures—significant deference should be afforded to local legislatures because they are in the best position to know what is necessary in their own communities.<sup>16</sup>

Professor Johnson’s characterization of the article is a bit off the mark. He says that “Michael de Leeuw, Counsel for the NAACP as amici in *District of Columbia v. Heller*, argues that in urban communities where Black voters have elected Black administrations, *gun prohibition* should be respected as an exercise of community autonomy.”<sup>17</sup>

This goes well beyond what we said in *Ready, Aim, Fire?*—that article was trying to come to grips with the post-*Heller* world in which outright prohibitions for certain firearms had already been declared unconstitutional. Instead of prescribing outright gun prohibition, we argued that the adoption of local firearm regulations (short of outright prohibitions) by local representatives should be given deference in determining the permissible contours of gun control, *i.e.*, highly concentrated urban areas have different public safety issues than rural, less populated areas.<sup>18</sup>

Of course, we also examined the available empirical data, and—with (quite frankly) admirable candor—admitted that it is a close call as to whether the outright ban in Washington, D.C. was even partially effective, noting that “[s]tripped of context, the statistics cited above could be taken as evidence that restrictive firearms laws do not work,”<sup>19</sup> and that “[w]e acknowledge, of course, that the empirical evidence concerning the effectiveness of gun control laws is not unequivocal.”<sup>20</sup> And, even though we concluded that, on balance, the available studies “tilt in favor of the conclusion that the District’s handgun ban resulted in a decrease in gun-related homicides and suicides,”<sup>21</sup> we were hardly sanguine about the state of affairs in the District with regard to gun violence, noting that the outright ban was “far from a perfect solution.”<sup>22</sup> Of course, the main reason for this—and the elephant in the room when it comes to gun violence—is the relative ease and anonymity with which people can purchase handguns in one state and then transport them elsewhere to sell

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Johnson, *supra* note 1, at 58 (emphasis added).

<sup>18</sup> de Leeuw et al., *Ready, Aim, Fire?*, *supra* note 4, at 172.

<sup>19</sup> *Id.* at 154.

<sup>20</sup> *Id.* at 155.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 156.

on the street.<sup>23</sup> The enormous difficulty in being able to track guns used in crimes to their origin creates a chasm in any rational study of the criminal use of firearms. I would assume it would be a law enforcement priority to determine whether someone in Kentucky (an extraordinarily lax state in terms of gun control measures)<sup>24</sup> is buying a large quantity of handguns and then going over the border to sell them in Illinois, which has a relatively strict gun control regime.<sup>25</sup>

In any event, after *Heller* and *McDonald v. City of Chicago*,<sup>26</sup> there is really no viable debate about whether Shelly Parker and Otis McDonald have the right to keep a handgun in their homes for the purpose of self-defense; they *do* have that right.<sup>27</sup> I also have little doubt that the Supreme Court will ultimately determine that a law abiding citizen has the right—subject to reasonable restrictions—to carry (bear) a handgun for self-defense, especially in light of the recent Seventh Circuit decision in *Moore v. Madigan*.<sup>28</sup> But the devil is eventually going to be in the details about what restrictions are “reasonable” for “keeping” and “bearing” arms. In *Heller*, Justice Scalia made clear that nothing in the opinion “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,”<sup>29</sup> and the Court reaffirmed that bans on “dangerous and unusual” weapons are permitted.<sup>30</sup>

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<sup>23</sup> Eric Lichtblau, *Study Ties Lax State Gun Laws to Crimes in Other States*, N.Y. TIMES, Sept. 27, 2010, at A10 (“[T]hose states with less restrictive gun laws exported guns used in crimes at significantly higher rates than states with more stringent laws.”).

<sup>24</sup> See *id.* (providing study results that conclude Kentucky is one of the states that most often exports guns used in crimes across state lines).

<sup>25</sup> See Monica Davey, *Strict Chicago Gun Laws Can’t Stem Fatal Shots*, N.Y. TIMES, Jan. 30, 2013, at A1 (“Illinois remains the only state in the nation with no provision to let private citizens carry guns in public.”).

<sup>26</sup> 130 S. Ct. 3020 (2010).

<sup>27</sup> See *id.* at 3020–21 (reaffirming the *Heller* holding that, based on the Second Amendment, state laws banning handgun possession are unconstitutional).

<sup>28</sup> 702 F.3d 933, 942 (7th Cir. 2012) (“The theoretical and empirical evidence . . . is consistent with concluding that a right to carry firearms in public may promote self-defense. Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It failed to meet this burden.”). But see *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (upholding a New York law that required an applicant for a carry permit to demonstrate “proper cause” in order to receive a license); James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After Heller*, 97 CORNELL L. REV. 907, 920–21 (2012) (“If concealed carry and open carry are in fact equal alternative outlets for the same indivisible right, then a state can ban or burden one so long as it allows the other. State may-issue concealed-carry laws would be safe even if they required a showing of ‘good cause,’ so long as the state allowed open carry of loaded handguns, as virtually all do. Rather than an upheaval, any extension of the Second Amendment outside the home under this doctrine would cause only a few local tremors.”).

<sup>29</sup> *Heller*, 554 U.S. at 626–27.

<sup>30</sup> *Id.* at 627.

At bottom, however, it is clear that at least to some extent the Parker/McDonald class will be allowed to protect itself with firearms, subject to reasonable restrictions. So, as far as I am concerned, that question has been answered. And yet in no way does it end the discussion on guns in this country. Obviously gun rights advocates still want as broad an interpretation of the Second Amendment as possible, and gun control advocates want as much leeway as possible to implement gun control measures.

### III. LET US TALK PAST EACH OTHER FOR A WHILE

The United States has the highest gun murder rate of any developed nation.<sup>31</sup> Sixty-seven percent of all homicides in the United States are committed with firearms.<sup>32</sup> And the homicide rate among African Americans is alarmingly high—despite being just 13% of the population of the United States,<sup>33</sup> African Americans were the victims of nearly 47% of all firearm homicides in the years between 2000 and 2010.<sup>34</sup>

Putting my cards down on the table, I start from the following premises:

1. These numbers are simply unacceptable;
2. *Things* can be done to improve these numbers; and
3. *Some of the things*<sup>35</sup> that can be done are consistent with the Second Amendment right to keep and bear arms, as articulated in *Heller* and *McDonald*.

From these premises, I conclude that national, state, and local governments should expend a significant amount of effort to generate reliable scientific data to identify those “things” in *Premise 3* and then implement them. And I think this is true even if those measures ultimately turn out to be exactly what the National Rifle Association says they are—

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<sup>31</sup> See, e.g., Max Fisher, *Chart: The U.S. Has far More Gun-Related Killings than Any Other Developed Country*, WASH. POST BLOGS (Dec. 14, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/14/chart-the-u-s-has-far-more-gun-related-killings-than-any-other-developed-country/> (“The U.S. gun murder rate is about 20 times the average for all other countries . . .”).

<sup>32</sup> See Rob Barry et al., *Murder in America*, WALL ST. J. (Apr. 7, 2013), <http://projects.wsj.com/murderdata/#view=all> (showing that 111,289 out of 165,482 murders were caused by a firearm).

<sup>33</sup> KAREN R. HUMES, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>34</sup> See Rob Barry et al., *supra* note 32 (showing that 78,521 out 165,068 murder victims were Black).

<sup>35</sup> This being a civil discussion, I am, of course, excluding all ridiculous “things” that might work, e.g., going house-to-house and forcibly removing all firearms.

more armed civilians and the doing away with “gun-free” zones<sup>36</sup> (though I have very little faith that this will be the answer).

Of course, one could quibble with these premises. Perhaps some might say that the civil liberty afforded by the Second Amendment trumps the lives of innocent bystanders. Others might say that there are no “*things*” that can be done *by the government* that would be *consistent with Second Amendment rights* that would affect these numbers. This latter position seems to be what the National Rifle Association implies when it offers its response to the tragedy in Newtown, Connecticut: more guns in the hands of law-abiding citizens.<sup>37</sup>

I prefer to take these premises as working assumptions—though I am open to the possibility that they can be disproven by hard data down the road. Similarly, there is nothing *logically* wrong with the National Rifle Association’s position:

1. Gun-free zones are attractive targets for criminals and lunatics with guns.<sup>38</sup>
2. Trained, armed civilians in the right place at the right time can, in some cases, deter or prevent crimes, including mass homicides.<sup>39</sup>
3. According to the “modern orthodoxy” of the National Rifle Association, more guns in the hands of law-abiding citizens make us all safer.<sup>40</sup>

These are premises that, presumably, could also be tested by analyzing hard data. The problem is that we do not have a wealth of up-to-date and reliable data on, for example, defensive gun use (“DGU”) statistics.

Instead, we often rely on anecdotal “evidence” that pushes the heartstrings one way or the other and tries to appeal to the broader “gut instinct.” Of course, for every anecdote of heroism with firearms disarming assailants, there are equally compelling stories of random victims being plucked from the living by madmen or criminals. Sometimes the same anecdotal evidence is used to convey both stories.<sup>41</sup>

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<sup>36</sup> See, e.g., *NRA: Full Statement by Wayne LaPierre in Response to Newtown Shootings*, GUARDIAN (Dec. 21, 2012), <http://www.guardian.co.uk/world/2012/dec/21/nra-full-statement-lapierre-newtown> (stating that Congress should implement laws putting armed police officers in every school).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Erica Ritz, *Wayne LaPierre’s Bold Claim About Universal Background Checks: ‘That Registry Will Be Used to Confiscate Your Guns’*, BLAZE (Feb. 23, 2013), <http://www.theblaze.com/stories/2013/02/23/watch-it-live-nras-wayne-lapierre-confronts-the-real-consequences-of-background-checks/>.

<sup>41</sup> For example, gun control advocates certainly used the massacre in Newtown as a prime example of why stricter gun control measures are needed; while gun rights activists argued that the

### A. *Why Is Data on Firearm Use So Poor?*

When it comes to gun control, we are not writing on a blank slate. The “pros,” “cons,” and contours of gun control have been debated for a long time. In recent days, those discussions have been amplified by the horrific killing of twenty-six innocent people in Newtown, Connecticut by a madman wielding a Bushmaster AR-15 with thirty-round clips, a Glock 10-millimeter handgun, and a Sig Sauer 9-millimeter handgun.<sup>42</sup>

In the wake of the Newtown shooting, President Obama created a task force led by Vice President Biden to offer recommendations for legislation, regulation and action by executive order.<sup>43</sup> The President announced the recommendations of the task force at a January 16, 2013 White House signing ceremony at which he signed twenty-three executive orders and urged Congress to pass additional legislation in four areas.<sup>44</sup>

Most of those executive orders should have been non-controversial,<sup>45</sup> but before the ink had dried on them, there were calls from certain quarters

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gun-free zone surrounding a school invites madmen, and that a trained, armed school administrator could have defused the situation with one clean shot.

<sup>42</sup> Erica Goode, *Rifle Used in Killings, America's Most Popular, Highlights Regulation Debate*, N.Y. TIMES, Dec. 17, 2012, at A25.

<sup>43</sup> Tommy Christopher, *President Obama and Biden Gun Task Force End Up Where They Began*, MEDIAITE (Jan. 16, 2013), <http://www.mediaite.com/online/president-obama-and-biden-gun-task-force-end-up-where-they-began/>.

<sup>44</sup> Peter Baker & Michael D. Shear, *Obama to 'Put Everything I've Got' into Gun Control*, N.Y. TIMES, Jan. 16, 2013, at A1.

<sup>45</sup> The executive orders consisted of: a memorandum requiring federal agencies to share data for background checks; an order addressing any barriers relating to HIPAA; an order incentivizing states to share information for background checks; directing the Attorney General to review policies on who should be considered “dangerous”; proposing rulemaking and allowing law enactment to run background checks before returning a seized gun; providing guidance to gun dealers, through the ATF, on how to run background checks for private sellers; launching a campaign to promote safe and responsible gun ownership; reviewing various safety standards; requiring federal law enforcement officers to trace guns recovered in criminal investigations; compiling and publishing a report analyzing information on lost and stolen guns; nominating an ATF director; providing training for “active shooter” situations; increasing law enforcement efforts to prevent gun violence and prosecute gun crime; directing the CDC to do research into the causes and prevention of gun violence; directing the Attorney General to issue a report on potential technological solutions for gun safety; clarifying that the Affordable Care Act does not prohibit doctors from inquiring about guns in the homes of patients; clarifying that there is no federal law that prevents a healthcare professional from reporting threats of violence; providing incentives for schools to hire school resource officers; developing best practices for emergency repeses for schools and houses of worship; clarifying the scope of mental health care available through Medicaid; finalizing regulations for the Affordable Care Act; committing to finalize mental health parity regulations; and launching a national dialogue on mental health. Rick Ungar, *Here Are the 23 Executive Orders on Gun Safety Signed Today by the President*, FORBES ONLINE (Jan. 16, 2013), <http://www.forbes.com/sites/rickungar/2013/01/16/here-are-the-23-executive-orders-on-gun-safety-signed-today-by-the-president/>.

to impeach the President<sup>46</sup> and to use legislative power to nullify the force of the executive orders.<sup>47</sup> The National Rifle Association was particularly virulent in its attacks on the President's actions.<sup>48</sup> Such are the current passions aroused by gun control in the United States.

One of the less-noted "executive orders" is actually a memorandum from the President to the Secretary of Health and Human Services in which he instructs the Secretary to conduct research through the Centers for Disease Control and Prevention ("CDC") "and other scientific agencies within the Department of Health and Human Services" into "the causes of gun violence and the ways to prevent it."<sup>49</sup>

The memorandum ordered the CDC to lift its quasi-self-imposed eighteen-year moratorium on gathering and analyzing gun-related data.<sup>50</sup> This moratorium dates back to 1996 when pro-gun-rights members of Congress removed \$2.6 million dollars of funding from the CDC—the precise amount that the CDC had used the year before to study firearms-related health issues through the National Center for Injury Prevention and Control.<sup>51</sup> The appropriation in 1996 also made clear that "none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control."<sup>52</sup> Rightly (or wrongly) the CDC took this admonition seriously and essentially stopped all research into firearms-related health issues.

The lack of good empirical data<sup>53</sup> should be a major concern to

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<sup>46</sup> Rachel Weiner, *Rep. Steve Stockman Threatens to Impeach Obama over Guns*, WASH. POST BLOG (Jan. 15, 2013, 11:05 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/01/15/rep-steve-stockman-threatens-to-impeach-obama-over-guns/>.

<sup>47</sup> Mollie Reilly, *Rand Paul to Challenge Obama's Gun Control Executive Actions*, HUFFINGTON POST (Jan. 17, 2013), [http://www.huffingtonpost.com/2013/01/16/rand-paul-obama-gun-actions\\_n\\_2491823.html](http://www.huffingtonpost.com/2013/01/16/rand-paul-obama-gun-actions_n_2491823.html).

<sup>48</sup> See Michael D. Shear, *White House Denounces Web Video by N.R.A.*, N.Y. TIMES, Jan. 17, 2013, at A19 (indicating that the NRA created a video accusing President Obama of being an elitist and a hypocrite); Devin Dwyer, *NRA President Defends Ad Attacking Obama, Vows 'Battle' Ahead*, ABC NEWS BLOG (Jan. 16, 2013, 6:40 PM), <http://abcnews.go.com/blogs/politics/2013/01/nra-president-defends-ad-attacking-obama-vows-battle-ahead/> (stating that at an interview, NRA President David Keene said that he was aggressively preparing a battle with the White House over President Obama's sweeping new proposals on gun violence).

<sup>49</sup> Memorandum on Engaging in Public Health Research on the Causes and Prevention of Gun Violence to the Secretary of Health and Human Services, 2013 DAILY COMP. PRES. DOC. 21 (Jan. 16, 2013), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201300021/pdf/DCPD-201300021.pdf>.

<sup>50</sup> See *id.* (declaring that the CDC will conduct or sponsor research into the causes of gun violence and the ways to prevent it, in effect lifting moratorium).

<sup>51</sup> Arthur L. Kellermann & Frederick P. Rivara, *Silencing the Science on Gun Research*, 309 J. AM. MED. ASS'N 549, 549 (2013).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., Joe Palazzolo & Carl Bialik, *Lack of Data Slows Studies of Gun Control and Crime*, WALL ST. J. (Dec. 21, 2012), <http://online.wsj.com/article/SB10001424127887324731304578191531343495520.html> (stating that the data on guns is scarce, making it difficult to draw conclusions from data).

proponents of both gun control and gun rights. There is no consensus on, for example, the number of DGUs in a given year—and the disagreement on the statistics is alarming. In a famous survey study by Gary Kleck and Marc Gertz conducted in 1995, they concluded that there were between 2,000,000 and 2,500,000 DGUs each year.<sup>54</sup> On the other end of the spectrum, David Hemenway used another survey study to argue that there were somewhere between 0 and 2,500,000 DGUs in a given year.<sup>55</sup> And, regardless of what side of the debate one happens to be on, those (or similar) numbers still get thrown around as if they are gospel truths.

It is certainly true that studies are still done (often by researchers with an agenda) and that some level of data is available—certainly there is no lack of crime data, but the lack of good objective data has far-reaching consequences. It is generally difficult to assess the efficacy (or lack thereof) of gun control measures, and authors on both sides of the general divide rely on old and often unconfirmable data when buttressing their claims. Moreover, because of the conflicting results reached by some of these older studies, authors and advocates tend to cherry-pick among the old stale data. A new focus on peer-reviewed gun data is necessary, and this author is strongly in favor of the Executive Memorandum to the CDC. I hope that a new emphasis on empirical data can help both sides of this debate craft narrowly-tailored solutions that can bring down the preposterously high rates of homicide and gun crime nationally and certainly in urban areas where the effects of gun crime are most acutely felt.

I believe that the current dearth of up-to-date and reliable empirical evidence helps fuel the passions of gun control and gun rights advocates, who often rely on anecdotal evidence and human props in trying to advance their agendas.<sup>56</sup> All sides should agree that up-to-date studies by qualified, neutral scientists and statisticians would help inform this debate.

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<sup>54</sup> 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).

<sup>55</sup> David Hemenway, *The Myth of Millions of Annual Self Defense Gun Uses: A Case Study of Survey Overestimates of Rare Events*, CHANCE, No. 3, 1997, at 6, 10.

<sup>56</sup> Much was made by gun rights advocates of President Obama's being surrounded at the January 16th signing ceremony by children who had written him letters about gun control. See, e.g., Harold Maass, *Is Obama Exploiting Kids to Push Gun Control?*, WEEK (Jan. 18, 2013, 10:45 AM), <http://theweek.com/article/index/238992/is-obama-exploiting-kids-to-push-gun-control> (stating that conservatives were lashing out and accusing the president of using children as props during his rally to reduce gun violence). But both sides are certainly guilty of "marketing" gun control or gun rights. During her recent Senate testimony opposing any stricter gun laws, Gayle Trotter, a Senior Fellow at the Independent Women's Forum, recounted the gripping story of Sarah McKinley, who used a Remington 12-gauge shotgun to kill a home intruder while protecting her three-month-old son. Ruth Marcus, *The Phony Pro-Gun Argument*, WASH. POST (Jan. 31, 2013), [http://articles.washingtonpost.com/2013-01-31/opinions/36659667\\_1\\_gun-violence-gun-control-proposals-gun-rights](http://articles.washingtonpost.com/2013-01-31/opinions/36659667_1_gun-violence-gun-control-proposals-gun-rights). But nothing under consideration by Congress could in any way have affected Ms. McKinley's ability to use her shotgun to defend her family in her home. *Id.*

If it turns out that local, severe urban gun regulations actually cost lives, then we need to rethink them. If it turns out that the guns that get to the inner cities come from criminals who, though criminals, lawfully buy weapons in states with lax gun control laws like Arizona and Kentucky, that would be interesting too. But we certainly need actual data to make informed arguments. Otherwise we are arguing from theoretical lifeboat ethics, anecdotes, and “gut instincts.”

Now perhaps I am being too optimistic about the state of human understanding. After all, there is an ugly tendency for people to attribute hostile political motives to any scientific study with which they disagree.<sup>57</sup> That is why it is critical that we have impeccably chosen scientists and statisticians working together on compiling reliable data in as transparent a manner as possible.

#### IV. WHAT CAN WE DO TO PROTECT THE NEWTOWN/PENDLETON/HARBOUR CLASS?

Law-abiding, innocent children killed by guns wielded by lunatics, criminals, or otherwise-law abiding family members have all been robbed of their inalienable rights of life, liberty, and the pursuit of happiness. What can we do to protect innocent people and especially children—children like the ones who were slaughtered in Newtown, Connecticut and like the children killed on the streets of Chicago and other large cities? We will call these innocent lives the “Newtown/Pendleton/Harbour class” after the children of Newtown as well as Hadiya Pendleton<sup>58</sup> and Ne’Ondre Harbour.<sup>59</sup>

This is my second question for Professor Johnson: Given that the Parker/McDonald class can have its non-“dangerous and unusual” guns for self-defense in the home and, to whatever degree the courts ultimately allow, on the street, what other gun control measures would you be in favor of to try to protect the Newtown/Pendleton/Harbour class?

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<sup>57</sup> See, e.g., Greg Laden, *Dollars for Deniers: Big Oil Funds Climate Science Denial*, DAILY KOS (Jan. 26, 2013), <http://www.dailykos.com/story/2013/01/26/1182365/-Dollars-for-Deniers-Big-Oil-Funds-Climate-Science-Denialism#> (describing how, regardless of how much data accumulates regarding climate change, there exist political deniers who base their belief on the small portion of research paid for by biased big oil companies).

<sup>58</sup> Hadiya Pendleton was a fifteen-year-old honor student who was shot dead, a week after performing at events surrounding President Obama’s inauguration, by a gunman while taking shelter from a rainstorm in Chicago. Catherine E. Shoichet & Ted Rowlands, *Teen Who Performed at Obama Inaugural Events Shot Dead in Chicago*, CNN (Jan. 31, 2013), <http://www.cnn.com/2013/01/30/justice/illinois-teen-shot/index.html>.

<sup>59</sup> Ne’Ondre Harbour was a sixteen-year-old gifted student-athlete who was the innocent victim of a shooting in the Garfield section of Pittsburgh. Michael A. Fuoco, *Future ‘Was so Bright’ for Shooting Victim Ne’Ondre Harbor*, POST-GAZETTE (Oct. 16, 2012), <http://www.post-gazette.com/stories/local/neighborhoods-city/future-was-so-bright-for-shooting-victim-neondre-harbour-16-657698/>.

- Would you favor some sort of national registry of guns?
- Would you favor a technological solution that allows law enforcement the ability to track a found gun to its purchaser?
- Would you favor closing the loophole for background checks for sales at gun shows and private sales?

I pose these questions because *prima facie* these measures would appear to offer the best chance to generate the data necessary to figure out how illegal guns are getting into the hands of criminals who otherwise would not be able to acquire them. This strikes me as critical data if we are going to be able to address the problem of criminals with guns.

Furthermore, it is my view that such measures would certainly be constitutional under *Heller*. After all, if the core of the Second Amendment right to keep and bear arms is self-defense, then surely there is nothing inconsistent with firearms used for that purpose being registered. In his excellent article *Implementing the Right to Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*,<sup>60</sup> Professor Eugene Volokh makes this point very strongly: “the tracking regulation itself is not much of a burden on self-defense; a person is just as free to defend himself with a registered gun as he would be if the gun were unregistered.”<sup>61</sup>

A challenge to such a registration or technological requirement would have the strong headwind of history against it. During this country’s early days, local militias were periodically required to take a census of the firearms held in private hands and then report that information ultimately to the federal government.<sup>62</sup> And, while the militia clause of the Second

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<sup>60</sup> Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).

<sup>61</sup> *Id.* at 1546.

<sup>62</sup> See, e.g., Message Transmitting Returns of the Militia, Mar. 22, 1804, 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 168–71 (1834), available at <http://lcweb2.loc.gov/ammem/amlaw/lwsplink.html> (recording data regarding firearms and ammunition for March 22, 1807); Message Transmitting Returns of the Militia, Feb. 28, 1805, 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 184–87 (1834), available at <http://lcweb2.loc.gov/ammem/amlaw/lwsplink.html> (recording of data regarding firearms and ammunition for Feb. 28, 1805); Message Transmitting Returns of the Militia, April 11, 1806, 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 199–203 (1834), available at <http://lcweb2.loc.gov/ammem/amlaw/lwsplink.html> (recording of data regarding firearms and ammunition for April 11, 1806); Message Transmitting Returns of the Militia, Feb. 11, 1807, 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 210–13 (1834), available at <http://lcweb2.loc.gov/ammem/amlaw/lwsplink.html> (recording of data regarding firearms and ammunition for Feb. 11, 1807).

Amendment has been all but “read out” of the amendment, the implementation of such a census by the founders’ generation would be pretty hard for the Supreme Court to ignore.

#### V. CONCLUSION

Professor Johnson’s article is a terrific history lesson and a great read. It does not, however, move the current debate very far. The Parker/McDonald class has won its case. Members of that class are and will be allowed to use appropriate firearms for self-defense. But it would be folly and morally wrong to ignore the public health concern that is the needless deaths of innocent children and adults. The Newtown/Pendleton/Harbour class needs protection too. But, the data that would inform how we could best protect that class is severely lacking; there is simply very little reliable data to inform policy. We are at a critical juncture, and we need to do whatever is possible to find out what measures can best protect the innocent from firearm violence while still protecting the right of the people to keep and bear arms for self-defense and other lawful purposes—whether those solutions are national, state, or local, and whether those solutions resemble currently-proposed gun control measures or not. But failure to act is not an option.