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Essay

Helpless by Law: Enduring Lessons from a Century-Old Tragedy

ROBERT J. COTTROL & RAYMOND T. DIAMOND

This essay examines questions of violence and self-defense in African American history. It does so by contrasting historical patterns of racist anti-Black violence prevalent in the nineteenth and early twentieth century, as exemplified by the destruction of the Greenwood community in Tulsa Oklahoma in 1921, with the current phenomenon of Black-on-Black violence in modern inner-city communities. Although circumstances have changed greatly in the century since the destruction of Greenwood, two phenomena persist: 1. the failure of authorities to protect Black communities and their residents, and 2. efforts by authorities to use the law or law enforcement to disarm members of Black communities leaving residents helpless by law.

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Helpless by Law: Enduring Lessons from a Century-Old Tragedy

ROBERT J. COTTROL *
& RAYMOND T. DIAMOND **

INTRODUCTION

A little more than 100 years ago, between May 31st and June 1st of 1921, the prosperous Negro community of Greenwood in Tulsa, Oklahoma was destroyed. Dubbed “the Black Wall Street,” Greenwood was a community of thriving small businesses, barber shops, beauty parlors, restaurants, funeral parlors, and other entrepreneurial efforts. It was a community of strivers and dreamers. Its success was fueled in part by the oil driven prosperity that brought wealth to the Sooner state, a wealth not spread equally among the different racial groups in Oklahoma, but a wealth that was spread, nonetheless. The destruction was brought about in part by a White mob or better put, a series of White mobs enraged by a later-to-be retracted claim that a Black youth had assaulted a young White woman.¹ It was also aided by local police and state National Guard units who sided with the White mobs and conducted their own attacks on the city’s Afro-American residents, levelled the homes and businesses of the residents, disarmed them, and finally herded them into detention camps.²

* Harold Paul Green Research Professor of Law, and Professor of History and Sociology, The George Washington University

** Jules F. and Frances L. Landry Distinguished Professor, and James Carville Alumni Professor, Louisiana State University Law Center

¹ Scott Ellsworth, *The Tulsa Race Riot*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE RACE RIOT OF 1921 37, 59 (2001).

² R. Haliburton Jr., *The Tulsa Race War of 1921*, 2 J. BLACK STUD. 333, 339–44, 346–48.

The story of the Tulsa Race Riot has been recounted in any number of books and articles.³ It has also been the subject of congressional hearings⁴ and an Oklahoma state commission.⁵ The 1921 race riot that levelled Tulsa's Greenwood neighborhood was important in many ways. It was in part a story of envy. Greenwood suffered the fate of a number of other Negro communities in the early twentieth century that had, despite the strident prejudices of the era, managed to gain a precarious foothold on prosperity only to see their efforts destroyed by Whites who felt that prosperous Negroes were too proud, too assertive, too uppity in the language of the day. The Tulsa Massacre was not unique. Similar events had destroyed Black communities in northern and southern cities in the early decades of the twentieth century. Racial animus led to the levelling of an Afro-American neighborhood in Atlanta in 1906.⁶ In 1919, the new assertiveness of Colored doughboys returning from "The War to End All Wars" made bigots uneasy and caused the year after the Armistice to be a year of widespread lynching of returning soldiers and assaults on Black communities, even in Washington, D.C.⁷ The small Negro community of Rosewood, Florida was destroyed in 1923 after allegations that a White woman had been raped in the vicinity.⁸ The tragedy of Tulsa was by no means unique. It was instead part of a pattern that was all too common in the early decades of the last century.

³ See generally ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 - RACE, REPARATIONS, AND RECONCILIATION (2002); JAMES S. HIRSCH, RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY (2002); HANNIBAL B. JOHNSON, BLACK WALL STREET: FROM RIOT TO RENAISSANCE IN TULSA'S HISTORIC GREENWOOD DISTRICT (1998); SCOTT ELLSWORTH, DEATH IN THE PROMISED LAND: THE TULSA RACE RIOT OF 1921 (1982); LEE E. WILLIAMS & LEE E. WILLIAMS II, ANATOMY OF FOUR RACE RIOTS: RACIAL CONFLICT IN KNOXVILLE, ELAINE (ARKANSAS), TULSA AND CHICAGO, 1919-1921 (1972); Alfred L. Brophy, *When More than Property Is Lost: The Dignity Losses and Restoration of the Tulsa Riot of 1921*, 41 LAW & SOC. INQUIRY 824 (2016); Chris M. Messer, *The Tulsa Race Riot of 1921: Toward an Integrative Theory of Collective Violence*, 44 J. SOC. HIST. 1217 (2011) Chris M. Messer & Patricia A. Bell, *Mass Media and Governmental Framing of Riots: The Case of Tulsa, 1921*, 40 J. BLACK STUD. 851 (2010).

⁴ See *Hearing: Continuing Injustice: The Centennial of the Tulsa-Greenwood Race Massacre*, SUBCOMM. CONST., C.R. & C.L., COMM. ON THE JUD., <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=112648> (last updated May 24, 2021) (including testimony by centenarian survivors of the riot). See also Daniel Victor, *At 107, 106 and 100, Remaining Tulsa Massacre Survivors Plead for Justice*, N.Y. TIMES, (June 9, 2021), <https://www.nytimes.com/2021/05/20/us/tulsa-massacre-survivors.html>.

⁵ See generally TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE RACE RIOT OF 1921 (2001).

⁶ See Dominic J. Capeci Jr. & Jack C. Knight, *Reckoning with Violence: W.E.B. Dubois and the 1906 Atlanta Race Riot*, 62 J. S. HIST. 727, 741, 745-46 (1996)

⁷ David F. Krugler, *A Mob in Uniform: Soldiers and Civilians in Washington's Red Summer, 1919*, 21 WASH. HIST. 49, 58-59 (2009); Jennifer Keene, *A 'Brutalizing' War? The USA after the First World War*, 50 J. CONTEMP. HIST. 78, 87-88 (2015).

⁸ David R. Colburn, *Rosewood and America in the Early Twentieth Century*, 76 FLA. HIST. Q. 175, 175-76, 192 (1997).

Tulsa, race, and racial violence are one part of our story. That part of the story occurred in a different era. The other part of our story is very much a part of our present. A century after the Tulsa race riot, on October 28, 2021, Avinash Nitin Samarth and Meghna Philip filed a brief on behalf of the Black Attorneys of Legal Aid, the Bronx Defenders, and other amici in the Supreme Court case of *New York State Rifle and Pistol Association v. Corlett*.⁹ The amici were supporting a claim that the Second Amendment protected the right to carry firearms for protection outside the home.¹⁰ Their brief caused more than a few public stirs.¹¹ The customary script in the public debate over guns, the Second Amendment and related issues, was to have robust and expansive interpretations of the right to bear arms come chiefly from protagonists who were White, rural, and conservative. Those who were Black, urban, and progressive, again according to conventional castings, were expected to be champions of stricter controls. Samarth and Philips had flipped the script.

What connects the worlds of the colored citizens of the Greenwood section of Tulsa, Oklahoma in 1921 with the African American residents of some of the meaner streets of New York City represented by Attorneys Samarth and Philip in the third decade of the twenty-first century? The answer is violence, violence combined with the state's failure to protect both groups from predators. In both cases that failure was compounded by the state's willingness to strip the means of self-defense from those it had failed to protect.

The race riot in Tulsa should be seen within the broader context of broader of anti-Black violence and Afro-American resistance to such in the nation's history.

⁹ Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners, *New York State Rifle & Pistol Ass'n v. Bruen*, (July 20, 2021) (No. 20-843) [hereinafter Bronx Public Defenders].

¹⁰ *Id.* at 17–20.

¹¹ See, e.g., Teresa Mull, *SLATE: Gun Owners, Public Defenders Unlikely Allies in Supreme Court Case*, GUNPOWDER MAG. (Nov. 29, 2021), <https://www.gunpowdermagazine.com/slate-gun-owners-public-defenders-likely-allies-in-supreme-court-case/>

A LONGSTANDING PATTERN

It has been said that violence is as American as cherry pie.¹² Perhaps violence is not so endemic to American history as to merit that observation, but, racial violence against Black people certainly is. Violence was central to the practice of race-based slavery of persons of African descent,¹³ the peculiar institution that ended only with the ratification of the Thirteenth Amendment after the Civil War.¹⁴ It was central to the subjugation of the free Negroes of the antebellum era as well.¹⁵ It was central to continued attempts to subjugate free Negroes after the Civil War during Reconstruction, and equally central to the successful attempts to redeem White racial dominance after Reconstruction's end.¹⁶ And the racial violence associated with Reconstruction, Redemption, and the early Twentieth Century provide meaningful context for what happened in Tulsa's Greenwood - Black Wall Street - in 1921.

¹² This was part of the reasoning of H. Rap Brown, then chair of the Student Non-Violent Coordinating Committee. On July 27, 1967, Brown made the following statement:

[H]ow can you tell black people to be nonviolent, and at the same time condone the sending of white killers into the black communities? It's something wrong. We are going to control our communities by any means necessary. We built the country up, we'll burn it down. You can quote that. I say violence is necessary. Violence is a part of America's culture. It is as American as cherry pie.

CBS Library of Contemporary Quotations; H. Rap Brown, AM. ARCHIVE PUB. BROAD., <http://americanarchive.org/catalog/cpb-aacip-80-74qjqrql> (last visited Feb. 8, 2022). Brown's assessment of violence in American culture was not only good rhetoric, but it was accurate. *See generally* AMERICAN VIOLENCE: A DOCUMENTARY HISTORY (Richard Hofstadter & Michael Wallace eds., 1971)

¹³ Necessary to the institution of slavery was corporal punishment. As one slaveholder said, "[I]t is like 'casting pearls before swine' to try to persuade a negro to work. He must be made to work, and should always be given to understand that if he fails to perform his duty he will be punished for it." KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 171 (1956) (quoting A.T. Goodloe, *Management of Negroes*, 18 S. CULTIVATOR 130 (1860)). There were many forms of punishment that a master might engage; but, as Stampp's classic treatment of slavery recognizes, it was the whip that epitomizes the violence of corporal punishment and the White master's ability to force the labor of Black slaves, for it was "the most common instrument of punishment—indeed, it was the emblem of the master's authority." *Id.* at 172–77.

¹⁴ "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. AMEND. XIII, §1.

¹⁵ As historian Ira Berlin has put it, "In the white mind, the free Negro was considerably more dangerous than the slave," IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 188 (1974). For this reason, "[w]henver the South felt threatened, free Negroes suffered hard times. The success of Toussaint L'Ouverture, the Missouri Crisis, the Vesey conspiracy, the advent of Garrisonian abolitionism, all stimulated assaults on the free Negroes' liberty and often their persons." *Id.* at 189.

¹⁶ *See, e.g.*, ERIC FONER, *RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863—1877*, at 119–23 (violence as against Blacks as a risk and as a function of everyday life), 342–44 (the Ku Klux Klan's influence on electoral violence against Blacks and against the Republican Part after its founding in 1866), 442–44 (violence suppressing Black participation in elections of 1869 and 1870). *See also* HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 1–145 (1988). *See generally* STANLEY F. HORN, *INVISIBLE EMPIRE: THE STORY OF THE KU KLUX KLAN* (1987), WILLIAM L. KATZ, *THE INVISIBLE EMPIRE: THE KU KLUX KLAN IMPACT ON*

First to be understood is the phenomenon of lynching, a fundamental tool of White supremacy. Immediately after the Civil War, Southern Whites sought to keep the Black population in its place. Southerners had seen how in the antebellum period Northerners - that term should be read as including the Northeastern, the Midwestern, and the Western states - had imposed racial segregation as a means to minimize White interaction with Blacks.¹⁷ Additionally, the White South had experience with segregation in Southern cities under the ancient slave régime.¹⁸ It was an easy extension of both Northern and Southern experience to impose America's own apartheid, "Jim Crow," as the way to secure White dominance.¹⁹ Jim Crow was thus a function of a private etiquette involving racially restrictive social practices that the U.S. Supreme Court ruled were beyond congressional ability to control.²⁰ Furthermore, Jim Crow was a function of state action to which judicial constructions of the Fourteenth Amendment²¹ —which had called for equal protection of the laws and for protection of the privileges or immunities of citizens of the United States from state deprivation—gave imprimatur.²² Jurisdictions across the South and the North took advantage

HISTORY (1986); ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971).

¹⁷ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW 18–21* (3d ed. 1974). *See also* LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 97–99 (1961). In addition to statutes and ordinances imposing separate status and limiting the political and judicial rights of free Negroes, there were extralegal norms that contributed as well.

¹⁸ *See* RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820-1860*, at 180–208 (1964)

¹⁹ *See generally* WOODWARD, *supra* note 16, at 18–21. Jim Crow has been said to have established

[A]n etiquette of discrimination. It was not enough for blacks to be second class citizens, denied the franchise and consigned to inferior schools. Black subordination was reinforced by a racist punctilio dictating separate seating on public accommodations, separate water fountains and restrooms, separate seats in courthouses, and separate Bibles to swear in black witnesses about to give testimony before the law. The list of separations was ingenious and endless. Blacks became like a group of American untouchables, ritually separated from the rest of the population.

Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 *LOY. L. REV.* 255, 264–65 (1983).

²⁰ *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

²¹ "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. AMEND. XIV, § 1.

²² Ten years prior to *The Civil Rights Cases*, *The Slaughter-House Cases* deprived the Fourteenth Amendment's privileges or immunities clause of any consequence. *See generally* *The Slaughter-House Cases*, 83 U.S. 36 (1872). *See generally Plessy v. Ferguson*, 163 U.S. 537 (1896), which most infamously that declared state imposed racial separation was consistent with Section 1's command of equal protection, so long as that which was separate was in fact equal.

to impose racial separation and degradation not only by virtue of “social prejudices”²³ and “racial instincts,”²⁴ but also by *law*.²⁵ [

As we have previously written, “[t]hese laws and customs were given support and gruesome effect by violence.”²⁶ This was so in both the North and the South.

In the South, racism and White dominance found expression not only through ad hoc mob action, but under the auspices of organized terrorist groups such as the Ku Klux Klan. The group started in 1866 as a social organization and soon turned its attention to the antisocial activity of terroristic night-riding.²⁷ By the time the Klan disbanded between 1868 and 1870,²⁸ its activities “had come to include assaults, murder, lynchings, and political repression against blacks, and Klan-like activities would continue and contribute to the outcome of the federal election of 1876 that ended Reconstruction.”²⁹

The Ku Klux Klan would experience a second incarnation in 1915 with the release of D.W. Griffith’s classic film, *Birth of a Nation*,³⁰ but “both pre- and post-dating the Klan’s revival, Klan tactics would play a familiar role in the lives of [B]lack people in the South,”³¹ for lynching had become a

²³ *Plessy*, 163 U.S. at 551.

²⁴ *Id.*

²⁵ Jim Crow was not exclusively a southern experience after the Civil War. For example, at one point or another, anti-miscegenation laws have been enacted by forty-one of the fifty states. Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50–51 (1964). The *Adams* case, in which the federal government challenged separate university facilities throughout the union, involved the State of Pennsylvania. See *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.D.C. 1973); *Adams v. Richardson*, 351 F. Supp. 636, 637 (D.D.C. 1972). *Hansberry v. Lee*, 311 U.S. 32 (1940) involved a covenant restricting the sale of property to blacks in Illinois. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 350 (1991). And while *Brown v. Board of Educ.*, 347 U.S. 483, 494–96 (1954), which declared that that racial separation is inherently unequal, involved a set of consolidated cases from former slave jurisdictions of Delaware, South Carolina, Virginia, and the District of Columbia, the defendant that gave its name to the case was the Board of Education of Topeka, Kansas, a Northern state.

²⁶ Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 350 (1991).

²⁷ WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 33–37 (Oxford Univ. Press 1987).

²⁸ STANLEY F. HORN, *INVISIBLE EMPIRE: THE STORY OF THE KU KLUX KLAN, 1866–1871*, 356–59 (Patterson Smith 1969).

²⁹ See WILLIAM L. KATZ, *THE INVISIBLE EMPIRE: THE KU KLUX KLAN IMPACT ON HISTORY* 19–59 (1986) (footnotes omitted) Wade, *supra* note 27, at 110–11. Through the physical intimidation of Black voters, the Republican Party, with which Black voters were affiliated, was disadvantaged. The Democratic Party, which most Southern whites gave loyalty to, managed to accrete power in the House of Representatives to the point that the Democrats captured the House of Representatives in the 1874 election. *Id.* The power of physical intimidation of Black voters thus contributed to the compromise between Republicans and Democrats after the Presidential election of 1876, when Democrats delivered the Presidency to Rutherford Hayes for the promise to remove federal troops enforcing Reconstruction from the South. *Id.*

³⁰ WADE, *supra* note 27, at 120.

³¹ Cottrol & Diamond, *supra* note 26, at 351.

common occurrence and everyday threat, one that would continue until the maturity of the modern civil rights movement in the 1960's. As we have recognized elsewhere:

Between 1882 and 1968, 4,743 persons were lynched, the overwhelming number of these in the South; 3,446 of these persons were black, killed for the most part for being accused in one respect or another of not knowing their place. These accusations were as widely disparate as arson, theft, sexual contact or even being too familiar with a white woman, murdering or assaulting a white person, hindering a lynch mob, protecting one's legal rights, not showing proper respect, or simply being in the wrong place at the wrong time.³²

Very often Black victims of lynching were simply intimidated by Whites into not resisting what all viewed to be inevitable. This viewpoint did not go without being challenged. Ida B. Wells-Barnett, was a prominent Black journalist and anti-lynching activist who wrote:

I had been warned repeatedly by my own people that something would happen if I did not cease harping on the lynching of three months before . . . I had bought a pistol the first thing after [the lynching], because I expected some cowardly retaliation from the lynchers. I felt that one had better die fighting against injustice than to die like a dog or a rat in a trap. I had already determined to sell my life as dearly as possible if attacked. I felt if I could take one lyncher with me, this would even up the score a little bit.³³

W.E.B. Du Bois, a co-founder of the National Association for the Advancement of Colored People (NAACP) and the editor of its journal, *The Crisis*, wrote of his contempt for those who eschewed resistance for what they deemed to be safety:

No colored man can read an account of the recent lynching at Gainesville, Fla., without being ashamed of his people. . . . Without resistance they let a white mob whom they outnumbered two to one, torture, harry and murder their women, shoot down innocent men entirely unconnected with the alleged crime, and finally to cap the climax, they caught and surrendered the wretched man whose attempted arrest caused the difficulty.

³² *Id.* at 351–53.

³³ IDA B. WELLS-BARNETT, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 62 (1970).

No people who behave with the absolute cowardice shown by thee colored people can hope to have the sympathy or help of the civilized folk. . . . In the last analysis lynching of Negroes is going to stop in the South when the cowardly mob is faced by effective guns in the hands of people determined to sell their souls dearly.³⁴

The sort of courage Du Bois insisted upon bespoke virtue, but not necessarily success, for often when intended victims of lynching resisted, using the firearms that Du Bois and Wells-Barnett spoke of, they were nonetheless doomed. The *New York Negro World* revealed the “ironic facts” of a 1920 Texas lynching; that Black men in Texas were soon arrested and lynched after having fired on and killed two Whites in self-defense.³⁵ Similarly, as we have recounted elsewhere,

[w]hen the sheriff of Aiken, South Carolina, came with three deputies to a [B]lack household to attempt a warrantless search and struck one female family member, three other family members used a hatchet and firearms in self-defense, killing the sheriff. The three wounded survivors were taken into custody, and after one was acquitted of murdering the sheriff, with indications of a similar verdict for the other two, all three were lynched.³⁶

And Eli Cooper of Caldwell, Georgia was understood in 1919 to have said, “Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob.” Pistols and shotguns did not help Cooper, for as his wife watched, he was dragged from his home by a mob of twenty men and killed.³⁷

The back story to the race riot and massacre on Tulsa’s Black Wall Street includes narratives that show both success and failure. The narratives show both the failure of trust in police and the self-reliance bespoken by the Second Amendment.³⁸ The lynching of Claude Chandler, a Black man

³⁴ HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 91 (1988) (quoting W.E.B. Du Bois, *Editorial, The Crisis: A Record of the Darker Races* 267, 270–71 (Oct. 1916)).

³⁵ RALPH GINZBURG, *100 YEARS OF LYNCHINGS* 139–40 (1988).

³⁶ *Id.* at 175–78.

³⁷ *Id.* at 124.

³⁸ The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. AMEND II. Recent Second Amendment jurisprudence has the right to self-defense at the heart of the right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). But the importance of the right to collective defense cannot be dismissed. James Madison wrote of the threat the framing generation perceived in a standing army, suggesting that the right to keep and bear arms was a hedge against that threat:

accused of killing a White police officer, is central to one such narrative. Police had raided the Chandler home, the site of a moonshine distillery. During the shootout that ensued, a police officer and Chandler's father were killed, Chandler, injured in the raid, was arrested and taken to the Oklahoma City jail, and on August 23, 1920, "three unmasked white men entered the . . . jail, overpowered the jailer, and a few minutes later took Claude Chandler."³⁹ Two hours later, rumors were circulating in the Black community of Chandler's kidnapping, his lynching was richly anticipated, and plans were made to come to his defense, with "[p]erhaps a thousand heavily armed black men" having assembled along a prominent street in the Black community.⁴⁰ Three cars of Black men departed the meeting point in search of rescuing Chandler, but a third that had stopped to fill its gasoline tank was surrounded by police. The occupants of the first two cars returned to see about their absent compatriots, and the occupants of all three vehicles were disarmed but allowed to conduct what would emerge as a nightlong fruitless search. About noon the following day, Chandler's body was found, having been beaten and shot twice, hanging from a tree.⁴¹ The Black community, struck by unlikelihood that three unmasked men could overpower a jailer, by suspected cooperation between the lynchers and law enforcement, was left to stand with grief and with the anger that comes with knowing the rightness of one's moral position even as one is impotent to defend it.⁴²

The *Tulsa Star*, a Black newspaper in Oklahoma, would note that "[t]he proper time to afford protection to any prisoner is before and during the time

Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments with the people on their side, would be able to repel the danger. THE FEDERALIST NO. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961).

Both of these values—individual self-defense and collective self-defense—were posited by Sir William Blackstone, the classic exponent of English common law, when he listed the right to possess arms as one of the "auxiliary rights" without which the primary rights of personal security, personal liberty, and private property could not be maintained. He wrote:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence [sic], suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute I W. & M. st. 2. c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

¹ WILLIAM BLACKSTONE, COMMENTARIES *143–44.

³⁹ BROPHY, *supra* note 3, at 17 (quoting *Misguided Oklahoma Patriots*, TULSA STAR 4 (Sept. 4, 1920)).

⁴⁰ *Id.*

⁴¹ *Id.* at 12–13.

⁴² *Id.* at 13–14.

he is being lynched, and certainly not after he is killed.”⁴³ The paper offered as well the view that “while there was danger of mob violence any set of citizens had a legal right—it was their duty—to arm themselves and march in a body to the jail and apprise the sheriff or jailer of the purpose of their visit and to take life if need be to uphold the law and protect the prisoner.”⁴⁴ Being armed for purposes of self-protection or “to uphold the majesty of the law” was a virtue, and in the view of the *Tulsa Star*, the police had no power to disarm any person armed for such purposes.⁴⁵

Other communities in Oklahoma would experience the threat of a feared lynching and take action, sometimes arms, against it. In Tulsa in September 1919, the *Tulsa Tribune* reported that “leaders of the Greenwood community allegedly showed up at the courthouse and demanded assurances that [a Black man] was arrested.”⁴⁶ About six months later in March 1920, Black men from the town of Shawnee “armed themselves and stole a couple of cars to chase after the mob that was forming to take a prisoner, Chap Davis, who had recently been convicted of attempted assault on a white teacher, from law enforcement officers.”⁴⁷ The *Tulsa Star* heaped praise on Davis’ defenders, intoning that

If one set of men arm themselves and chase across the country to violate the law, certainly another set who arm themselves to uphold the supremacy of the law and prevent crime, must stand out prominently as the best citizens. . . . We need more citizens like them in every community and of both races.⁴⁸

October 1920 would see Jim Adkinson, a Black man from Okmulgee, falsely accused of having raped a White woman.⁴⁹ More than a thousand Blacks were said by the *Black Dispatch* to have armed themselves in anticipation of a riot that did not come.⁵⁰ April 1921 would see a group of Black men free a Black prisoner named John McShane who “had been taken

⁴³ BROPHY, *supra* note 3, at 17 (quoting *Misguided Oklahoma Patriots*, *TULSA STAR* 4 (Sept. 4, 1920)).

⁴⁴ BROPHY, *supra* note 3, at 18 (quoting *The Facts Remain the Same*, *TULSA STAR* 8 (Sept. 8, 1920)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 19 (citing *Grand Jurors Probe Takes a New Angle*, *TULSA TRIB.* 1 (June 13, 1921)).

⁴⁷ *Id.* at 19.

⁴⁸ *Id.* (quoting *Mob Rule and the Law*, *TULSA STAR* 8 (Mar. 6, 1920)).

⁴⁹ *Id.* at 20 (citing *Near Lynch Victim Proved to be an Innocent Man*, *TULSA STAR* 3 (Oct. 23, 1920)).

⁵⁰ BROPHY, *supra* note 3, at 20 (citing *Near Race Riot is Staged at Okmulgee*, *BLACK DISPATCH* 1 (Oct. 15, 1920)). The *Black Dispatch* was not the only Black newspaper that proclaimed the self-reliant defiance of the Black community in Okmulgee. A headline in the *Tulsa Star* proclaimed ‘Colored Men Armed for Self-Defense, Waited for Attack that Did Not Come.’ *Riot Averted by Race Men in Okmulgee*, *TULSA STAR* 1 (Oct. 16, 1920).

into ‘protective custody’ after he won a fist fight with a white man.”⁵¹ In the view of McShane’s rescuers, they were justified in the jailbreak, for “when the sheriff brought McShane to jail, he did so with the knowledge that he would be taken from the jail and lynched.”⁵²

These were but modern iterations of old wisdom, that surrender does not constitute safety. That realization, as I.H. Spears—a Black lawyer from Tulsa who was central to the battles surrounding the aftermath of the Greenwood riot⁵³—would say, counseled active self-defense: “Every time I hear of a lynching, [it] makes me want to get some ammunition.”⁵⁴

None of this is to say that race riots, directed not at targeted individuals but at communities of Black people, were not a form of violence that Blacks in the South were subject to in the postbellum period through the early Twentieth Century. In 1873 there was a massacre of as many as 165 or more when an all-Black Republican militia in Colfax, Louisiana⁵⁵ defended the local courthouse over the opposition of a mob organized by White supremacist and White terror organizations, the Knights of the White Camelia, and the Old Time Ku Klux Klan.⁵⁶ There would be federal prosecutions under Section 6 of the Enforcement Act of May 31, 1870, passed by Congress under the authority of Section 5 of the Fourteenth Amendment. The statutory provision read:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of

⁵¹ BROPHY, *supra* note 2, at 20–21.

⁵² *Id.* at 21.

⁵³ *Id.* at 23, 28.

⁵⁴ *Id.* at 23 (quoting Defendant’s Brief, *Redfearn v. Am Cent. Ins. Co.*, 243 P. 929 (Okla. 1926) at 48).

⁵⁵ LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* 109 (2008).

⁵⁶ *Id.* at 89. *See also* CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION* (2008)

honor, profit, or trust created by the Constitution or laws of the United States.⁵⁷

As the U.S. Supreme Court explained two years after the massacre in *United States v. Cruikshank*,⁵⁸ “[t]o bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States.”⁵⁹ A Black private militia group had been massacred by a mob. The theory of the indictment was that the right was the “lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.”⁶⁰ But the Court concluded that the Fourteenth Amendment had added “nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.”⁶¹ The conviction under the Enforcement Act was overturned.⁶²

Another such example came in 1906, a year that would see a race riot grip Atlanta, Georgia for three full days. The local newspapers were rife with “headlined accounts of four supposed assaults by [B]lacks upon White women,”⁶³ and anger among Whites ran high. At least four Blacks were killed on September 22,⁶⁴ a small beginning to the twenty-five Blacks and two Whites killed across three days.⁶⁵ And yet, there were Black efforts made toward collective and armed self-defense. Though Blacks “were unable to offer effective resistance when trapped downtown or caught in white sections of the city, they did fight back successfully when mobs invaded their neighborhoods.”⁶⁶ By way of example, in one Black neighborhood to the southeast of downtown Atlanta where the riot began,

[R]esidents of Brownsville determined they would defend themselves and their homes if attacked. That determination did

⁵⁷ Enforcement Act of 1870, ch. 114, 16 Stat. 140, 141.

⁵⁸ *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁵⁹ *Id.* at 549.

⁶⁰ *Id.* at 551 (quoting the first and ninth counts of the indictment).

⁶¹ *Id.* at 554.

⁶² *Id.* at 559.

⁶³ SHAPIRO, *supra* note 16, at 99.

⁶⁴ *See id.* at 100

⁶⁵ REBECCA BURNS, *RAGE IN THE GATE CITY: THE STORY OF THE 1906 ATLANTA RACE RIOT* 5 (rev. ed. 2009). Whether there were two white deaths or only one depends on how one counts. Charles Crowe, *Racial Massacre in Atlanta: September 22, 1906*, 54 J. NEGRO HIST. 150, 168 (1969), reports only one death. Two were contemporaneously reported by the *New York Times*, including a woman who was “killed by the shock” of seeing a lynching. *Whites and Negroes Killed at Atlanta*, N.Y. TIMES, Sept. 25, 1906, at 1.

⁶⁶ JOHN DITTMER, *BLACK GEORGIA IN THE PROGRESSIVE ERA: 1900-1920* 130 (1980).

not suit the racists, and police moved in to arrest [B]lack citizens for having armed themselves. By that act police clearly revealed their partisanship; whites had been allowed to seize and use arms practically at will, but when [B]lacks, responding to news of bloodshed downtown, prepared to act in self-defense, the police took action. The police met with resistance in Brownsville, however. When police opened fire upon a group of [B]lacks on the street the [B]lacks responded in kind, and one officer was killed and another wounded. Several of the Brownsville residents were killed or wounded.⁶⁷

Walter White, who would later become the executive secretary of the National Association for the Advancement of Colored People,⁶⁸ vividly recalled his experience in the Atlanta race riot. Warned that a White mob would be marching down the street, where the family home lay, to “clean out the n*****s,” a thirteen-year-old Walter White would join with his father in armed defense of the family home.⁶⁹ It was a particularly dangerous posture to be in, as White and his father overheard one of the mob cry out, pointing out the family home, “That’s where that n***** mail carrier lives! Let’s burn it down! It’s too nice for a n***** to live in!”⁷⁰ Fortunately for White and his family, shots rang out from a nearby building.⁷¹ Met with armed resistance, the mob retreated.⁷² White would later recall in his autobiography that the experience had been formative, gripping him with “the knowledge of [his] identity, and in the depths of [his] soul [he] was vaguely aware that [he] was glad of it.”⁷³

In the North, the race riot would be a preferred vehicle of White dominance. In New York, for example, Negro strikebreakers were used to combat strikes of White union workers, and understandably, hostilities ran high.⁷⁴ There were clashes that occurred regularly between Blacks and Irish union workers,⁷⁵ culminating in a major race riot that lasted for four days in 1900.⁷⁶

⁶⁷ SHAPIRO, *supra* note 16, at 100.

⁶⁸ *Walter White*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Walter-White-American-civil-rights-activist> (Mar. 17, 2022).

⁶⁹ WALTER WHITE, *A MAN CALLED WHITE* 5, 10–11 (1995).

⁷⁰ *Id.* at 11.

⁷¹ *Id.* at 12.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ GILBERT OSOFSKY, *HARLEM: THE MAKING OF A GHETTO: NEGRO NEW YORK 1890-1930* 42 (1963).

⁷⁵ *Id.* at 45–46.

⁷⁶ *Id.* at 46–49.

What happened to Greenwood followed the Red Summer of 1919,⁷⁷ when segregated Black neighborhoods across the nation were attacked by White mobs.⁷⁸ Race riots had long been a feature of the American experience⁷⁹ but not the sort of race riot the nation became accustomed to in the 1960s, when Black folk in cities such as Detroit, Los Angeles, and Washington, D.C. poured out their rage and destroyed their own space.⁸⁰

⁷⁷ The term “Red Summer” was coined by James Weldon Johnson, who first used the term in his autobiography. See JAMES WELDON JOHNSON, *ALONG THIS WAY: THE AUTOBIOGRAPHY OF JAMES WELDON JOHNSON* 356–57 (1933); see also CAMERON MCWHIRTER, *RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA* 13 (2011); WILLIAM M. TUTTLE, JR., *RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919* 14 (1996); Stanley B. Norvell & William M. Tuttle, Jr., *Views of a Negro During “The Red Summer” of 1919*, 51 *J. NEGRO HIST.* 209, 209 (1966). During the Red Summer of 1919, Johnson was the field secretary of the National Association for the Advancement of Colored People. MCWHIRTER, *supra* note 77, at 15.

⁷⁸ As historian Herbert Shapiro has observed,

Riots had previously occurred in individual cities, but 1919 represented something new in American history; within a span of weeks racial violence spread from one city to another, and every city feared its turn was next. It was clear that these confrontations could not be explained as simply a local phenomenon. As Americans learned the news of racial outbreaks in such diverse cities as Omaha, Washington, Knoxville, and Chicago, it was apparent that these explosions expressed tensions afflicting the national society.

HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 149–50 (1988). From April 14 to October 1, 1919, there were race riots in twenty-two locations around the country. Norvell & Tuttle, *supra* note 77, at 77; see also Mark Ellis, *J. Edgar Hoover and the “Red Summer” of 1919*, 28 *J. AM. STUD.* 39, 40 (1994). On December 1, 1919, the Boston Herald reported thirty-nine riots or “race clashes” in 1919, along with “[f]orty-three Negroes, 4 white men lynched from January 1 to September 14, 1919.” *Antilynching: Hearings on H.R. 259, 4123, and 11873 Before the H. Comm. on the Judiciary*, 66th Cong. 9–10 (1920).

⁷⁹ See JAN VOOGD, *RACE RIOTS & RESISTANCE: THE RED SUMMER OF 1919* 13 (2008). This pattern of white violence perpetrated by riot on Black people in Black neighborhoods is one of long standing, beginning in the antebellum period. DAVID GRIMSTED, *AMERICAN MOBING, 1828–1861: TOWARD CIVIL WAR* 13 (1998). White mob violence against Black people occurred in Providence, Rhode Island in 1831, LEONARD P. CURRY, *THE FREE BLACK IN URBAN AMERICA 1800–1850: THE SHADOW OF THE DREAM* 102–03 (1981), in New York in 1834, LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860* 102 (1961); CURRY, *supra*, at 101, in Cincinnati in 1841, JOHN M. WERNER, *REAPING THE BLOODY HARVEST: RACE RIOTS IN THE UNITED STATES DURING THE AGE OF JACKSON, 1824–1849* 50–114 (1986), in Boston in 1843, CURRY, *supra*, at 100, and in Philadelphia in five times between 1829 and 1849, WERNER, *supra*, at 166–229; CURRY, *supra*, at 104. This rendition is not exhaustive. See generally WERNER, *supra* note 79. For a list, see WERNER, *supra*, App. I, at 298. For an exhaustive study of not only of white mob violence but violence of other types as well, see SHAPIRO, *supra* note 78, at xiii–xvi.

⁸⁰ David R. Francis, *How the 1960s’ Riots Hurt African-Americans*, *NBER DIGEST*, Sept. 2004, at 3. In commenting on the REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS that followed the riots of the summer of 1967, Hans W. Mattick, who had been employed under contract by the Commission to research sociological aspect of the riots, explained:

Although the civil disorders since World War II have been racial in character, they have not been *interracial*. In contrast to the interracial conflicts that erupted occasionally from the colonial period through World War II, in which groups of one race came into direct conflict with groups of another, recent civil disorders, including those of 1967, have been directed against the local symbols of white American society: authority and property.

Race riots up until that point had involved White people running amuck in the segregated Black portions of cities large and small.⁸¹

Urban centers of the great cities would be one locus. It was a Saturday night in early May when Charleston, South Carolina suffered “the first of the major riots of the Red Summer,” when hundreds of sailors of the U.S. Navy swarmed the city’s Black district, killing two and wounding seventeen more, and accounting as well for the wounding of seven sailors and a White policeman.⁸² Washington, D.C. would suffer its own riot from July 19 to July 22.⁸³ Though at least one of them had been completely fabricated, press reports of rape of White women in Washington and suburban Maryland had been rampant for weeks and had raised great concerns.⁸⁴ On July 19, one White woman reported to police that she had fought off two Black men by screaming and fighting them off with her umbrella.⁸⁵ The next day’s paper’s headlines included “SCREAMS SAVE GIRL FROM 2 NEGRO THUGS”⁸⁶ and “NEGROES ATTACK GIRL, WHITE MEN VAINLY PURSUE”;⁸⁷ that evening began three nights of violence that ended with the introduction of two thousand federal troops, and at the end of which an estimated one thousand Whites are estimated to have participated in an attack on their Black neighbors,⁸⁸ leaving six dead and injuring upwards of one hundred.⁸⁹ At least one of those dead was White, the victim of William Laney, who had fled a mob of Whites crying “Catch the n*****!” and “Kill the n*****!”⁹⁰ Laney hid from the mob and reemerged to go to his place of employment after ascertaining that the safety on his pistol was turned off.⁹¹ When the crowd attacked again and fired at him, Laney fired back and for his trouble was convicted of manslaughter.⁹² The jury that decided the case determined that self-defense did not apply, and the appellate court that considered the matter concluded that the jury was within its discretion: “Where a person voluntarily participates in a contest or mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the

Hans W. Mattick, *The Form and Content of Recent Riots*, 35 U. CHI. L. REV. 660, 660, 662 (1968).

⁸¹ See SHAPIRO, *supra* note 78, at 267–68.

⁸² TUTTLE, *supra* note 77, at 23–25.

⁸³ ARTHUR I. WASKOW, FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960S: A STUDY IN THE CONNECTIONS BETWEEN CONFLICT AND VIOLENCE 21–33 (1966).

⁸⁴ TUTTLE, *supra* note **Error! Bookmark not defined.**, at 29.

⁸⁵ *Screams Save Girl from 2 Negro Thugs*, WASH. TIMES, July 19, 1919.

⁸⁶ *Id.*

⁸⁷ Terry Ann Knopf, *Race, Riots, and Reporting*, 4 J. BLACK STUD. 303, 310–11 (1974); Peter Perl, *Nation’s Capital Held at Mercy of the Mob*, WASH. POST (July 16, 1989), <https://www.washingtonpost.com/archive/lifestyle/magazine/1989/07/16/nations-capital-held-at-mercy-of-the-mob/89f8f5bc-7e32-43aa-8479-d1213768e769/>.

⁸⁸ Knopf, *supra* note 87, at 310.

⁸⁹ TUTTLE, *supra* note 77, at 30.

⁹⁰ *Laney v. United States*, 294 F. 412, 413 (D.C. Cir. 1923).

⁹¹ *Id.*

⁹² *Id.*

course of such conflict on the ground of self-defense.”⁹³ This was a disarmament of a post hoc nature; Laney may well have saved his life, but he paid for it with his freedom.⁹⁴

⁹³ *Id.* at 415 (quoting Elmer Almy Wilcox & Wm. Lawrence Clark, *Homicide*, in 21 CYCLOPEDIA OF LAW AND PROCEDURE 646, 812 (William Mack ed., 1906)).

⁹⁴ Laney’s conviction was upheld, enabling his sentence of eight years. *Id.* at 416; see Transcript of Record at 8, *Laney*, 294 F. 412 (1923)

Was this merely a court examining the record to find support for the jury finding of guilt on the charge of manslaughter, concluding that since the jury found Laney guilty it must have concluded that he was in a position of safety and voluntarily left it to confront the mob? Or did the court misstate a crucial understanding of the law of self-defense?

Part of this defense to crimes of violence is the requirement that before the use of deadly force is credited as justified, one must have retreated, as Blackstone put it, “as far as he conveniently or safely can,” not because the law encourages cowardice—though retreat in the face of an attack might well constitute cowardice when a defense is possible—but in Blackstone’s words, because of “a real tenderness of shedding his brother’s blood.” 2 WILLIAM BLACKSTONE, COMMENTARIES *185. -Self-defense might be just as Blackstone put it, “the primary law of nature,” incapable of being “taken away by the law of society,” but yet, in the form of English civility, it had its limits, an important one of which was the imperative of self-preservation. *Id.* at *4.

Stand your ground laws, providing that one need not retreat in the face of violence unless it were impossible to safely do so, have undergone special scrutiny and special criticism since the death of Trayvon Martin, but the law of standing one’s ground was nothing new when Laney defended himself against the white mob that had beset him.

Runyan v. State, 57 Ind. 80, 84 (1877), declared that “the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed . . . or even to save human life. “Thirty years later in *Miller v. State*, 119 N.W. 850, 857 (Wis. 1909), a Wisconsin court opined that “[t]he ancient doctrine requiring the party assaulted to ‘retreat to the wall’ . . . may have been all right in the days of chivalry . . . [but] is unadaptable to our modern development and, therefore, has been pretty generally, and in this state very definitely, abandoned. “This may have been for practical reasons. After all, one may perhaps more safely retreat when confronted by a knife or a sword, and not so safely when confronted by firearms, which are and were in ready supply in our country.

Moreover, chivalry and civically minded concern to preserve the life even of one’s attacker had by then fallen to the recognition of an unescapable reality. As the *Erwin v. State*, 29 Ohio St. 186 (1876), court had put it, American men—the word is used purposefully—had not been so susceptible to the lesson that all life is sacred. “[A] true man”—at least one who is not the aggressor—“is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.” *Id.* at 199–200.

The federal law of self-defense would seem to have been of little difference. In 1921, in *Brown v. United States*, Justice Holmes wrote:

The law has grown . . . in the direction of rules consistent with human nature. . . . [I]f a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense. That has been the decision of this Court. *Beard v. United States*, 158 U.S. 550, 559. Detached reflection cannot be demanded in the presence of an uplifted knife. . . . [I]n this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.

256 U.S. 335, 343 (1921).

If standing one’s ground was deemed permissible at federal law by nearly twenty-five years when Laney confronted his mob, what accounts for the outcome of the case? Did the jury not believe Laney’s testimony when he said that he left the backyard where he had retreated so that he could get to work? Did the jury not understand that the miasmic nature of the Washington, D.C. race riot, such that there was no safety for anyone Black within shouting distance of a mob? Or did the jury conclude that in the

William Laney had stood alone, but he was not alone in engaging in self-defense, whether recognized by law or not. The *Washington Bee*, the local representative of the Black press, no doubt correct in describing a “reign of hysteria and terror,” reported that Black residents had “armed themselves as best they could.”⁹⁵ Many were Black veterans of the world war that had just ended, and taking up arms, they rode into the city shooting at Whites in mob formation.⁹⁶ Washington’s Black community both perceived and acted on the need for collective self-defense.

The Chicago Race Riot of 1919 in July of that year was the bloodiest of the Red Summer.⁹⁷ The riot had begun for what in Jim Crow America might have been considered the best of reasons, for a group of Blacks had defied race norms and attempted to swim at a whites-only beach on Lake Michigan’s shore, and a mutual exchange of rock throwing ensued.⁹⁸ The riot had also begun innocently enough, with five Black teenaged boys enjoying Lake Michigan in a racially undesignated portion of the beach close to where volleys of rock throwing were taking place.⁹⁹ One of the boys was struck in the head by a rock thrown by a White man, lost consciousness, and drowned.¹⁰⁰ Though the boys identified the assailant, an arrest was refused.¹⁰¹ When the police arrested a Black man on another charge, a Black man fired into a crowd of police, wounding one, and was killed for his efforts.¹⁰² But as historian William M. Tuttle, Jr. has put it, “[s]uddenly, other pistol shots reverberated. The restless onlookers, many of them armed, had their cue. The gunfire had signaled the start of race war.”¹⁰³ Black people in Chicago defended themselves against marauding gangs, primarily with firearms and knives as they “attempt[ed] to repulse gangs that either invaded the territory of the black belt or threatened its peripheries.”¹⁰⁴ It would not be accurate to state that Black victims of the gangs who raided Black neighborhoods got as good as they gave, for by the end of the riot, seven Blacks had been killed by the police, and sixteen more were killed by marauding Whites, and fifteen Whites were killed as well.¹⁰⁵ Five hundred

face of White rage, Black lives do not matter? In any case, *Laney v. United States* may be argued to represent a successful Black defiance of violence at the hands of a White mob, even if the victim paid for it with his freedom.

⁹⁵ CHAD L. WILLIAMS, *TORCHBEARERS OF DEMOCRACY: AFRICAN AMERICAN SOLDIERS IN THE WORLD WAR I ERA* 249 (2010).

⁹⁶ *Id.*

⁹⁷ TUTTLE, *supra* note 82, at 64–65.

⁹⁸ *Id.* at 5–6.

⁹⁹ *Id.* at 4–6.

¹⁰⁰ *Id.* at 6–7.

¹⁰¹ *Id.* at 7.

¹⁰² *Id.* at 8.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 34.

¹⁰⁵ *Id.* at 10.

thirty-seven had been injured in the rioting, and hundreds of Black families had been left without a home.¹⁰⁶

Even tiny Longview, Texas, nearly balanced with 8,500 Whites and 8,200 Blacks, would suffer a race riot in June of the Red Summer, the sequel to a lynching of one Black man found in the bedroom of a White woman and the unsuccessful lynching and escape of two Black men who had had the audacity to call for a police investigation.¹⁰⁷ A White mob stormed the homes of the two who did not know their place, but they were protected by their armed neighbors.¹⁰⁸ Shots were exchanged, somewhere between 100 and 150 in a single half hour, with four Whites felled by fatal wounds.¹⁰⁹ The mob would exact vengeance in the form of the burning of six homes owned by Blacks, the two who escaped and four others.¹¹⁰ The police would exact a pound of flesh as well, by tracking and killing the father in law of one of the escapees.¹¹¹ But as with Washington and Chicago—to a lesser extent, Charleston, where one White police officer and seven White civilians were wounded¹¹²—Black victims of White mob violence and cooperative police endeavor had been able to protect themselves and their communities by virtue of armed resistance.

This was not a new pattern. Only two years prior to the Red Summer, in the East St. Louis, Illinois race riot of 1917, where forty-eight people were killed, thirty-nine of them Black.¹¹³ This happened “after two local white police detectives were accidentally shot and killed by [B]lacks defending their neighbourhood [sic] against a white gang which had driven through the streets.”¹¹⁴ Suitably offended, Whites set out the next day to beat and kill Blacks, burning Black homes and razing significant portions of Black neighborhoods.¹¹⁵ An editorial in the *St. Louis Post Dispatch* reported the following:

All the impartial witnesses agree that the police were either indifferent or encouraged the barbarities, and that the major part of the National Guard was indifferent or inactive. No organized effort was made to protect the Negroes or disperse the murdering groups. The lack of frenzy and of a large

¹⁰⁶ CHI. COMM’N ON RACE RELATIONS, *THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT* 667 (1922). TUTTLE, *supra* note 82, at 64.

¹⁰⁷ *Id.* at 25–28.

¹⁰⁸ *Id.* at 27–28.

¹⁰⁹ *Id.* at 28.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 23–25.

¹¹³ Malcolm McLaughlin, *Reconsidering the East St Louis Race Riot of 1917*, 47 INT’L REV. SOC. HIST. 187, 187 (2002).

¹¹⁴ *Id.* at 188. *See also* Shapiro, *supra* note 16, at 116.

¹¹⁵ McLaughlin, *supra* note 100, at 187. *See also* Shapiro, *supra* note 16, at 116.

infuriated mob made the task easy. Ten determined officers could have prevented most of the outrages. One hundred men acting with authority and vigor might have prevented any outrage.¹¹⁶

This reporting was not the rambling of a biased press. A congressional committee investigating the East St. Louis riot concluded that the police “became a part of the mob by countenancing the assaulting and shooting down of defenseless [N]egroes and adding to the terrifying scenes of rapine and slaughter.”¹¹⁷ In the face of police contempt for its duty and fidelity to the higher calling of racism, “instead of protecting [B]lacks, the police disarmed them.”¹¹⁸ Indeed, having disarmed Black victims, the police further victimized them, for at least some of the disarmed Blacks “GOT . . . A BULLET OUT OF THE RIFLE OF THE MAN IN UNIFORM WHO HAD FIRST DISARMED HIM.”¹¹⁹ By the coming of Red Summer, the Black citizens of East St. Louis knew the truth of the same terrible lesson that others had learned before them, that when a White mob comes,

[t]he officers sometimes come and disarm Negroes, ONLY Negroes, and then they withdraw and on comes the mob. If this happens too often, the Negro will naturally conclude that there is a connection between the disarming officer and the mob. And then the Black man will naturally prefer to die with his gun in his hands rather than without it.¹²⁰

. . . Mobs do not like to attack armed men. The more defenseless the mob thinks its intended victim is, the more likely is that mob to attack. . . . [T]he best time for Negroes to get arms is LONG BEFORE RIOTS. . . .¹²¹

¹¹⁶ Editorial, *The East Side Atrocities*, ST. LOUIS POST-DISPATCH (July 5, 1917), reprinted in IDA B. WELLS-BARNETT, EAST ST. LOUIS MASSACRE 49 (1917).

¹¹⁷ BEN JOHNSON ET AL., REPORT ON THE SPECIAL COMMITTEE AUTHORIZED BY CONGRESS TO INVESTIGATE THE EAST ST. LOUIS RIOTS (1918), reprinted in *The Politics of Riot Commissions, 1917–1970* 59, 70 (Anthony M. Platt ed., 1971).

¹¹⁸ BROPHY, *supra* note 3, at 14.

¹¹⁹ ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION 14 (2002) (quoting *And This is the White Man's Law?*, THE BLACK DISPATCH, September 3, 1920, at 4).

¹²⁰ *Id.* at 14 n.45. (quoting William Pickens, *Terrible Lessons*, THE BLACK DISPATCH, August 22, 1919, at 4).

¹²¹ William Pickens, *Terrible Lessons*, THE BLACK DISPATCH, August 22, 1919, at 4

A DISQUIETING CONTINUITY

We are going to fast-forward, if you can still fast-forward today in this age of the vanishing VCR, from Greenwood in 1921 and the early twentieth century racial violence that it represented, to our own time. Our time travel will take us from the lynch mobs and hastily formed posses that did so much to shatter the hopes of the residents of Greenwood to our present, where we confront the seemingly curious story of the Bronx Black Public Defenders filing a brief supporting the right of New York residents to carry guns for self-defense. In our journey, we are going to skip over many critical events in the history of race relations and the struggle for racial justice in the nation. We also want to note in passing that any recounting of the struggle for racial justice in America is incomplete unless the under told story of armed resistance to racist violence during the civil rights movement of the 1950s and 1960s is included.¹²² In our fast forwarding, we will also only briefly mention an important story of legal change critical to our discussion, the Supreme Court's explicit recognition of the Second Amendment as protecting the right of individuals to own firearms for self-defense in the twenty-first century.¹²³ The former consideration, the history of race and the struggle for racial justice transformed the nation in ways that would make American society unrecognizable to Tulsa's residents, Black, White, and Indian who lived there in 1921. The American system of apartheid, Jim Crow, that prevailed in many parts of the nation, and certainly in Oklahoma's Tulsa a century ago, is no more. The disenfranchisement of Black voters that began with the end of Reconstruction and reached its zenith in the interwar years when the Tulsa massacre took place is a thing of the past, even recognizing that efforts at voter suppression are still a reality. In the last decade the United States has seen both a President, Barack Obama, and a Vice President, Kamala Harris, of African descent. Black governors, senators, and Supreme Court Justices, unthinkable during the administration of Warren Harding, President at the time of the Tulsa massacre, are now unremarkable. In looking at race in America one can argue about whether

¹²² Probably the most important group of southern Negroes organized for defense against racist attacks in the 1960s, was the Deacons for Defense and Justice. *See generally* LANCE HILL, *THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT*, (2004). The role of armed resistance in the civil rights movement is covered in CHARLES E. COBB JR., *THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* (2014). Legal scholar Nicholas Johnson provides an important historical overview of the importance of firearms in Afro-American history in NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* (2014). Any discussion of this topic is incomplete without referencing Robert Williams, North Carolina NAACP organizer in the 1950s. *See* ROBERT F. WILLIAMS, *NEGROES WITH GUNS* (1962).

¹²³ This occurred with the Supreme Court's twenty-first century Second Amendment decisions first explicitly stating that the Second Amendment protected an individual's right to have firearms from federal infringement (*See* *District of Columbia v. Heller*, 554 U.S. 570 (2008)) and second, that the second and fourteenth amendment protected the individual from state infringement of the right to bear arms (*See* *McDonald v. City of Chicago*, 561 U.S. 742 (2010)).

our focus should be on how far we have come or how far we still have to go. One can debate the perennial question of whether the glass is half empty or half full, but we live in a world profoundly different from the one that witnessed the massacre in Greenwood.

And yet in one important way the world that many African Americans inhabit at the beginning of the third decade of the twenty-first century bears a remarkable resemblance to the world experienced by the residents of Greenwood 100 years earlier. Violence and the failure of the state to afford meaningful protection in many communities remains a horrifying reality for many. The kind of racist violence that was routine in the wake of the First World War has largely faded. It does flare up every now and then. We can consider racist sociopath Dylann Roof's massacre of nine worshipers at the Mother Emanuel African Methodist Episcopal Church in Charleston, South Carolina on the June 17, 2015,¹²⁴ James Byrd's murder by white supremacists who tied a chain around his neck and dragged him behind a truck on June 7, 1998,¹²⁵ or the murderous March of Neo Nazis in Charlottesville, Virginia in August of 2017.¹²⁶ These are real and frightening reminders that the kind of racist violence that was very much a part of the nation's past remains, though diminished in numbers, very much a part of our present and can indeed grow in a future that is always uncertain.

Still, with that said, the concern with violence in Black communities today comes not from the racist mobs that in the last century destroyed the Greenwoods in Oklahoma or the Rosewoods in Florida and similar communities across the nation. The violence that terrifies residents of African American communities today is a frightening degree of internal violence, Black on Black crime, including staggering homicide rates. The problem is not new. Three years after the assault that destroyed Greenwood, Tennessee Sen. John Knight Shields introduced a measure in 1924 restricting delivery of firearms through the mails.¹²⁷ Ordering guns through the Post Office had been one way that Black citizens were able to acquire firearms in southern states that had passed laws requiring police permission to purchase guns.¹²⁸ These laws, like laws that placed facially neutral restrictions on voting were applied with great discrimination, as their authors

¹²⁴ Daniel J. Gross, *Court Upholds Death Sentence for Charleston Church Shooter Dylann Roof*, USA TODAY (Aug. 26, 2021, 6:40 AM), <https://www.usatoday.com/story/news/nation/2021/08/25/charleston-emanuel-shooter-dylan-roofs-death-sentence-court-upholds/5589926001/>.

¹²⁵ *3 Whites Indicted in Dragging Death of Black Man in Texas*, CNN (July 8, 1998, 11:07 PM), <http://www.cnn.com/US/9807/06/dragging.death.02/index.html>.

¹²⁶ Dana Lind, *Nazi Slogans and Violence at a Right-Wing March in Charlottesville on Friday Night*, VOX (Aug. 12, 2017, 11:36 AM), <https://www.vox.com/2017/8/12/16138132/charlottesville-rally-brawl-nazi>.

¹²⁷ 1924 CONG. REC. S3945 (daily ed. Mar. 11, 1924) (statement of Sen. Shields).

¹²⁸ *Id.*

intended.¹²⁹ Shield's remarks reflect the paternalistic racism exhibited by many during the era, but it also indicates the salience of a concern over violence in the Black community:

How clearly the record localizes the canker on the community. Eighty-three per cent of 75 homicides . . . were negroes killed by negroes. If the record showed a greater percentage of whites killed by whites, or if it disclosed a pregnant danger of racial conflict, the situation would be far more appalling and difficult of solution. Can not we, the dominant race, upon whom depends the enforcement of the law, so enforce the law that we will prevent the colored people from preying upon each other? Does the fault not rest squarely on our shoulders? But we can make no progress until we begin respecting and obeying the law much more than we do now, and set the example for these colored persons to obey and respect the law also.¹³⁰

Whatever Shield's motives were, he touched on a real and persistent problem, extraordinarily high homicide rates for the Black population. We did a quick check of homicide rates by race as published by the Department of Justice from 1950 to 2020, for five-year intervals. We made no attempt at statistical analysis beyond the bare figures reported by the reporting government agencies.

¹²⁹ See Florida Justice Buford's concurrence in *Watson v. Stone*, 4 So.2d 700, 703 (Fla. 1941), where he indicated that a Florida statute was never intended to be applied to the white population and was solely designed to disarm Negroes.

¹³⁰ 1924 CONG. REC. S3946 (daily ed. Mar. 11. 1924) (statement of Sen. Shields).

Table 1.¹³¹

Year	Overall US homicide rate per 100,000	White Homicide Rate per 100,000	Black Homicide Rate per 100,000	Black Male Homicide Rate per 100,000	Black Male Homicide Rate Ages 15-24, per 100,000
1945	*	2.8	*	*	*
1950	5.4	2.6	29.5	49.1	53.8
1955	4.8	2.4	25.7	42.6	*
1960	5.2	2.7	25.8	41.9	43.2
1965	5.7	3.0	26.6	47.1	*
1970	8.8	4.4	39.1	78.2	98.3
1975	*	5.9	40.6	*	*
1980	10.4	7.0	39.6	69.4	82.6
1985	7.9	5.5	29.7	*	*
1990	9.4	5.8	41.0	63.1	137.1
1995	8.3	5.1	32.7	*	*
2000	5.9	3.7	22.2	35.4	85.3
2005	6.1	3.7	23.0	37.6	*
2010	5.3	3.3	17.7	31.5	71.0
2015	5.7	3.3	19.8	35.4	74.9
2020	7.8	3.6 (2017)	21.4 (2017)	*	*

¹³¹ Denoted statistic was not readily available through sources published by the Department of Justice or Center for Disease Control. U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. "HOMICIDE IN THE UNITED STATES: 1950-1964," NATIONAL CENTER HEALTH STATISTICS, U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, PUB HEALTH SERVICE PUBLICATION No. 1000-SERIES 20-NO 6, HOMICIDE IN THE UNITED STATES: 1950-1964 (1967), https://www.cdc.gov/nchs/data/series/sr_20/sr20_006acc.pdf; BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ 197471, HOMICIDE TRENDS IN THE UNITED STATES: 2000 UPDATE (2000) (<https://bjs.ojp.gov/content/pub/pdf/htus00.pdf>); RANDOLPH ROTH, AMERICAN HOMICIDE SUPPLEMENTAL VOLUME (AHSC): AMERICAN HOMICIDES TWENTIETH CENTURY (AHTC) (2009); *Deaths by Homicide per 100,000 Resident Population in the U.S. from 1950-2018*, STATISTA (MAR. 2, 2021), <https://www.statista.com/statistics/187592/death-rate-from-homicide-in-the-us-since-1950/>; *Mortality Dashboard*, NATIONAL CENTER FOR HEALTH STATISTICS, (Feb 2, 2022), <https://www.cdc.gov/nchs/nvss/vsrr/mortality-dashboard.htm#; Table 29: Death Rates for Homicide, by Sex, Race, Hispanic Origin, and Age: United States, Selected Years 1950-2016>, CENTER FOR DISEASE CONTROL (2017), <https://www.cdc.gov/nchs/data/hs/2017/029.pdf>; *Age-adjusted death rates for selected causes of death, by sex, race, and Hispanic origin: United States, selected years 1950-2017*, CENTER FOR DISEASE CONTROL, https://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/Health_US/hs18tables/table005.xlsx.

The figures indicate a Black homicide rate that on average has been higher than 6 times the White homicide rate in the postwar period. When we turn our attention to Black men ages 15 to 24, we see a homicide rate that is on average better than 15 times the overall White homicide rate for the postwar era. These and similar observations about the Black homicide rate are well known and have been made by numerous scholars in criminology and sociology.¹³² A number of explanations have been advanced in efforts to explain the profound racial differences in homicide rates. Certainly the long history of racial exclusion in the nation's history must be taken into account by anyone attempting to explain the persistent racial differences in homicide rates.¹³³

We do not have the time and it is not our task in this essay to consider and evaluate the many explanations that have been offered for higher Black crime rates in general and Afro-American homicide rates in particular. But one explanation seems to have particularly strong explanatory power and also has a particular resonance with the discussion we are providing. That explanation is long term patterns of alienation between African American communities and those charged with enforcing the law and presumably protecting those communities. The long history of tensions between Black communities and law enforcement is well-known. Part of that history of tension has to do with historic patterns of policing used to support the activities of White supremacists, as we saw in Greenwood in 1921. The police officer as fomenter of racial violence is by no means a thing of the past.¹³⁴ But, in modern times, the problem has shifted from police forces that have acted as active abettors of racial violence to police forces who are ineffective protectors for a variety of complex reasons. A continuous pattern of violence in Black communities, combined with reactive aggressive policing and inevitable instances of confrontation between police and citizens of Afro-American communities, including police misconduct, contribute to mistrust between protectors and protected that works to lessen the effectiveness of many police departments with a predictable increase in

¹³² See, e.g., Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 SOC. FORCES 1325 (1996); Karen F. Parker, *A Move Toward Specificity: Examining Urban Disadvantage and Race-and Relationship-Specific Homicide Rates*, 17 J. QUANTITATIVE CRIMINOLOGY 89 (2001); Ruth D. Peterson & Lauren J. Krivo, *Racial Segregation and Black Urban Homicide*, 71 SOC. FORCES 1001 (1993).

¹³³ See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 136–41 (1993) (discussing Black hyper segregation and African American crime rates).

¹³⁴ One among a number of recent such cases is the case of Derek Chauvin, the former Minneapolis police officer who killed Black Minneapolis resident George Floyd by kneeling on his neck for more than nine minutes. *Derek Chauvin Pleads Guilty in George Floyd Civil Rights Case*, BBC NEWS (Dec. 15, 2021), <https://www.bbc.com/news/world-us-canada-59671567>.

crime as the frequent result. An illustration of this was furnished in a study done by sociologist Matthew Desmond and his associates indicating that 911 calls from a Black neighborhood in Milwaukee decreased significantly after a well-publicized case of police misconduct in that city—the beating of an unarmed African American man.¹³⁵ Well-publicized incidents of this and less well-publicized incidents that are nonetheless known in certain inner city communities may very well have a chilling effect on the first step toward police-community cooperation, a willingness to call police in times of emergency.¹³⁶

Even when inner-city residents call the police, they often do not get the same attention and concern from law enforcement that residents of whiter and more affluent neighborhoods get. The record on this is mixed. A study conducted by the Bureau of Justice Statistics indicated approximately equal willingness to call 911 across racial lines and equal rates of satisfaction regardless of race with police response to 911 calls regarding crime.¹³⁷ But reports from around the country indicate slower police response times in some predominately Black neighborhoods.¹³⁸ Whether these slower response times might be attributed to racial animus or the likelihood that more affluent, more upscale communities get better governmental services for a variety of reasons, e.g., greater civic engagement in such communities, more sophisticated political participation and greater ability of residents in such areas to articulate their grievances before the press and governmental agencies, slower police response times, or the perception that poor Black neighborhoods get less robust police protection, contribute to the sense in many urban communities that the residents' lives are under-valued and under-protected.¹³⁹

And, certainly, the Black homicide statistics and the daily headlines and news broadcasts support the perception on the part of African American residents in some of the nation's more dangerous inner-city communities that their lives are at risk and that the criminal justice system is unable, or

¹³⁵ Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 870 (2016).

¹³⁶ *Id.* at 871–72.

¹³⁷ MATTHEW DUROSE & LYNN LANGTON, U.S. DEP'T OF JUST., SPECIAL REPORT: REQUEST FOR POLICE ASSISTANCE, 2011 2–4 (2013).

¹³⁸ See, e.g., Pascal Sabino, *West Siders Would Call 911, but No Officers Would Show Up. After Lawsuit City Forced to Track Emergency Response Times*, BOOK CLUB CHI. (Nov. 19, 2021, 7:25 AM), <https://blockclubchicago.org/2021/11/19/west-siders-would-call-911-but-no-officers-would-show-up-after-lawsuit-city-now-must-track-emergency-response-times>.

¹³⁹ See Geoff Kelly, *Where's a Cop When You Need One?*, INVESTIGATIVE POST (Dec. 7 2021), <https://www.investigativepost.org/2021/12/07/wheres-a-cop-when-you-need-one>; Rod K. Brunson, *Protests Focus on Over-Policing. But Under-Policing Is Also Deadly*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/outlook/underpolicing-cities-violent-crime/2020/06/12/b5d1fd26-ac0c-11ea-9063-e69bd6520940_story.html.

unwilling, to take the steps necessary to ensure their safety.¹⁴⁰ This leads to a conclusion similar to the one the residents of Greenwood made a little over a hundred years ago, the individual must be prepared for self-defense by owning, and often carrying, a gun.¹⁴¹

This conclusion is by no means confined to African Americans in dangerous inner-city neighborhoods. Instead, it is a widespread American response. The United States is a nation of widespread firearms ownership. Indeed, some forty-six percent of arms owned by civilians throughout the world are owned in the United States.¹⁴² And estimates of the percentage of the American population that live in homes with firearms range from thirty to fifty percent.¹⁴³ The large-scale ownership of firearms by the civilian population in the United States is frequently the subject of commentary in the international press.¹⁴⁴

Widespread ownership of firearms had been a longstanding feature of American life, but the twenty-first century has brought something of a legal liberalization of gun ownership to the country. The Supreme Court's explicit recognition of the Second Amendment as protecting the right to have arms against both federal and state infringement ended the limited success the handgun prohibition movement enjoyed in Washington, D.C. and Chicago, Illinois.¹⁴⁵ Probably equally important in the twenty-first century, the right to carry firearms for self-defense as a matter of state statutory law has become a national norm. Of the fifty states, forty-three allow individuals to either carry firearms for self-defense with no permitting requirement or have permitting schemes that require officials to issue licenses to carry firearms for self-defense to individuals who are not prohibited from owning firearms.¹⁴⁶ The movement toward legalizing widespread carrying of firearms represented something of a shift in American history. While widespread ownership of firearms had long been common in the United States, carrying, particularly carrying concealed in urban areas, had

¹⁴⁰ See *A Second Chance: The Case for Gun Diversion Programs*, GIFFORDS L. CTR. (Dec. 7, 2021), <https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-programs>.

¹⁴¹ *Id.*

¹⁴² See AARON KARP, SMALL ARMS SURVEY, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 (2018).

¹⁴³ See KIM PARKER ET AL., PEW RSCH. CTR., AMERICA'S COMPLEX RELATIONSHIP WITH GUNS 16 (2017).

¹⁴⁴ See, e.g., Pierre Breteau, *Les Etats-Unis, le Pays Occidental Où Le Taux D'armes en Circulation Est Le Plus Élevé*, LE MONDE (May 14, 2018, 4:47 PM), https://www.lemonde.fr/les-decodeurs/article/2017/10/02/avec-le-plus-fort-taux-d-armes-en-circulation-les-etats-unis-sont-aussi-le-pays-le-plus-meurtrier_5195001_4355770.html; Charlosie Manfroni, *¿Por Qué los Ciudadanos de los Estados Unidos Usan Armas?*, LA NACION (Jan. 18, 2022, 12:05 AM), <https://www.lanacion.com.ar/opinion/por-que-los-ciudadanos-de-los-estados-unidos-usan-armas-nid18012022>.

¹⁴⁵ See *District of Columbia v. Heller*, 554 U. S. 570, 636 (2008) (Stevens, J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

¹⁴⁶ *State-by-State Concealed Carry Permit Laws*, PROCON.ORG (Mar. 11, 2022), <https://concealedguns.procon.org/state-by-state-concealed-carry-permit-laws>.

frequently been subject to restrictive permitting processes particularly in the twentieth century.¹⁴⁷

It is in this context of fear of violent crime, unsatisfactory police protection, and national liberalization of firearms carrying that we should view the brief by the Bronx Black Public Defenders. New York City has long been something of a national outlier with respect to gun ownership, particularly handgun ownership. Legislation passed in 1911 required licensing both to own and to carry handguns.¹⁴⁸ Like many of the permitting schemes in the South, fear of a disfavored racial or ethnic group provided much of the motivation for the legislation, but, in New York's case, fear of Italian immigrants more than African Americans seems to have been the primary motivator.¹⁴⁹ Although the legislation was initially sold as a modest measure that would keep members of criminal gangs from committing murder and mayhem on the streets of New York,¹⁵⁰ the law was administered in a way that made it essentially impossible for ordinary citizens to get permits to carry outside the home.¹⁵¹ The actual administration of the home permitting process also made it expensive and cumbersome for ordinary citizens to get pistols for protection in the home or at one's place of business, even though citizens in New York were theoretically entitled under the law to get what are called premises permits even before *Heller*.¹⁵² Even after the Supreme Court's decisions in *Heller* and *McDonald*, the Second Circuit sustained New York City's administration of the New York State licensing scheme which ended up costing New York City residents some four-hundred dollars in fees in order to get a license for a premises permit.¹⁵³ This was in contrast to costs for premises permits in the rest of the state that range from three dollars to ten dollars.¹⁵⁴

New York City has long had a policy through fees and delays (obtaining a permit may take up to six months)¹⁵⁵ of discouraging ordinary citizens, particularly poor people, from possessing arms for self-defense, even in the home.¹⁵⁶ City authorities, on the other hand, have long been notoriously liberal in allowing the rich and famous to not only own, but also to carry,

¹⁴⁷ See Edward H. Sheppard, *Control of Firearms*, 34 MO. L. REV. 376, 378–80 (1969).

¹⁴⁸ Brief for Italo-Am. Jurists and Att'ys as Amici Curiae in Support of Petitioners at 14, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. argued Nov. 3, 2021).

¹⁴⁹ See *id.* at 16–29.

¹⁵⁰ *Id.* at 20.

¹⁵¹ Jonah E. Bromwich & Ashley Southall, *What Happens if the Supreme Court Strikes Down New York's Gun Law?*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/05/nyregion/supreme-court-new-york-gun-control-law.html>.

¹⁵² See *Kwong v. Bloomberg*, 723 F.3d 160, 163 (2d Cir. 2013).

¹⁵³ *Id.* at 172.

¹⁵⁴ *Id.* at 162–63.

¹⁵⁵ *Gun Sales: Waiting Periods in New York*, GIFFORDS L. CTR. (May 21, 2021), <https://giffords.org/lawcenter/state-laws/waiting-periods-in-new-york/>.

¹⁵⁶ Bronx Public Defenders, *supra* note 9, at 8.

firearms for personal protection.¹⁵⁷ Stories about resident and nonresident celebrities granted permits to carry throughout New York City have long been staples of the city's journalists.¹⁵⁸ Over the years the city's newspapers have reported that former President Donald Trump, his son Donald Trump Jr., actor Robert De Niro, talk show host Sean Hannity, radio shock jock Howard Stern, and radio personality Alexis Stewart, daughter of television cooking maven Martha Stewart, among other luminaries, had carry permits in New York City.¹⁵⁹

New York City authorities administer their handgun permitting power with a stunning lack of fairness amounting to a de facto ban for the residents of the city's poorer communities and a permissive red-carpet allowance for richer residents and nonresidents to have instant access to the means of self-defense throughout the five boroughs. It is a class and racial disparity that would long ago have brought about the organized wrath of the civil rights and civil liberties communities, except in this case we are dealing with a still disfavored right—the right to have arms for self-defense.

The policies have devastating consequences for some, but not necessarily for those for whom the policies are ostensibly intended. In their brief the Bronx Defenders note that virtually all their clients who are prosecuted for violations of the New York licensing scheme are Black and Hispanic.¹⁶⁰ The Bronx Defenders vividly note the consequences of the prohibitory regime:

The consequences for our clients are brutal. New York police have stopped, questioned, and frisked our clients on the streets. They have invaded our clients' homes with guns drawn, terrifying them, their families, and their children. They have forcibly removed our clients from their homes and communities and abandoned them in dirty and violent jails and prisons for days, weeks, months, and years. They have deprived our clients of their jobs, children, livelihoods, and ability to live in this country. And they have branded our clients as "criminals" and "violent felons" for life. They have done all of this only because our clients exercised a constitutional right.¹⁶¹

A skeptical reader might dismiss claims such as the ones made by the Bronx Defenders with thoughts such as that the people who are being arrested for violations are after all breaking the law and "something has to

¹⁵⁷ See Joe Craven McGinty, *The Rich, the Famous, the Armed*, N.Y. TIMES (Feb. 18, 2011), <https://www.nytimes.com/2011/02/20/nyregion/20guns.html>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; *Which Celebs Can Carry Guns?*, US WEEKLY (Sept. 27, 2010), <https://www.usmagazine.com/celebrity-news/news/which-celebs-are-allowed-to-carry-guns-2010279>.

¹⁶⁰ Bronx Public Defenders, *supra* note 9, at 5.

¹⁶¹ *Id.*

be done about guns.” But the circumstances as outlined by the Bronx Defenders raise troubling questions about whether the restrictive regulatory scheme in New York City achieves its ostensible aims of reducing crime by criminals with guns, and if it does so without additional unfavorable consequences, including over-criminalization and turning otherwise law-abiding citizens into criminals for regulatory offenses having little to do with performing *malum in se* acts.¹⁶²

The examples provided by the Bronx Defenders show, as we would expect, sympathetic defendants, who, while lacking intent to cause harm, nonetheless ran afoul of the city’s restrictive gun policies. One particularly striking case reacquaints us with long-standing concerns over constitutional guarantees of equal protection, the Second Amendment, and how rigidly we should adhere to longstanding notions that mistake of law should not provide a defense. The Bronx Defenders furnish the case of one Sophia Johnson.¹⁶³ She had been a resident of a Midwestern state where she had purchased a firearm for her and her daughter’s safety. She had been a victim of domestic violence and assault. She moved to New York. Unaware of New York’s firearms regulations, Ms. Johnson assumed that the fact that her gun had been lawfully purchased in her home state would be legally sufficient to allow her to keep her gun in her new residence in New York. It wasn’t. A few years after moving to New York, she found herself in an abusive relationship. At some point her abuser stole her gun. She reported the matter to the police. Ultimately, the police charged her with felonious possession of a firearm. The charges hung over her head for a year and a half, disrupting her plans to study for a master’s degree and causing her considerable anxiety over who would support her minor daughter if she were to be sentenced to prison.¹⁶⁴

Another woman with a previously clean record whose life was turned upside down for running afoul of New York City’s gun laws was Jasmine Phillips.¹⁶⁵ Phillips, from Texas, was a decorated combat veteran. She legally possessed a pistol for self-defense in Texas. She drove to New York to bring her children to her husband, from whom she had been separated. She brought her pistol with her. Someone tipped the New York police that she had brought a pistol to New York. Police forcibly opened her car door, put her in a chokehold and threw her to the ground. She was held first at the precinct and then the courthouse for several hours without food, water, a phone call or, as the Defenders’ brief notes, even access to a bathroom.¹⁶⁶

¹⁶² Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J. L. & PUB. POL’Y 17, 37–38 (2016).

¹⁶³ Bronx Public Defenders, *supra* note 9, at 25–27.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 17–18.

¹⁶⁶ *Id.*

The consequences got to be even more severe. The judge set a high monetary bail causing her to be imprisoned for several weeks in New York's notorious Rikers Island prison.¹⁶⁷ Children's services filed a neglect proceeding against her.¹⁶⁸ In Ms. Phillips's words, "I lost everything: my job, my car, my home, and my kids."¹⁶⁹ She was ultimately released from New York custody through a diversion program, but her legal troubles didn't end there.¹⁷⁰ Later in Texas, a judge ruled against her in a child custody case because of her felony arrest.¹⁷¹ A woman without a prior history of criminal activity and one who had served with distinction in a combat zone would forever have the terms "felony arrest" attached to her record with the constant fear that that label could destroy her family life.

Johnson and Phillips might be seen as individuals who ran into the harsh doctrine that mistake of law is no defense, or as we say to lay people, "ignorance of the law is no excuse." But there are cases where individuals—because of real dangers and threats to their lives—feel compelled to arm themselves because the state has simply failed to protect them. One example of an individual who carried a firearm for fear of street crime in New York City was Sam Little. Mr. Little, enrolled in a program to get an associate degree in child psychology, had been the victim of criminal violence.¹⁷² He had friends who had been shot and killed.¹⁷³ He had also been slashed across the face with a knife.¹⁷⁴ He started carrying a gun.¹⁷⁵ That ultimately led to his arrest and ultimately eight months of incarceration destroying his dream of getting an associate degree in child psychology and working in the field of social service.¹⁷⁶ The Bronx Defenders described his arrest as an occasion where the police jumped out of a car and immediately frisked Little.¹⁷⁷ The police may have been following the advice and were certainly following the approach of former New York mayor Michael Bloomberg:

¹⁶⁷ *Id.* Rikers Island serves as New York City's primary detention facility for prisoners awaiting trial who cannot afford cash bail. *See, e.g.,* Jan Ransom, Jonah E. Bromwich & Rebecca Davis O'Brien, *Inside Rikers: Dysfunction, Lawlessness and Detainees in Control*, N.Y. TIMES, <https://www.nytimes.com/2021/10/11/nyregion/rikers-detainees-correction-officers.html> (last updated Nov. 8, 2021). It is notorious for its violence and abuse of prisoners. *Id.*

¹⁶⁸ Bronx Public Defenders, *supra* note 9, at 18–19.

¹⁶⁹ *Id.* at 19.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 22–23.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 23.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 23–24.

¹⁷⁷ *Id.* at 23.

Ninety-five percent of your murders—murders and murder victims—fit one M.O. You can just take the description, Xerox it and pass it out to all the cops.

They are male minorities, 16 to 25. That's true in New York. That's true in virtually every city. And that's where the real crime is And the way you get guns out of the kids' hands is to throw them up against the wall and frisk them.¹⁷⁸

In view of New York's practices, Johnson, Phillips, and Little had the misfortune to be poor and ordinary. If they had the fame and wealth of a Donald Trump, a Robert DeNiro, or an Alexis Stewart, they could have in all likelihood easily received not only permits to own but permits to carry as well. This strikingly unequal treatment is often justified on the ground that permits to carry are granted on the basis of "special need," although why celebrity status creates a greater need than residence in a dangerous neighborhood is never made clear. In any event, the practice leaves citizens of dangerous communities with a stark choice: go defenseless in dangerous neighborhoods or risk having your life destroyed by the criminal justice system ostensibly charged with your protection.

A skeptic might, with some justification, look at cases like Johnson, Phillips, and Little and urge a bit of caution. Their cases are being put forward by a group of public defenders seeking to change law and public policy. Naturally they can be expected to put forward the most sympathetic defendants, displayed in the best light. Are such cases representative, or are they unfortunate anomalies that might be safely dismissed?

The question of whether strict gun control measures reduce crime or simply add a group of peaceable citizens—particularly African-American, Hispanic-American, and other disadvantaged citizens—to the roll of criminals is a question that has not received the attention it deserves in the great American gun control debate. Certainly, information from sources other than the Bronx Public Defenders indicate that substantial numbers of Americans are arrested each year simply for possessing firearms while engaging in no other criminal activity.¹⁷⁹ Some of the people so arrested may indeed represent a threat to public safety. But often the only 'crime' committed by some of these individuals was a lack of awareness of local regulations, the inability to pay licensing fees, or an unwillingness to wait months for a permit when forced to face immediate threats from criminal

¹⁷⁸ Quint Forgey, *Bloomberg in Hot Water Over 'Stop-and-Frisk' Audio Clip*, POLITICO (Feb. 11, 2020, 11:26 AM), <https://www.politico.com/news/2020/02/11/michael-bloomberg-stop-and-frisk-clip-113902>.

¹⁷⁹ See e.g., LAWRENCE A. GREENFELD & MARIANNE W. ZAWITZ, BUREAU JUST. STAT., WEAPONS OFFENSES AND OFFENDERS 3 (1995) (describing a federal law that prohibits the possession of handguns by those under the age of eighteen).

predators. Nationwide data gathered by the Bureau of Justice Statistics indicate that some 21% of those arrested for weapons possession had never been previously arrested.¹⁸⁰ The data also indicates that 35% of those so arrested had no felony convictions.¹⁸¹

The city of Chicago might provide an illustration that even in jurisdictions where gun laws have been liberalized, the problem of the non-criminal offender being made a criminal for a simple regulatory offense remains a problem. The city had a ban on handgun ownership until the ban was pronounced unconstitutional in *McDonald*.¹⁸² Two years after the Supreme Court's decision in *McDonald*, the Seventh Circuit in a 2012 case declared Illinois law—which provided no mechanism for legally carrying firearms for self-defense—to be violative of the Second Amendment.¹⁸³ In response, the Illinois legislature passed a statute providing a mechanism allowing state residents to get permits to carry pistols.¹⁸⁴ The Illinois statute requires state officials to issue permits to citizens who are legally entitled to own firearms—basically individuals who are not prohibited from doing so by federal law.¹⁸⁵ There are difficulties with the permitting scheme. An information bulletin put out by a gun owners' advocacy group indicates training to qualify for the license may cost as much as \$300.¹⁸⁶ The state's licensing fee is \$150.¹⁸⁷ The information bulletin also reports that waiting time for processing can take up to ninety days, 120 days in some cases.¹⁸⁸

Processing delays or perhaps fees seem to cause at least some individuals who might otherwise be eligible for pistol licenses to carry without permits. A 2020 study conducted by the Center for Criminal Justice Research, Policy, and Practice at Loyola University indicated that seventy-percent of those arrested for gun crime were charged with gun possession.¹⁸⁹ Sixty-nine percent of those so arrested were Black.¹⁹⁰ Thirty-seven percent of those arrested were only charged with gun possession, and no other crime.¹⁹¹ Roughly 50% of those arrested for illegal gun possession

¹⁸⁰ BRIAN A. REAVES, BUREAU JUST. STAT., *Felony Defendants in Large Urban Counties*, 2019 – STATISTICAL TABLES 10 (2013).

¹⁸¹ *Id.* at 12.

¹⁸² *McDonald v. City of Chicago*, Ill., 130 S.Ct. 3020, 3021 (2010).

¹⁸³ *Moore v. Madigan*, 703 F.3d 933, 942 (2012).

¹⁸⁴ Caitlyn G. McEvoy, *The New Illinois Concealed Carry Law*, 101 ILL. BAR J. 620, 620 (2013).

¹⁸⁵ *Id.*

¹⁸⁶ *Concealed Carry License Q & A*, CHI. GUNS MATTER, <http://www.chicagogunsmatter.org/concealed-carry/28-concealed-carry-license-q-a> (last visited Mar. 8, 2022).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ DAVID E. OLSON ET AL., CTR. FOR CRIM. JUST. RSCH., POL'Y, & PRAC., ARRESTS IN ILLINOIS FOR ILLEGAL POSSESSION OF A FIREARM: EXAMINING THE CHARACTERISTICS AND TRENDS IN ARRESTS FOR ILLEGAL POSSESSION OF A FIREARM WITHIN THE CONTEXT OF CRIMES INVOLVING GUNS 2 (2020).

¹⁹⁰ *Id.* at 4.

¹⁹¹ *Id.* at 7.

had no prior criminal convictions.¹⁹² These figures led Cook County State’s Attorney Kim Fox to publicly question whether the Chicago Police Department was in fact arresting the wrong people, people who were not in fact contributing to gun violence.¹⁹³ Prior to legislative changes that went into effect on January 1, 2018, an individual convicted of illegal possession of a loaded gun faced a mandatory prison sentence of one to three years.¹⁹⁴

The situation we have briefly outlined in our discussions of New York and Chicago are replicated in other jurisdictions. The states of California, Maryland, New Jersey, Massachusetts, among other jurisdictions give broad, indeed unbridled discretion to police officials to determine who can have a license to carry a firearm outside the home for protection.¹⁹⁵ These statutes were enacted and are maintained as public safety measures. Such statutes often find their most rigorous enforcement in crime plagued inner-city communities. Supporters of such measures often point to the high crime rates in such communities, noting particularly the high rates of Black-on-Black homicides as justification for these measures and indeed more rigorous steps to stem the tide of violence. And yet the implementation of such measures ignores the fact that even in the most crime-plagued neighborhoods, the perpetrators of violent crime are a very small minority.¹⁹⁶ Measures that seek to render whole populations defenseless in order to stop a criminal minority have had minimal success in disarming the criminal minority, but have often rendered whole communities defenseless.¹⁹⁷

The mean and dangerous streets of the South Bronx in New York, West Baltimore in Baltimore, East Garfield Park in Chicago, and similar venues across the nation in 2022 are a long way from the imperiled lives and dashed

¹⁹² *Id.* at 6.

¹⁹³ Chip Mitchell, *Kim Foxx’s Office Says CPD is Arresting the Wrong People to Curb Gun Violence*, WBEZ CHI. (June 11, 2021, 2:05 PM), <https://www.wbez.org/stories/kim-foxxs-office-says-cpd-is-arresting-the-wrong-people-to-curb-gun-violence/5f78bab4-584e-4188-afc9-9dedfb0565c5>.

¹⁹⁴ OLSON ET AL., *supra* note 189, at 13.

¹⁹⁵ See generally *Duncan v. Bonta*, No. 19-553762021, 2021 U.S. App. LEXIS 35256, at *19–20 (9th Cir. 2021) (upholding a California law prohibiting possession of large-capacity magazines); *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (upholding California’s concealed carry permit system because the Second Amendment “does not preserve or protect a right of a member of the general public to carry concealed firearms in public”); *Md. Shall Issue v. Hogan*, 963 F.3d 356, 359 (4th Cir. 2020) (holding a Maryland statute banning rapid fire trigger activators on firearms did not violate the Takings Clause provisions in the United States Constitution and the Maryland State Constitution); *Rogers v. Grewal*, No. 3:18-cv-01544-BRM-DEA, 2018 U.S. Dist. LEXIS 84443, at *8, *11 (D. N.J. May 21, 2018) (upholding New Jersey’s handgun permit law forbidding possession of any handgun without a permit to carry); *Commonwealth v. Harris*, 119 N.E.3d 1158, 1163–64 (Mass. 2019) (upholding a Massachusetts law criminalizing knowing possession of a firearm in his or her vehicle).

¹⁹⁶ See generally Robert J. Cottrol, *Submission is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1032 (1998). Footnote 11 discusses the concept of microcultures and notes that an ultra-violent microculture in urban Black communities plays a disproportionate role in driving inner city homicide rates. *Id.* at 1034 n.11.

¹⁹⁷ *Id.* at 1078–79, n.179.

hopes of the residents of the Greenwood neighborhood of Tulsa, Oklahoma in 1921. And yet, one need not strain to find continuity. Both Greenwood and the modern inner city present us with a constant in American life a failure to protect Black lives from predators. If the Greenwood story can be explained with a simple word, racism. What is happening in urban communities is more complex and harder to explain. High crime and Black homicide rates occur in cities, unlike early twentieth century Tulsa, where the African American vote has been firmly secured and indeed in venues with Black mayors, police chiefs and dominance on city councils and other governing bodies. But the failure to protect remains a constant, as does the push to deny the most elemental right, the right to self-defense.