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## Article

### Self-Defense and Gun Regulation for All

DAVID KAIRYS

*The importance and universality of self-defense rights are beyond dispute. Self-defense emerged as a major social and constitutional issue in the second half of the twentieth century focused on minorities and women before it provided the primary basis for expansive Second Amendment rights. Supporters of broad Second Amendment rights base them on an individual and collective right to self-defense against attacks by others, but they differ about the source of the danger—the others who are attacking. Professor Nicholas Johnson emphasizes that law-abiding blacks are most at risk and most need guns to defend themselves because of black-on-black violence and the government's failure to provide safety. He opposes gun regulation, which he considers "disarmament," and favors armed self-defense. The import of the common arguments of opponents of gun regulation is that their absolutist understanding of their rights to self-defense and freedom, their dire perceptions of the perils of government, and their fantasies of the necessity and efficacy of armed resistance to the federal government require the rest of us to live with the open gun market, with its very real and immediate toll of over 30,000 people shot dead a year, and with the usually unspoken normalcy of widespread murder and fear that undermines the quality and tenor of daily life. But there are regulations that would significantly reduce the easy availability of guns to criminals, youth, and mass murderers without interfering with self-defense. Blacks and whites, and everybody else, do not need that open gun market for self-defense. Self-defense and gun regulation can coexist.*

## ARTICLE CONTENTS

I. INTRODUCTION .....	1671
II. SELF-DEFENSE .....	1673
III. THE GUN MARKET AND GUN REGULATION .....	1675
IV. DISARMAMENT .....	1679
V. CONCLUSION .....	1683



# Self-Defense and Gun Regulation for All

DAVID KAIRYS\*

## I. INTRODUCTION

As a public defender forty-five years ago,<sup>1</sup> I noticed many cases in which my clients' testimony established that they acted in self-defense, but judges and juries were hostile to the defense, even if it was corroborated by other evidence. Sometimes judges refused to seriously consider the defense or interpreted state law very narrowly to preclude it. The problem seemed to be who was raising self-defense. The hostility arose when, for example, self-defense was asserted by drug dealers defending themselves and their drug businesses against other drug dealers, or by women trying to fend off attacks by domestic abusers. In the same period, the sixties,<sup>2</sup> political movements and law review articles emerged that cast a new focus on self-defense.<sup>3</sup> The Black Panthers openly displayed guns for self-defense against attacks by police and the FBI.<sup>4</sup> Feminists sought revocation of the longstanding male immunity for rape or assault of their wives or partners, and sought recognition of women's rights to defend

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\* Professor of Law, Beasley Law School, Temple University. This is a reply to Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013). I appreciate research assistance by Luke Trama and feedback on a draft from Jon Vernick.

<sup>1</sup> See DAVID KAIRYS, PHILADELPHIA FREEDOM: MEMOIR OF A CIVIL RIGHTS LAWYER 7–138 (2008) (memoir covering, in part, work as a public defender from 1968 to 1971).

<sup>2</sup> Here, as is often the case, the reference to the 1960s includes at least part of the 1970s.

<sup>3</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 202 (2008) (discussing the increasing popularity of the self-defense interpretation of the Second Amendment during the 1960s and beyond); see also Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 623 (1980) (“This Article examines how sexual stereotypes of women and the male orientation built into the law prevent judges and jurors from appreciating the circumstances of battered women’s acts of self-defense and their perceptions.”).

<sup>4</sup> See FRANK DONNER, THE AGE OF SURVEILLANCE, THE AIMS AND METHODS OF AMERICA’S POLITICAL INTELLIGENCE SYSTEM 177–84, 212–32 (1981) (“The flourishing of (legally acquired) arms as a symbol of defiant strength and the abrasive challenge to police oppression in the ghetto . . . including a demand that the black community be armed for self-defense, set the stage for a crushing response by local police units all too ready to take the word for the deed.”); see also Black Panther Party, *Platform: What We Want, What We Believe* (1966), available at <http://history.hanover.edu/courses/excerpts/111bpps.html> (“We will protect ourselves from the force and violence of the racist police and the racist military, by whatever means necessary. . . . We therefore believe that all black people should arm themselves for self defense.”).

themselves.<sup>5</sup> Self-defense rights, principally focused on the rights of minorities and women, emerged as a major social and constitutional issue in the second half of the twentieth century, before self-defense became the primary basis for expansive Second Amendment rights.

After one of these self-defense-less cases, I formulated an argument that the defense of self-defense is required not only by state law but also by the United States Constitution.<sup>6</sup> My emphasis was on due process, equal protection, and “the first[] and . . . primary[] civil right,” personal security.<sup>7</sup> The Second Amendment did not seem helpful or relevant and was probably not mentioned. It had been limited, based on its specific language, to use of firearms related to state militias, and it had not been held to be a fundamental right that applies against the states.<sup>8</sup> Who could have known back then that the Second Amendment would be interpreted by the Supreme Court, based on an originalist theory that originally sprang up in the 1960s with considerable National Rifle Association (“NRA”) funding and support,<sup>9</sup> to constitutionally protect a broadly formulated individual right of self-defense?<sup>10</sup>

Professor Nicholas Johnson, like the Supreme Court majority in *District of Columbia v. Heller*,<sup>11</sup> prefers the Second Amendment theory, at least when it comes to self-defense with firearms.<sup>12</sup> But whatever the theory, he will not get any disagreement from me about the importance or

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<sup>5</sup> Schneider, *supra* note 3, at 647 (“[A] more individualized approach, which permits consideration by the trier of fact of the particular circumstances and perceptions under which a battered woman kills her assailant, will correct the sex bias in the law that disadvantages such women defendants.”).

<sup>6</sup> I wrote briefs on this, but I do not have them or recall the particular cases.

<sup>7</sup> David Kairys, *Civil Rights*, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 1878, 1879 (Neil J. Smelser & Paul B. Baltes eds., 2001). The pioneering civil rights work by Thomas Emerson and David Haber in 1952 described the right to personal security this way: “In a society based upon human dignity and the development of the individual personality, clearly all members are entitled to security of the person—protection from bodily harm, involuntary servitude, and the fear of physical restraint.” THOMAS I. EMERSON & DAVID HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, at v (1952).

<sup>8</sup> See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”).

<sup>9</sup> See Siegel, *supra* note 3, at 192.

<sup>10</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 587, 602, 636 (2008). The text of the Second Amendment, focused exclusively on firearms and militias, seems an unlikely way for framers to have formulated an individual right to self-defense, which in that time would often if not usually be exercised without firearms.

<sup>11</sup> 554 U.S. at 630.

<sup>12</sup> The *Heller* majority’s emphasis on a broad self-defense basis for the Second Amendment could mean there is a Second Amendment violation if a state court precludes self-defense—by firearm or not—where the evidence establishes the defense. See *id.* at 451 (“While reasons for the state’s failure to protect . . . individuals may have changed, the core private interest in self-preservation within that window, as well as the tools to facilitate it, has not.”).

universality of self-defense.<sup>13</sup> Nor will I disagree about the “strategic dichotomy” adopted by many civil rights leaders and activists, who were committed to nonviolence as a political, moral, or religious principle and strategy, and were also prepared to defend themselves and their families.<sup>14</sup>

But Professor Johnson’s argument goes beyond self-defense for all. He rejects what he calls the “modern orthodoxy” in the black community that, faced with the devastating toll of gun violence, embraces “disarming all” rather than armed self-defense.<sup>15</sup> Professor Johnson focuses on black communities, but he also raises one of the conflicts that defines the modern debate: more or fewer guns?

## II. SELF-DEFENSE

Professor Johnson presents a particularized version of the general argument often heard these days among supporters of broad Second Amendment rights: the Second Amendment was intended to and should be interpreted to implement an individual and collective right to self-defense against attacks by others. There is considerable disagreement about the source of the danger—the others who are attacking. Most people who support gun rights see the danger stemming from criminals, youths, and mentally deranged people.<sup>16</sup> Some fear violent political movements.<sup>17</sup> Others fear minorities, particularly black people, a fear that sometimes degenerates into racist arguments and rhetoric.<sup>18</sup> Activists and scholars

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<sup>13</sup> Self-defense was, at the time of the Constitution and the Bill of Rights, firmly protected under federal, state, and common law. See 2 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 1444 (1803) (“[T]he subjects of England are entitled . . . to the right of having and using arms for self-preservation and defense.”); see also Robert J. Spitzer, *Gun Law, Policy, and Politics*, 84 N.Y. ST. B.J. 35, 39–40 (2012) (“U.S. and British common law has recognized and legally sanctioned personal self-defense for hundreds of years, prior to and independent of the Second Amendment. But it arises from the area of criminal law, not constitutional law.”).

<sup>14</sup> See Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1532–53 (2013) (discussing the insistence on a legitimate form of private self-defense while condemning political violence).

<sup>15</sup> *Id.* at 1495–97 (summarizing his critique of the “modern orthodoxy”).

<sup>16</sup> See Gun Control: Key Data Points from Pew Research, PEW RES. CTR. (Mar. 13, 2013), <http://pewresearch.org/2013/03/13/gun-control-key-data-points-from-pew-research/> (“There was broad bipartisan support for laws to prevent mentally ill people from purchasing guns.”). There is reason for caution as well as diligence here, since mental illness does not generally involve or correlate with a likelihood of violence.

<sup>17</sup> See Harold S. Herd, *A Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196, 235 (1997) (stating that “[c]ontemporary extremist philosophy appears to stem from the anti-communist movement of the 1950s”).

<sup>18</sup> See, e.g., Brian Todd, *Ron Paul’s 90’s Newsletters Rant Against Blacks, Gays*, CNN (Jan. 11, 2008, 3:45 AM), <http://www.cnn.com/2008/POLITICS/01/10/paul.newsletters/> (“[E]ven in my little town of Lake Jackson, Texas, I’ve urged everyone in my family to know how to use a gun in self-defense. For the animals are coming.” (quoting Texas Representative Ron Paul)); Charlton Heston,

who support gun rights predominantly focus on the danger of oppressive government, and that is commonly linked to the origin of the Second Amendment in legal scholarship and court opinions these days.<sup>19</sup>

An extreme form of the oppressive government perspective views the Second Amendment as embodying armed resistance to the federal government, and insists that the Second Amendment should protect private possession of arms needed to resist the American military.<sup>20</sup> Florida congressman Ted Soho, for example, would protect the right of Americans to “the same equipment as the military to protect them against tyrannical government.”<sup>21</sup> This takes the idea of American exceptionalism<sup>22</sup> to a new

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Nat'l Rifle Ass'n Vice President, Address at the Free Congress Foundation's 20th Anniversary Gala (Dec. 7, 1997), available at <http://www.vpc.org/nrainfo/speech.html> (“Mainstream America is depending on you, counting on you, to draw your sword and fight for them. These people have precious little time or resources to battle misguided Cinderella attitudes, the fringe propaganda of the homosexual coalition, the feminists who preach that it's a divine duty for women to hate men, blacks who raise a militant fist with one hand while they seek preference with the other.”); see also ANDREW MACDONALD, *THE TURNER DIARIES 2* (1978) (mentioning, from the start, “groups of Blacks forcing their way into White homes to rob and rape, knowing that even if their victims had guns they probably would not dare use them”). Federal Officials have called the *The Turner Diaries* a “bible of the extremist right.” Peter Applebome, *Terror in Oklahoma: The Background*, N.Y. TIMES, Apr. 26, 1995, at A22.

<sup>19</sup> See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 649–50 (1989) (explaining that many scholars have referred to the Second Amendment as a self-defense tool to protect citizens against oppressive government); see also *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (“It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”). In the 1960s, the Black Panthers, facing real, not hypothetical, oppressive government violence, made the same argument. See *supra* note 4. The insurrectionist history and interpretation have been challenged, with the suggestion that the real and present danger comes from the insurrectionists, not the government. JOSHUA HORWITZ & CASEY ANDERSON, *GUNS, DEMOCRACY, AND THE INSURRECTIONIST IDEA* 5–8 (2009).

<sup>20</sup> *Heller* includes firearms commonly used by the people for self-defense. *Heller*, 554 U.S. at 627.

<sup>21</sup> Scott Keyes, *Tea Party Congressman: Citizens Should Have Same Weapons as the Military*, THINK PROGRESS (Jan. 22, 2013), <http://thinkprogress.org/justice/2013/01/22/1479081/ted-yoho-military/>; see also Kevin D. Williamson, *Regulating the Militia*, NAT'L REV. (Dec. 28, 2012), <http://www.nationalreview.com/articles/336529/regulating-militia-kevin-d-williamson?pg=2> (“There is no legitimate exception to the Second Amendment for military-style weapons, because military-style weapons are precisely what the Second Amendment guarantees our right to keep and bear.”); Gunscom, *Chris Kyle on Gun Violence, Gun Control, Veteran Life and SHOT Show*, YOUTUBE (Jan. 20, 2013), [http://www.youtube.com/watch?feature=player\\_embedded&v=IILVMUIDpaE](http://www.youtube.com/watch?feature=player_embedded&v=IILVMUIDpaE) (explaining, as former Navy SEAL and author Chris Kyle stated, that the founding fathers “had the same weapons the military did”). NRA CEO Wayne LaPierre testified before Congress as follows:

I think without any doubt, if you look at why our Founding Fathers put (the Second Amendment) there, they had lived under the tyranny of King George and they wanted to make sure that these free people in this new country would never be subjugated again and have to live under tyranny.

David Weina, *Some Gun Control Opponents Cite Fear of Government Tyranny*, NPR (Apr. 8, 2013), <http://www.npr.org/blogs/itsallpolitics/2013/04/08/176350364/fears-of-government-tyranny-push-some-to-reject-gun-control>; see also Brief for the Nat'l Rifle Ass'n & the NRA Civil Rights Defense

level; no nation guarantees an ongoing armed force that is opposed to itself and a perpetual state of actual or threatened civil war.<sup>23</sup>

Professor Johnson's version of the self-defense argument recounts the awful history of violence by white state, local, and federal law-enforcement officials, as well as by individuals and groups of whites, against African Americans.<sup>24</sup> But this is not the source of danger to blacks that moves him to vehemently oppose the black community's overwhelming support for gun regulation. Professor Johnson's argument is that in the current circumstances "the complexion of the threat has changed"<sup>25</sup>—the danger for African Americans now comes mainly from black-on-black violence and the failure of government to provide safety<sup>26</sup>—but blacks are still most at risk and most need guns to defend themselves.

### III. THE GUN MARKET AND GUN REGULATION

The basis for Professor Johnson's argument, like universal self-defense, seems beyond challenge. By any measure, it is true—blacks are most at risk.<sup>27</sup> However, the fundamental question his article raises but fails to address is why he opposes, rather than favors, gun regulation. Making handguns as easily available as they are in our poorest and most desperate minority urban neighborhoods—where it is "easier for young black men to obtain a handgun than an up-to-date school textbook or a

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Fund as Amici Curiae in Supporting Respondent at 9, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) ("A militia that only practices with arms under conditions set by Congress can hardly be expected to serve either as an effective check to a national standing army, or as an effective adjunct to that army should the need arise."); WAYNE LAPIERRE, GUNS, FREEDOM, AND TERRORISM 30 (2003) ("[T]here is no such thing as a free nation where police and military are allowed the force of arms but individual citizens are not.").

<sup>22</sup> See Richard W. Stevenson, 'Exceptionalism' Argument May Prove Potent for Republicans, N.Y. TIMES (Nov. 18, 2011), <http://thecaucus.blogs.nytimes.com/2011/11/18/exceptionalism-argument-may-prove-potent-for-republicans/> (Mitt Romney saying, "We have a president right now who thinks America's just another nation. America is an exceptional nation."); see also *id.* (Rick Perry saying, "The answer to our troubles lies in a positive, optimistic vision, with policies rooted in American exceptionalism, [which] is the product of unlimited freedom.").

<sup>23</sup> *Heller* includes only firearms commonly used by the people for self-defense. 554 U.S. at 627.

<sup>24</sup> Johnson, *supra* note 14, at 1497–1516. The courts generally provided no relief to African Americans from discrimination, repression, and racially motivated violence. See David Kairys, *A Brief History of Race and the Supreme Court*, 79 TEMP. L. REV. 751, 753 (2006) (discussing Supreme Court jurisprudence on the subject of racial discrimination).

<sup>25</sup> Johnson, *supra* note 14, at 1570.

<sup>26</sup> *Id.* at 1567–76.

<sup>27</sup> See JOHN A. RICH, *WRONG PLACE, WRONG TIME: TRAUMA AND VIOLENCE IN THE LIVES OF YOUNG BLACK MEN*, at ix (2009) (stating that young black men have a higher rate of both fatal and nonfatal violence than any other group); David Kairys, *Why Are Handguns So Accessible on Urban Streets?*, in *AGAINST THE WALL: POOR, YOUNG, BLACK, AND MALE* 242 (Elijah Anderson ed., 2008) (noting that black communities, particularly black young men, are the most affected by handgun deaths).

regular job[]”<sup>28</sup>—obviously makes it more dangerous there.

Professor Johnson does not discuss regulations of guns or the gun market that might reduce the toll of deaths and injuries because he does not consider gun regulation a potentially beneficial option.<sup>29</sup> He considers only two mutually exclusive alternatives for the black community and for society as a whole: (1) continuation of the current legal structure and market in guns that yields easy availability for anyone who wants a gun and war-level casualties; or (2) “disarmament”—prohibition and seizure of privately held firearms.<sup>30</sup> He does not seriously consider any other options.<sup>31</sup>

This is a false, though frequently posed, choice. Guns are so easily available to criminals, youths, and mass murderers because of the lack of serious regulation of the gun market. While the problem is usually framed in terms of “illegal guns,” it resides more accurately and persistently in what is shockingly legal.<sup>32</sup>

Federal law and the laws of most states<sup>33</sup> allow anyone who can pass a Brady Act record check to walk into a gun store and buy and go on their way with as many guns as they can pay for. The guns are not registered, and purchasers do not need a license. Since the Brady Act covers only

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<sup>28</sup> Kairys, *Why Are Handguns So Accessible on Urban Streets?*, *supra* note 27, at 242. Quoting oneself seems bad form, but this captures this important point as best as I can.

<sup>29</sup> The closest he comes is to assert that since, in his view, more guns make us safer—with that typically unshakeable sense among gun proponents that more guns somehow necessarily means more guns in the right hands—regulations that limit availability of guns make us less safe. Johnson, *supra* note 14, at 1589–90.

<sup>30</sup> *Id.* at 1578–81.

<sup>31</sup> He briefly brings up and quickly dismisses certain regulations dealing with gun storage, thefts, and ammunition. *Id.* at 1494 n.5, 1603 n.643.

<sup>32</sup> See KAIRYS, *supra* note 1, at 338 (explaining that under federal law and the laws of most states, anyone who passes a background check can legally purchase as many handguns as he or she pleases or resell them without running a background check on the subsequent buyer); Kairys, *Why Are Handguns So Accessible on Urban Streets?*, *supra* note 27, at 243 (claiming that new handguns are “so easily available that it makes no sense to steal one”); David Kairys, *The Cities Take the Initiative: Public Nuisance Lawsuits Against Handgun Manufacturers*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 363 (Bernard E. Harcourt ed., 2003) [hereinafter Kairys, *The Cities Take the Initiative*] (describing the easy availability of handguns as a common feature of life in cities); David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1183 (2000) [hereinafter Kairys, *The Governmental Handgun Cases*] (noting that “there is generally no regulation of the quantity, frequency, or purpose of firearm purchases or sales, nor is there any national registration of purchasers or firearms”); David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 3 (1998) (setting out the basis for the city lawsuits against handgun manufacturers, see *infra* note 54, and comparing the lack of meaningful regulation of handguns to the strict regulation of tobacco, drugs, and asbestos); see also KAIRYS, *supra* note 1, at 335–53.

<sup>33</sup> This short summary of the gun market and currently applicable laws is drawn from David Kairys, *Assault Weapon Bans Are Not Enough*, AM. PROSPECT (Jan. 9, 2013), <http://prospect.org/article/assault-weapon-bans-are-not-enough>. For more complete descriptions, see *supra* note 32.



federally licensed firearms dealers, purchasers who are not licensed dealers can legally resell or transfer ownership without doing a record check on the recipient and without reporting or registering the change of ownership. This is the “gun-show loophole,” which opens the door for “straw purchases”—those who have no criminal record buying for someone who does. Forty percent of gun purchases and 80% of guns used in crimes are obtained in this way.<sup>34</sup>

Regulations that significantly and selectively limit access to guns reduce the danger. Many studies—and the near consensus view in the field of public health and other related fields—confirm this.<sup>35</sup> One of the hallmarks of anti-regulation scholars and activists like Professor Johnson is their denial of *any connection* between our easy access to guns and our unacceptably high level of gun casualties. Professor Johnson cites the handful of familiar but thoroughly refuted authors, as well as studies that purport to show that more guns make us safer, without considering the counter-studies or convincing data and arguments that go the other way.<sup>36</sup> The insistent and unquestionable denial by anti-regulation advocates of this

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<sup>34</sup> See DANIEL W. WEBSTER ET AL., JOHNS HOPKINS CTR. FOR GUN POLICY & RESEARCH, THE CASE FOR GUN POLICY REFORMS IN AMERICA 34 (2012) [hereinafter GUN POLICY REFORMS], available at [http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper102512\\_CGPR.pdf](http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper102512_CGPR.pdf) (recognizing that common-sense policies adopted at the state and local level, such as “regulation and oversight of licensed gun dealers, regulation of gun sales by private sellers, and permit-to-purchase licensing systems” can reduce the diversion of guns to criminals). The loophole or problem includes but is also broader than gun shows, encompassing all private sales.

<sup>35</sup> See TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 199–200 (1999) (outlining a framework needed to regulate the inherent dangers of guns); DAVID HEMENWAY, PRIVATE GUNS PUBLIC HEALTH 224–26 (2004) (proposing the use of a public health approach, which creates an agency that has the power to regulate firearms as a consumer product in order to reduce gun violence); Jon Vernick, Daniel Webster and Katherine Vittes, *Law and Policy Approaches to Keeping Guns from High-Risk People*, in RECONSIDERING LAW AND POLICY DEBATES (John Culhane, ed., 2011) (focusing on regulations that affect high-risk people); REDUCING GUN VIOLENCE IN AMERICA, INFORMING POLICY WITH EVIDENCE AND ANALYSIS (Daniel Webster & Jon Vernick eds., 2013) (providing a comprehensive collection of essays on gun control policy in the United States and internationally); GUN POLICY REFORMS, *supra* note 34, at 7 (discussing gun control policies at the state and local level); *Center for Gun Policy and Research*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/> (last visited Mar. 22, 2013) (providing research that brings the school’s public health expertise and perspectives to gun violence prevention).

<sup>36</sup> See David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Use: Results from a National Survey*, 15 VIOLENCE & VICTIMS 257, 271 (2000) (concluding in their study that guns are used more often to intimidate and threaten or to kill and wound innocent victims than to wound criminals or thwart crimes); David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1444 (1997) (discrediting a Kleck and Gertz survey by concluding that their results do not provide reasonable estimates about the amount of self-defense gun use); GUN POLICY REFORMS, *supra* note 34, at 9 (“[T]he research showing crime-reducing effects of RTC [right to carry] laws, including Lott’s, has been carefully reviewed by a National Council of Research panel of experts, and others, and has been found to have serious flaws.”).

obvious connection is at the heart of our inability to constructively face or discuss gun issues.

There are beneficial and mostly well-studied methods for regulating guns that will substantially reduce access by criminals, youths, and mass murderers,<sup>37</sup> while maintaining the right to possession for self-defense and hunting. Here is a short list of regulations, focused on the obvious inadequacies of the current gun market, that I compiled after the Newtown elementary school massacre<sup>38</sup>:

1. Require a Brady Act record check for all transfers of guns, and improve the record database and retrieval system.<sup>39</sup>
2. Consider additional prohibitions, including banning handguns for anyone under twenty-one years old.<sup>40</sup>
3. Register guns and license gun owners, and consider a requirement that guns be insured.<sup>41</sup>
4. Limit the quantity of purchases of guns and ammunition.<sup>42</sup>

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<sup>37</sup> See *supra* note 35. They will not eliminate it, which is usually not a policy imperative for inaction.

<sup>38</sup> This is drawn from my article in *The American Prospect*. Kairys, *Assault Weapon Bans Are Not Enough*, *supra* note 33; see also *supra* note 32.

<sup>39</sup> This closes the gun-show loophole and makes straw purchases much more difficult. Michael Martinez, 'Universal Background Check: What Does It Mean?', CNN (Jan. 28, 2013, 3:00 PM), <http://www.cnn.com/2013/01/14/us/universal-background-checks> (recognizing that a universal background check requirement would close federal loopholes on checks at guns shows and other private sales).

<sup>40</sup> Rates of gun homicide perpetrated by 18 to 20-year-olds are extraordinarily high. GUN POLICY REFORMS, *supra* note 34, at 5 (showing the spike in the homicide rate committed by this age group per 100,000 people in 2009). Federal law allows 18 to 20-year-olds to buy and possess handguns (although it prohibits licensed dealers from selling to them). *Id.*; *Handguns for 18-Year-Olds?*, N.Y. TIMES (Nov. 25, 2010), <http://www.nytimes.com/2010/11/26/opinion/26fri1.html>. Only five states currently prohibit handgun ownership or possession for anyone younger than twenty-one, although all fifty states prohibit them from consuming alcohol. GUN POLICY REFORMS, *supra* note 34, at 5. Other or broader prohibitions should also be examined based on, for example, conviction of some misdemeanors in addition to felonies, drug abuse, and mental illness. See *id.* ("Restrictions on youths' ability to purchase and possess firearms should be broadened.").

<sup>41</sup> Registration and licensing have shown benefits according to studies of states that have adopted them. See GUN POLICY REFORMS, *supra* note 34, at 7 (asserting that "[s]trong regulation and oversight of licensed gun dealers, . . . and permit-to-purchase licensing systems (which require potential gun purchasers to apply for a license directly with a law enforcement agency, where they are typically photographed and fingerprinted) were each associated with significantly fewer guns that were diverted to criminals"). Requiring notice of any transfer or theft yields a database that would greatly assist law enforcement and promote responsible ownership, particularly if failure to provide notice of a transfer or theft subjects a gun owner to some fine or liability for harm done by that gun. Similarly, an insurance requirement would, as we have long accepted as to cars, shift the burden of the costs of gun injuries from victims and medical facilities. These and other regulations can raise privacy concerns. See, e.g., KC Mass & Josh Levs, *Newspaper Sparks Outrage for Publishing Names, Addresses of Gun Permit Holders*, CNN (Dec. 27, 2012), <http://www.cnn.com/2012/12/25/us/new-york-gun-permit-map> (providing an example of a privacy concern due to a map published in a New York newspaper showing the names and addresses of all handgun permit holders in Westchester and Rockland counties).

5. Ban some guns, ammunition, and clips, and require safety and storage features.<sup>43</sup>
6. Establish clear and enforceable criminal offenses related to guns.<sup>44</sup>
7. Repeal the federal and state statutory mess resulting from NRA domination of Congress and many state legislatures, which currently undermines law enforcement and public safety.<sup>45</sup>

#### IV. DISARMAMENT

The focus of Professor Johnson's criticism throughout his article is his staunch opposition to disarmament. The black community, in his view, is understandably distraught about gun violence, but their "modern

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<sup>42</sup> One-gun-a-month limits have been enacted by some states. See Larry Bodine, *New Jersey One-Gun Law Upheld, Setting a Precedent*, HUFFINGTON POST (Feb. 11, 2013, 1:58 PM), [http://www.huffingtonpost.com/larry-bodine/one-gun-laws\\_b\\_2625273.html](http://www.huffingtonpost.com/larry-bodine/one-gun-laws_b_2625273.html) (acknowledging that New Jersey's one-gun-a-month law was recently upheld by the Third Circuit Court of Appeals, and noting that Maryland and California also have similar laws). Legitimizing purchases of twelve guns per year every year only looks like a reform because much larger purchases of guns are now common, while encouraging a level of ownership that has no legitimate purpose. Limits should be set, but at some reasonable level that respects ownership for self-defense and hunting.

<sup>43</sup> See GUN POLICY REFORMS, *supra* note 34, at 10 (comparing a 1994 United States federal law, which expired in 2004, that had banned the manufacture, transfer, and possession of certain assault weapons with a law of the government of Australia, under which the government bought banned weapons from citizens, and noting that ten years after the law went into effect there were no mass shootings and homicide rates declined). There is simply no legitimate reason for domestic availability of assault weapons and large clips like those used in Newtown and other recent massacres. Inexpensive design and storage requirements can reduce accidents and accessibility.

<sup>44</sup> For example, current federal law and the laws of most states leave law enforcement without a clear or easily enforceable straw-purchasing offense. See Kairys, *The Governmental Handgun Cases*, *supra* note 32, at 1183–84; Mike Dornig, *Criminals Use Loophole to Get Guns*, CHI. TRIB. (Sept. 9, 2001), [http://articles.chicagotribune.com/2001-09-09/news/0109090294\\_1\\_straw-purchases-gun-trafficking-brady-act](http://articles.chicagotribune.com/2001-09-09/news/0109090294_1_straw-purchases-gun-trafficking-brady-act) ("Gun control advocates argue the [straw buyer] problem underscores the need for more comprehensive laws, including regulation of all secondhand gun sales. Such a system would establish a paper trail, making it easier to catch buyers who act as fronts for others . . .").

<sup>45</sup> On the federal level, this should include repeal of the prohibition on releasing ATF data and the immunity that protects the gun industry from civil liability for wrongdoing, which were adopted in response to lawsuits by forty cities and one state. See *infra* note 54. It should also include: the exclusion of guns and ammunition from the Consumer Products Safety Commission, so the commission cannot investigate (for example, ammunition that blows up in the hands of gun owners); limits on gun-related research by the CDC and other agencies; and the recent relaxation of regulations governing manufacturers and dealers (for instance, gun manufacturers can only be subjected to an inspection once a year). On the state level, the NRA has successfully lobbied forty state legislatures to ban ("pre-empt") local regulation of guns, which has prevented cities and towns from adopting regulations based on their particular circumstances. See Laura Chauss Savin, *Municipalities and Gun Control: Handgun Bans*, 6 HAMLINE L. REV. 431, 432, 443 (1983) (discussing state preemption in California of a San Francisco handgun ban and concluding that "[s]ince municipalities receive all their powers from the state, the authority of a municipality to enact firearms legislation is dependent upon the state"). These should be repealed.

orthodoxy” has gone astray by “trusting the state” and seeking to “disarm all,”<sup>46</sup> which leaves those most in need of self-defense—law-abiding blacks—without guns to protect themselves.

Disarmament means prohibition and seizure of all firearms in private hands.<sup>47</sup> Firearms become unlawful contraband subject to seizure by law enforcement agencies using all necessary force, raising the specter of police and soldiers raiding houses and killing Americans who refuse to give up their guns. Fear of disarmament drives Professor Johnson’s argument and the NRA’s bank accounts.<sup>48</sup>

But *disarmament* is not an accurate characterization of the regulations struck down in *Heller* and *McDonald*, the “modern orthodoxy” in the black community, or the goal of gun-control advocacy in the United States.

The District of Columbia and Chicago regulations invalidated in *Heller* and *McDonald*, respectively, required that handguns within city limits be registered and prohibited registration of additional handguns. However, previously registered handguns were unaffected and remained lawful, and shotguns<sup>49</sup> and rifles were not banned at all.<sup>50</sup> These regulations certainly prohibited individuals who did not have a previously registered handgun from registering or lawfully possessing one after the effective date of the regulations and squarely raised the Second Amendment issue. But there was no divestment or seizure of existing handguns, and the regulations left many handguns as well as all long guns lawfully in private hands. This

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<sup>46</sup> See Johnson, *supra* note 14, at 1498 n.22 and accompanying text.

<sup>47</sup> “Disarm” is defined in the dictionary as “to divest of arms.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 355 (11th ed. 2003).

<sup>48</sup> See, e.g., David Horsey, *Sick Symbiosis Between Colorado Killings and NRA Fundraising*, L.A. TIMES (Aug. 10, 2012), <http://articles.latimes.com/2012/aug/10/nation/la-na-tt-sick-symbiosis-20120809> (“The NRA is, after all, a fundraising machine that runs on fear and a sense of crisis, even when the fear is false and the crisis manufactured.”).

<sup>49</sup> Gun experts often rank shotguns as high as or higher than handguns for effective self-defense use in the home. See, e.g., B. Gil Horman, *Choosing a Home-Defense Gun: Determining the Best Home-Defense Firearm Takes Careful Development of a Self-Defense Plan*, AM. RIFLEMAN (May 17, 2012), <http://www.americanriflesman.org/articles/best-gun-for-home-defense/> (“Although handguns are useful for home-defense, they are, on the whole, weak stoppers when compared to rifles and shotguns.”); SELECTING A HOME DEFENSE GUN, [http://home.comcast.net/~dsmjd/tux/dsmjd/tech/home\\_defense.htm](http://home.comcast.net/~dsmjd/tux/dsmjd/tech/home_defense.htm) (last visited March 27, 2013) (ranking a shotgun above a handgun since “no handgun is what you can call sufficiently powerful for self defense”). But see Chuck Hawks, *Guns for Home Defense*, CHUCK HAWKS, [http://www.chuckhawks.com/guns\\_home\\_defense.htm](http://www.chuckhawks.com/guns_home_defense.htm) (last visited Mar. 27, 2013) (“A shotgun would seem to be an excellent choice for sweeping rioters from the front porch steps during a civil insurrection, but for defense inside the home a handgun is probably a better choice.”).

<sup>50</sup> See CHI. MUN. CODE § 11.1-3(c)(1) (1982) (now CHI. MUN. CODE § 8-20-050(c)(1) (1990)) (exception for previously registered handguns); *Parker v. District of Columbia*, 478 F.3d 370, 399–400 (D.C. Cir. 2007) (noting that D.C. Code § 7-2502.02 prohibits the registration of a pistol not registered in the District by the applicant prior to 1976); *Hunt v. Daley*, 677 N.E.2d 456, 457 (Ill. App. Ct. 1997) (acknowledging that under CHI. MUN. CODE § 8-20-050, which renders certain firearms unregistered, “pursuant to a grandfathering provision . . . handgun owners whose handguns were validly registered prior to the effective date of the handgun ban could continue to re-register their handguns”).

was a serious ban, but not disarmament.

Black leaders generally supported the District of Columbia and Chicago regulations, but Professor Johnson does not substantiate his repeated assertions that there is a “modern orthodoxy” in the black community that seeks disarmament. There is surprisingly little support in his article for this main claim and object of criticism.<sup>51</sup> Throughout the article, Professor Johnson uses disarmament interchangeably or synonymously with regulations that would limit access to guns by criminals, youth, and mass murderers without prohibiting them to—or disarming—law-abiding people. He casts a broad net, inferring support for disarmament, for example, from “allegiance” to the Democratic Party (although the party has never advocated disarmament),<sup>52</sup> from advocacy of “stringent gun control,”<sup>53</sup> and from such non-disarming activities as bringing lawsuits on behalf of cities against handgun manufacturers for creating a public nuisance by knowingly distributing their products in a manner that makes them easily available to criminals and youth.<sup>54</sup>

Disarmament has not been and is exceedingly unlikely to be a serious option in the United States. Though references to disarmament are frequently heard in the gun debate, they come from opponents of

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<sup>51</sup> Two long footnotes on the black modern orthodoxy and “[a]dvocates of stringent, supply-side, gun control” are bereft of quotations or citations to black leaders; they quote a couple white leaders of gun control groups who at some point favored banning handguns, and several articles or books, also by whites, that support the District of Columbia and Chicago regulations or oppose the Second Amendment interpretation adopted in *Heller*. Johnson, *supra* note 14, at 1495 n.11, 1497 n.20, 1497 n.21. One of the white advocates of banning handguns Professor Johnson cites is Josh Sugarmann, Executive Director of the Violence Policy Center and author of *EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS*, at xv–xvii (2001) (presenting a pre-*Heller* argument for banning all handguns; he does not address how it would be done or the consequences and costs of widespread handgun seizures). Another footnote cites or quotes a few black congressmen and mayors who have proposed banning handguns or “stringent gun controls.” Johnson, *supra* note 14, at 1494 n.5. In the text, Professor Johnson notes that the Urban League was a member of a coalition that favored banning handguns, and “[t]he NAACP pressed a stringent gun-control agenda” with a lawsuit claiming negligent marketing in black communities by gun manufacturers. *Id.* at 1494.

<sup>52</sup> Johnson, *supra* note 14, at 1495.

<sup>53</sup> *Id.* at 1494 nn.13–14 and accompanying text.

<sup>54</sup> These lawsuits brought by over forty cities and one state were doing quite well until Congress responded by: (1) shielding the manufacturers with a broad immunity to civil lawsuits to which all other industries and businesses are subject; and (2) prohibiting release by ATF of crime gun trace data to researchers and the public, and to manufacturers in a way that had previously established, under the theory of the lawsuits, their notice and knowledge of the effects of their distribution practices (usually referred to as the “Tiahrt amendment”). See *supra* notes 32–33. Disclosure: I conceived and sometimes litigated these lawsuits. See Kairys, *The Cities Take the Initiative*, *supra* note 32, at 374–79; see also GUN POLICY REFORMS, *supra* note 34, at 7 (noting that the 2003 Tiahrt amendments “limit public access to crime gun trace data, prohibit the use of gun trace data in hearings pertaining to licensure of gun dealers and litigation against gun dealers, and restrict ATF’s authority to require gun dealers to conduct a physical inventory of their firearms,” and the Protection of Lawful Commerce in Arms Act of 2005 “provides broad protections from lawsuits against firearm manufacturers and retail sellers”).

regulation—not proponents—who stir fear and rally support by regularly equating any regulation of guns with disarmament. Handguns have been banned and the public has been disarmed in some countries, mainly in Western Europe, with some impressive results.<sup>55</sup> But disarmament—as well as any serious regulation of guns—runs against a steep and seemingly impenetrable wall in the United States.

This is usually attributed to the power of the NRA, with its generous funding by gun manufacturers and large base of supporters, sometimes whacky but usually effective strategies, and not-so-veiled threats of violence directed at anyone who would disagree.<sup>56</sup> But other wealthy, effective, and unscrupulous industries and lobbies do not do as well. Lead paint, asbestos, and PCBs have been banned, and tobacco is highly regulated. The key difference is that many Americans identify guns with our highest ideals—freedom, liberty, and, for some, patriotism—and are suspicious of gun regulation. Their moderate form of this identification has been tolerant of the NRA’s extremism. They support the NRA because it protects gun ownership, even as they favor a range of gun regulations opposed by the NRA.<sup>57</sup> Reforms have been hard, to say the least, because

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<sup>55</sup> For example, in the United Kingdom, where the rate of registered gun owners per 100 people is 3.48, and the yearly number of gun deaths per 100,000 people is 0.25. *United Kingdom—Gun Facts, Figures, and the Law*, GUNPOLICY.ORG, <http://www.gunpolicy.org/firearms/region/united-kingdom> (last visited Mar. 28, 2013). After banning handguns following the school shooting in 1996, gun deaths went from 59 to 49 in 1998. See Peter Wilkinson, *Dunblane: How UK School Massacre Led to Tighter Gun Control*, CNN (Jan. 30, 2013, 5:57 PM), <http://www.cnn.com/2012/12/17/world/europe/dunblane-lessons/> (“Within a year and a half of the Dunblane massacre, UK lawmakers had passed a ban on the private ownership of all handguns in mainland Britain, giving the country some of the toughest anti-gun legislation in the world.”); *England & Wales—Gun Facts, Figures, and the Law*, GUNPOLICY.ORG, [http://www.gunpolicy.org/firearms/region/england-and-wales#number\\_of\\_gun\\_homicides](http://www.gunpolicy.org/firearms/region/england-and-wales#number_of_gun_homicides) (last visited Mar. 28, 2013) (showing the decrease in gun deaths from 59 in 1997 to 49 in 1998).

<sup>56</sup> See Molly Ball, *Why the NRA Wants to Wear the Black Hat in the Gun-Control Debate*, ATLANTIC (Dec 21, 2012), <http://www.theatlantic.com/politics/archive/2012/12/why-the-nra-wants-to-wear-the-black-hat-in-the-gun-control-debate/266582/#> (suggesting that the core components of the NRA’s press strategy after the Sandy Hook shooting in Newtown, Connecticut were stroking fear, polarizing the debate, casting blame elsewhere, and playing to the base); Walter Hickey, *How The Gun Industry Funnels Tens of Millions of Dollars to the NRA*, BUS. INSIDER (Jan. 16, 2013), <http://www.businessinsider.com/gun-industry-funds-nra-2013-1> (explaining that individual dues and gun industry contributions fund the NRA); Stephanie Mencimer, *Is the NRA Encouraging Anti-Government Extremism?*, MOTHER JONES (Apr. 15, 2010), <http://www.motherjones.com/mojo/2010/04/nra-encouraging-tea-party-and-militia-violence> (linking NRA campaigning to anti-government violence such as the Oklahoma City bombing and threatened governmental overthrows). On the threats, see, e.g., *Gun Control Law Maker Threatened*, PHILA. INQUIRER, Apr. 27, 2007, at B1. See generally *supra* notes 32–33.

<sup>57</sup> See *supra* notes 20–21 and accompanying text. Polls regularly show that NRA members overwhelmingly favor, for instance, universal background checks, which the NRA opposes. See *supra* note 54. Guns are also connected to food in much of the country, and by many to self-defense, although the latter has been greatly exaggerated. See *supra* note 20 (noting “[a]n extreme form of the oppressive government perspective” rationale for gun rights).

the NRA effectively manipulates this widespread moderate version of gun identification while the opposition usually ignores or mocks it.

Banning and seizure of all handguns in the United States is not a plausible or desirable option in the current or any foreseeable political and cultural context. The likely result would be armed resistance and something like a dispersed second civil war, with casualties and political division far beyond any benefits or the acceptable bounds of any leaders or governments.<sup>58</sup> This is the reality of contemporary politics and culture in the United States. Whatever support there ever was for disarmament has languished in favor of more likely and less onerous options.

Toward the end of the article, Professor Johnson cites polls showing overwhelming support in the black community for gun regulation and the District of Columbia and Chicago regulations. Professor Johnson presents this polling to show that the disarming modern orthodoxy is out of step with the black community, but offers no explanation of why he does not view this widespread support for gun regulation—rather than for disarmament—as the modern orthodoxy in the black community and the whole country.<sup>59</sup>

## V. CONCLUSION

The import of Professor Johnson's argument—no matter how earnestly put or movingly tied to the plight of his ancestors<sup>60</sup>—and the import of the common arguments of opponents of gun regulation, is that their absolutist understanding of their rights to self-defense and freedom, their dire perceptions of the perils of government, and their fantasies of the necessity

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<sup>58</sup> Banning and seizure of handguns would dominate the political landscape and perhaps consolidate volatile right-wing extremist and insurrectionist movements with widespread conservative anti-government sentiment.

<sup>59</sup> See Johnson, *supra* note 14, at 1580–81. “Mid-sixty percent majorities . . . favor gun control of some sort.” *Id.* at 1578. Professor Johnson sees a gap because higher percentages of blacks have allegiance to the Democratic Party than to black community leaders, which he assumes, but does not substantiate, favor disarmament. Polls seem to avoid any clear questions about disarmament or questions that distinguish between disarmament and Chicago/District of Columbia-type bans with grandfather clauses that do not seize existing guns. They show strong, post-Newtown support, by everyone, for regulations like the ones outlined here. See Lydia Saad, *Americans Back Obama's Proposals to Address Gun Violence*, GALLUP (Jan. 23, 2013), <http://www.gallup.com/poll/160085/americans-back-obama-proposals-address-gun-violence.aspx> (showing majority support for proposals ranging from criminal background checks to high capacity magazine sales); *Attitudes About Gun Control*, PEW RES. CTR. (Jan. 14, 2013), [http://www.people-press.org/files/legacy-detailed\\_tables/01-14-13%20Detailed%20Tables.pdf](http://www.people-press.org/files/legacy-detailed_tables/01-14-13%20Detailed%20Tables.pdf) (showing the vast majority of Blacks and Hispanics are in favor of gun control, with a slight majority of whites in favor of gun ownership); Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, GALLUP (Dec. 27, 2012), <http://www.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx> (showing that the vast majority of Americans are still opposed to handgun bans); *Public Divided over State, Local Laws Banning Handguns*, PEW RES. CTR. (Mar. 23, 2010), <http://www.people-press.org/2010/03/23/public-divided-over-state-local-laws-banning-handguns/> (showing majority support for localities and state's rights to ban handguns among Blacks and Hispanics, but not whites).

<sup>60</sup> See Johnson, *supra* note 14, at 1603.

and efficacy of armed resistance to the federal government require the rest of us to live with the open gun market, with its very real and immediate toll of over 30,000 people shot dead a year—about eighty on average each day, including four children under eighteen years old—and with the usually unspoken normalcy of widespread murder and fear that undermines the quality and tenor of daily life.<sup>61</sup> But blacks and whites, and everybody else, do not need that open gun market—or the toll of death, injury and suffering we have become accustomed to—for self-defense. Self-defense and gun regulation can coexist.

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<sup>61</sup> See GUN POLICY REFORMS, *supra* note 34, at 2 (citations omitted) (“More than 31,000 people a year in the United States die from gunshot wounds. Because victims are disproportionately young, gun violence is one of the leading causes of premature mortality in the U.S.”).