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## Insuring against Guns Symposium Article

George A. Mocsary

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## Article

### Insuring Against Guns?

GEORGE A. MOCSARY

*This Article examines whether mandating liability insurance for firearm owners would meet its avowed goals of efficiently compensating shooting victims and deterring unlawful and accidental shootings without creating a net social loss by chilling socially beneficial gun use. In the process, the Article also examines whether nonmandatory liability insurance may enable socially desirable, but potentially risky, firearm-related activities.*

*The analysis indicates that a compulsory firearm-liability insurance regime is unlikely to attain its goals, and may in fact exacerbate the problems it seeks to solve by incentivizing firearm owners to take less care with their weapons. It also shows that it is markedly unlikely that such a mandate would achieve a significant level of compliance. Optional forms of firearm-liability insurance can, however, enable socially desirable activities by those who would otherwise be unable to bear the risks inherent in those activities.*

*One of the best ways to incentivize an activity is to compensate it or to remove its financial consequences. Well-meaning legislators, regulators, and industry members would therefore best serve their constituencies by encouraging optional insurance that covers liability risks arising from socially useful activities, rather than pushing for unhelpful mandates that may aggravate the firearm violence that they seek to remedy.*

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# Insuring Against Guns?

GEORGE A. MOCSARY\*

## I. INTRODUCTION

In response to some appalling shootings that recently captured the nation's attention,<sup>1</sup> legislators, economists, and journalists have called for the enactment of laws making firearm-liability insurance a prerequisite to purchasing or owning a weapon.<sup>2</sup> A number of such laws have been proposed, but to date none have been enacted.<sup>3</sup>

Proponents of compulsory liability insurance for gun owners hope that insurance would provide a source of monetary compensation for shooting victims and their families, while serving as a source of private regulation that would determine who may have a firearm, create incentives for insurers to require firearm owners to take care that their weapons are not involved in gun crime, and place the costs created by guns onto their owners.<sup>4</sup> Although preventing and covering the costs of gun accidents is a

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<sup>1</sup> E.g., *Aurora, Colorado Shooting News*, ABCNEWS, <http://abcnews.go.com/topics/news/aurora-colorado-shooting.htm> (last visited Apr. 12, 2014); *Complete Coverage on Sandy Hook School Shootings*, CNN, <http://www.cnn.com/SPECIALS/us/connecticut-school-shooting/> (last visited Apr. 12, 2014).

<sup>2</sup> See, e.g., Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, N.Y. TIMES, Feb. 22, 2013, at A1 (describing legislative proposals); Caitlin Kenney, *Should Gun Owners Have to Buy Liability Insurance?*, NPR (Jan. 31, 2013, 5:00 AM), <http://www.npr.org/blogs/money/2013/01/31/170700177/should-gun-owners-have-to-buy-liability-insurance> (interviewing economists); John Wasik, *Newtown's New Reality: Using Liability Insurance to Reduce Gun Deaths*, FORBES (Dec. 17, 2012), <http://www.forbes.com/sites/johnwasik/2012/12/17/newtowns-new-reality-using-liability-insurance-to-reduce-gun-deaths/> (discussing the journalist's viewpoint).

<sup>3</sup> See *infra* Part II.B.

<sup>4</sup> See, e.g., Cooper & Walsh, *supra* note 2; Elizabeth Bunn, *U.S. Insurers Resist Push to Make Gun Owners Get Coverage*, BLOOMBERG (Feb. 19, 2013), <http://www.bloomberg.com/news/2013-02-19/u-s-insurers-resist-push-to-make-gun-owners-get-coverage.html>; Tom Harvey, *The Case for Compulsory Gun Insurance*, HUFFINGTON POST (Oct. 2, 2013), [http://www.huffingtonpost.com/tom-harvey/the-case-for-compulsory-g\\_b\\_4029894.html](http://www.huffingtonpost.com/tom-harvey/the-case-for-compulsory-g_b_4029894.html); Kenney, *supra* note 2.

consideration, advocates of firearm-liability insurance are primarily motivated by a desire to prevent criminal shootings and compensate gun-crime victims.<sup>5</sup> Proponents generally suggest that the goal of a mandatory firearm-liability system would not be gun control, but rather a reliance on private market mechanisms to both screen potential gun owners and cause them to bear the costs of their ownership.<sup>6</sup>

Opponents, including insurers, have argued that, instead of achieving its stated goals, compulsory insurance would likely compensate only a few shooting victims, would not impact gun possession by those who misuse firearms, would create incentives for gun owners to be *less* careful with their weapons, and would be problematic to implement.<sup>7</sup> Some also raise concerns that forcing firearm owners to insure themselves and their weapons may suffer from constitutional infirmities.<sup>8</sup>

Both the hopes of proponents and the concerns of opponents deserve attention. This Article uses economic analysis, evidence from other attempts at firearm regulation, and other legal tools to directly examine the question at the heart of the debate over mandated firearm-liability insurance: whether and how effectively insurance can curb and compensate for criminal gun violence.<sup>9</sup> Much of the discussion also applies to

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<sup>5</sup> See, e.g., Ameya Pawar, Op-Ed., *Insure Guns to Ensure We Save Lives*, CHI. TRIB., Feb. 26, 2013, at C21; Harvey, *supra* note 4; H.L. Pohlman, Op-Ed., *Requiring Gun Insurance Will Increase Safety*, HARTFORD COURANT (Feb. 1, 2013), [http://articles.courant.com/2013-02-01/news/hc-op-pohlman-insurance-to-curb-gun-violence-0103-20130201\\_1\\_gun-owners-gun-violence-rapid-fire-weapons](http://articles.courant.com/2013-02-01/news/hc-op-pohlman-insurance-to-curb-gun-violence-0103-20130201_1_gun-owners-gun-violence-rapid-fire-weapons).

This Article considers suicides, which comprise the majority of shooting deaths, *see infra* note 143, to be distinct from other intentional shootings and accidental shootings. Suicides are unlikely to be covered by liability insurance policies save in very rare circumstances. See Peter Kochenburger, *Liability Insurance and Gun Violence*, 46 CONN. L. REV. 1265, 1274–75 (2014); *infra* notes 219, 222, 285. But *see infra* text accompanying notes 79–80, 155–56 (describing Oregon’s proposed statute that would require coverage of suicides).

<sup>6</sup> See, e.g., Pohlman, *supra* note 5; Wasik, *supra* note 2.

<sup>7</sup> See Am. Ass’n of Ins. Servs., *Missing the Target: Gun Insurance Proposals Overlook Important Realities of the Risks*, VIEWPOINT MAG., Winter 2013, at 3, 6; Bunn, *supra* note 4; Thomas Harman, *Insurers Skeptical of State Moves Toward Mandatory Liability Insurance for Gun Owners*, ADVISEN FPN (Jan. 29, 2013), <http://fpn.advisen.com/articles/article192441274-1504094012.html>; James Taranto, *Insurance as Punishment*, WALL ST. J. (Feb. 7, 2013), <http://online.wsj.com/news/articles/SB10001424127887323452204578290151788526728>.

<sup>8</sup> See generally Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits*, 14 ENGAGE 18 (2013) (predicting constitutional pitfalls for gun liability insurance mandates, and recommending potential solutions).

<sup>9</sup> Scholars have looked at the intersection of firearm injury and insurance from other angles. See, e.g., Tom Baker & Thomas O. Farrish, *Liability Insurance & the Regulation of Firearms*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 292, 299–305 (Timothy D. Layton ed., 2005) (focusing on existing residential insurance products for individuals and on product-liability and business-related liabilities for businesses); Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1431–33 (2013) (focusing on gun liability insurance as a form of regulation). See generally Gilles & Lund, *supra* note 8 (focusing on constitutional implications).

accidental firearm injuries. The Article concludes that, although insurance may have some positive effects along a few limited dimensions and is likely to enable some risky but otherwise socially beneficial activities, on the whole it should not be expected to either curb gun violence or compensate its victims. Indeed, a mandatory insurance system is likely to make matters worse in several respects, potentially exacerbating the problems that it seeks to alleviate.

The remainder of this Article proceeds in five parts. Part II sets forth the relevant statutory and insurance background, including existing federal statutes limiting shooting liability, the compulsory-insurance bills proposed thus far, and existing insurance products for firearm owners. Part III discusses the role of liability insurance as a private regulator, including some likely problems with relying on liability insurance to combat gun violence. Part IV discusses the ways in which insurance can serve as an enabler of desirable activities, including beneficial firearm use. Part V examines how the presence of mandatory insurance is likely to impact the behavior of insured gun owners. Part VI challenges the premise that a gun-owner-liability-insurance mandate could be implemented with a degree of compliance that would justify deeming it successful.

## II. THE CURRENT LEGAL AND INSURANCE ENVIRONMENTS

This Part begins by describing two federal statutes that limit firearm-related tort liability: the Protection of Lawful Commerce in Arms Act and the Child Safety Lock Act. It then discusses the various federal and state legislative proposals that would have required would-be firearm owners to carry liability insurance when they purchase or possess firearms. The Part concludes by surveying the available insurance products specifically intended for firearm owners.

### A. *Existing Statutes*

This Section discusses the Protection of Lawful Commerce in Arms Act.<sup>10</sup> The enacted law consists of two main components, typically referred to as the Protection of Lawful Commerce in Arms Act (“PLCAA”)<sup>11</sup> and the Child Safety Lock Act (“CSLA”).<sup>12</sup> Each Act’s relevant provisions are discussed below.

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<sup>10</sup> Pub. L. No. 109-92, 119 Stat. 2095 (2005).

<sup>11</sup> Pub. L. No. 109-92, §§ 1–4, 119 Stat. 2095, 2095–99 (2005) (codified as amended at 15 U.S.C. §§ 7901–03 (2012)).

<sup>12</sup> Pub. L. No. 109-92, § 5, 119 Stat. 2095, 2099–101 (2005) (codified as amended at 18 U.S.C. § 922 (2012)).

### 1. *Protection of Lawful Commerce in Arms Act*

The PLCAA bans, with some minor exceptions, civil lawsuits in both federal and state court against manufacturers and sellers of properly functioning firearms.<sup>13</sup> The Act provides exceptions for suits alleging negligent entrustment, negligence per se, and harm from situations arising from the violation of a state or federal statute that “expressly” or “clearly can be said to” regulate the sale or marketing of firearms.<sup>14</sup> The PLCAA states that its purposes are to, among other things, “preserve a citizen’s access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting. . . . [and] [t]o guarantee a citizen’s rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution.”<sup>15</sup>

The Act thus immunizes manufacturers and sellers from practically all tort liability resulting from the criminal or accidental misuse of a firearm by purchasers and third parties, as long as the firearm was properly functioning and sold in compliance with all laws.<sup>16</sup> Because liability cannot attach in these situations, insurance is inappropriate because the would-be insured has no insurable interest, the loss of which would result in financial harm, to protect with insurance.<sup>17</sup>

### 2. *Child Safety Lock Act*

The CSLA requires pistols transferred to consumers by licensed

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<sup>13</sup> 15 U.S.C. §§ 7902–03. Suits pending at the time of the Act’s passage were made subject to dismissal. *Id.* § 7902(b); see NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 520 (2012). Product-liability lawsuits are not barred. 15 U.S.C. § 7903(5)(A)(iv)–(v).

<sup>14</sup> 15 U.S.C. § 7903(5)(A)–(B); see *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 398–404 (2d Cir. 2008).

<sup>15</sup> 15 U.S.C. § 7901(b)(2)–(3). Other purposes were to prevent lawsuits from creating “unreasonable burdens on interstate and foreign commerce” and to protect the First Amendment rights of firearm manufacturers and sellers. *Id.* § 7901(b)(4)–(5).

<sup>16</sup> See *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135–37 (9th Cir. 2009). A thorough search yielded fewer than a dozen cases decided on the basis of the negligent entrustment or negligence per se exceptions, and most of those were dismissals. The full results of the search are on file with the author.

<sup>17</sup> This Article assumes that the PLCAA will continue to remain in effect and that a mandatory-insurance system would not be construed to require coverage for claims not supported by insurable interests, whether or not the relevant statute or regulation excluded such coverage from its requirements. Although the statutes proposed so far do not carve out these exceptions, insurers could price them at zero. Nonetheless, there would be some administrative costs to insurers providing this coverage and handling losing claims based thereon.

In the liability-insurance context, an insured has an insurable interest if it is possible for an event to happen that can create liability under the insurance. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 44[c] (5th ed. 2012). Though the typical policies behind requiring an insurable interest of preventing gambling and preventing the insured from destroying the object of the insurance do not apply with strength in the liability context, an insurable interest is nonetheless required for a liability policy to be valid. *Id.* §§ 40, 44[c].

firearm dealers, manufacturers, and importers to be accompanied by a “secure gun storage or safety device.”<sup>18</sup> A secure gun storage or safety device can either be a gun safe or similarly lockable storage unit, or a device that attaches to the pistol.<sup>19</sup>

Relevant to the question of when gun owner liability insurance may be appropriate to protect an insurable interest, the Act immunizes the lawful owner of a handgun from most types of civil-damages lawsuits resulting from the criminal or other misuse of the weapon by an unauthorized third party.<sup>20</sup> The immunity applies as long as the handgun “had been made inoperable by use of a secure gun storage or safety device” when accessed.<sup>21</sup> Like the PLCAA, the CSLA does not provide protection from suits for negligent entrustment or negligence per se.<sup>22</sup> Unlike its companion statute, it protects both business and consumer firearm owners.<sup>23</sup>

The CSLA thus creates a second category where, in the absence of preemptive federal legislation explicitly making its provisions inapplicable, compulsory liability insurance for firearm owners is inappropriate. Finally, and similarly to the PLCAA, one purpose of the CSLA is “to avoid hindering industry from supplying firearms to law abiding citizens for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.”<sup>24</sup>

With the PLCAA and CSLA setting the boundaries within which a firearm-liability-insurance statute may operate, the next Section looks at the insurance requirements that legislatures have hitherto proposed.

## B. *Proposed Federal and State Legislation*

This Section describes the federal and state mandatory firearm-liability-insurance proposals made to date. In the process, it begins to highlight some of the nuances of the potential post-enactment systems that each proposal implies. None of the proposals described below have become law.

### 1. *Federal Firearms Risk Protection Act*

The Firearms Risk Protection Act of 2013 would have required firearm

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<sup>18</sup> 18 U.S.C. § 922(z)(1) (2012).

<sup>19</sup> *Id.* § 921(a)(34).

<sup>20</sup> *Id.* § 922(z)(3).

<sup>21</sup> *Id.* § 922(z)(3)(C)(i)(I).

<sup>22</sup> *Id.* § 922(z)(3)(C)(ii).

<sup>23</sup> *Id.* § 921(a)(1). With the possible exception of intentional shootings (and even there if vicarious-liability doctrines apply), there is little or no distinction to be made between business and individual firearm owners vis-à-vis firearm-liability insurance. As such, this Article treats them alike unless it states otherwise.

<sup>24</sup> Pub. L. No. 109-92, § 5(b)(3), 119 Stat. 2095, 2099 (2005).



owners to be covered by a liability insurance policy if they bought or came to “own[]” a firearm that had been purchased after the Act’s effective date.<sup>25</sup> It also would have required firearm sellers to verify that would-be purchasers are covered by insurance.<sup>26</sup> Governments and their agencies would have been exempt from the requirement.<sup>27</sup> The required insurance would have had to cover “the purchaser specifically for losses resulting from use of the firearm while it is owned by the purchaser” and must have had to be issued by an insurer licensed in the purchaser’s state.<sup>28</sup> The proposal was thus unclear as to whether the required insurance would have covered intentional shootings, including malicious criminal shootings, by the owner or third parties. The penalty for noncompliance would have been a fine of up to \$10,000.<sup>29</sup>

The bill’s sponsor presented it to the House of Representatives “as a market-based solution to holding gun owners liable for the weapons they own,” while stating, in accord with the proposal’s text, that it “pose[d] no specific requirements on insurance companies themselves.”<sup>30</sup> It would have applied to purchases 180 days after its enactment.<sup>31</sup> The Act would thus have required new would-be owners to carry insurance, but would not have required either insurers or states to provide the coverage.

## 2. California

Two California Assemblymen proposed a bill requiring firearm-owner liability insurance,<sup>32</sup> but the proposed text of the bill has not been made public and the insurance provision was not in the version voted on by the legislature.<sup>33</sup> They equated a liability requirement for gun owners to mandated automobile insurance for drivers.<sup>34</sup> One of the bill’s sponsors stated that the insurance “would encourage gun owners to take firearms safety classes and keep their guns locked up to get lower insurance rates.”<sup>35</sup> The other said that his proposal would have required all gun owners to

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<sup>25</sup> Firearm Risk Protection Act of 2013, H.R. 1369, 113th Cong. § 2(a) (2013).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 2(b).

<sup>30</sup> 159 CONG. REC. E370 (daily ed. Mar. 21, 2013) (statement of Rep. Maloney).

<sup>31</sup> H.R. 1369, 113th Cong. § 2(c).

<sup>32</sup> Don Thompson, *California Bill Would Force Gun Owners to Buy Insurance*, INS. J. (Feb. 7, 2013), <http://www.insurancejournal.com/news/west/2013/02/07/280464.htm>.

<sup>33</sup> Robert Farago, *California Mandatory Gun Insurance Bill AB-231 Revealed. Ish.*, THE TRUTH ABOUT GUNS.COM (Feb. 6, 2013), <http://www.thetruthaboutguns.com/2013/02/robert-farago/california-mandatory-gun-insurance-bill-revealed-or-not/>; see Assemb. B. No. 231, 2013 Gen. Assemb., Reg. Sess. (Cal. 2013) (enacted).

<sup>34</sup> Thompson, *supra* note 32.

<sup>35</sup> See *id.* (referencing Assemblyman Jimmy Gomez’s comments). The truth of the assumption that mandatory automobile liability insurance has improved driving habits or road safety is questionable. See *infra* Part V.A.

carry the insurance,<sup>36</sup> but that the bill would have neither forced insurers to cover illegal or intentional acts nor required insurance companies to offer the insurance.<sup>37</sup> His intent was to manage gun violence and to cause gun owners, rather than taxpayers, to bear the costs of firearm accidents.<sup>38</sup>

### 3. Connecticut's Three Proposals

Connecticut legislators have proposed three bills relating to compulsory liability insurance for gun owners. House Bill 5268 contained a dual mandate to “require firearm owners to maintain liability insurance” and to establish a fifty percent tax on ammunition not sold and consumed at a shooting range.<sup>39</sup> The bill provided no other detail on the insurance or tax requirement. Most notably, it did not require insurers operating in the state to offer the mandated insurance. The bill’s sponsor acknowledged that such insurance was a new concept that he had not discussed with insurers.<sup>40</sup> Like one of the California bill’s sponsors, he hoped that mandatory insurance would “lead[] to improvement in gun safety in much the same manner driving habits improved following the introduction of mandatory automobile insurance.”<sup>41</sup> His website stated that the ammunition tax intended to “limit[] access in Connecticut to . . . ammunition.”<sup>42</sup>

House Bill 5452 was somewhat more detailed than its predecessor. It would have required firearm purchasers to present proof of liability insurance to dealers and current firearm owners to obtain liability insurance “for such firearm[s].”<sup>43</sup> Like its predecessor, the bill did not require Connecticut insurers to offer the coverage that it would have mandated, nor did it state a minimum insurance requirement. The bill’s text seemed to call for separate coverage for each firearm, excluding blanket coverage for all of an insured’s firearms.<sup>44</sup>

House Bill 6656 proposed that both owners and those who possess firearms (except on a temporary basis at a gun club) must have in place “personal liability insurance that provides coverage for bodily injury or

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<sup>36</sup> See Thompson, *supra* note 32 (referencing Assemblyman Philip Ting’s comments).

<sup>37</sup> Bunn, *supra* note 4.

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

<sup>39</sup> H.B. 5268, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013).

<sup>40</sup> Harman, *supra* note 7.

<sup>41</sup> *Id.*

<sup>42</sup> Rep. Godfrey to Introduce Package of Firearms, Ammunition Laws, CONN. HOUSE DEMOCRATS (Dec. 20, 2012), [http://www.housedems.ct.gov/godfrey/2012/pr110\\_2012-12-20.html](http://www.housedems.ct.gov/godfrey/2012/pr110_2012-12-20.html). The website also stated that the ammunition tax was part of a package of gun-control proposals intended to make it more difficult to obtain firearms and ammunition, and to require the registration of “all firearms.” *Id.*

<sup>43</sup> H.B. 5452, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013).

<sup>44</sup> See *id.* (referring to insurance coverage for “such firearm” rather than the gun owner’s collection as a whole (emphasis added)).

property damage caused by the use of a firearm” and “self defense insurance that provides coverage for civil and criminal defense costs and provides for reimbursement of criminal defense costs if such person uses a firearm in self defense.”<sup>45</sup> Violators of the insurance requirements would have been guilty of a Class A misdemeanor.<sup>46</sup> Unlike its two predecessors, House Bill 6656 would have required the Connecticut Insurance Commissioner to adopt regulations to implement the insurance requirements, including minimum coverage amounts and permissible exclusions.<sup>47</sup>

#### 4. *District of Columbia*

The District of Columbia’s Firearm Insurance Amendment Act of 2013 would have required D.C.’s firearm owners, except for peace officers, to maintain \$250,000 of liability insurance to “specifically cover any damages resulting from negligent acts, or willful acts that are not undertaken in self-defense, involving the use of the insured firearm while it is owned by the policy holder.”<sup>48</sup> Like Connecticut’s House Bill 5452, text suggests that the Act would have required individual coverage for each firearm owned.<sup>49</sup> The Act would have imposed a rebuttable presumption that a person is the owner of a lost or stolen firearm until the loss or theft is reported to the police.<sup>50</sup> The penalty for not maintaining the insurance would have been revocation of firearm-ownership privileges,<sup>51</sup> which in turn would have entailed a criminal penalty if possession was maintained.<sup>52</sup> Like the proposals discussed so far, D.C.’s would not have required insurers to offer the coverage that it mandated. The proposal would have required firearm owners to obtain the mandated insurance within thirty days of the Act’s passage.<sup>53</sup>

#### 5. *Illinois’s Two Proposals*

Illinois’s first proposal, Amendment 20 to House Bill 1155, would have amended its criminal code to require holders of handgun carry licenses to maintain \$1,000,000 of liability insurance to cover “negligent or willful acts involving the use of the firearm while it is owned by that

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<sup>45</sup> H.B. 6656, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> B. 20-0170, 2013 Council, Reg. Sess. (D.C. 2013). Interestingly, and unlike Connecticut’s House Bill 6656, the D.C. proposal seems intentionally to have excluded a requirement to obtain self-defense coverage.

<sup>49</sup> *See id.* (referring to coverage for “*the* insured firearm” (emphasis added)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See* D.C. CODE § 22-4503 (LexisNexis 2013) (providing criminal penalties for the unlawful possession of a firearm).

<sup>53</sup> B. 20-0170.

person.”<sup>54</sup> Like Connecticut’s House Bill 5452 and D.C.’s Act, amended House Bill 1155 would seemingly have required individual coverage for each firearm owned.<sup>55</sup> Like D.C.’s proposal, Illinois’s created a presumption that one was the owner of a lost or stolen firearm until the loss or theft was reported to the police.<sup>56</sup> The penalty for not maintaining the insurance would have been revocation of the owner’s Firearm Owner’s Identification Card, which is required by state law to carry or own a firearm.<sup>57</sup> Interestingly, the proposal would have required the State Police, rather than the Illinois Department of Insurance, to adopt the rules needed to implement the mandate.<sup>58</sup> The amendment would not have required insurers operating in Illinois to provide the coverage that it mandated.<sup>59</sup> The amended bill’s sponsor stated that a policy under House Bill 1155 for carry-license holders would cost between \$500 and \$2,000—although he did not specify, presumably he envisioned this to be a yearly cost.<sup>60</sup>

The state’s second proposal, House Bill 2589, was nearly identical to its first, with the relevant exceptions that it would have: (1) applied to all firearm owners rather than only to holders of handgun carry licenses; (2) not required the State Police to adopt rules in relation to the statute (it did not discuss any further rulemaking); and (3) been “[e]ffective immediately” upon passage.<sup>61</sup>

## 6. Maryland

Maryland’s Senate Bill 577 would have required anyone who possesses a firearm to have \$250,000 of liability coverage for “accidental injuries caused by the firearm.”<sup>62</sup> This language, like that of the other state proposals, is unclear as to whether it requires firearm-specific, or only owner-specific, coverage. The bill would have apparently applied to any temporary possession by third parties that was authorized by the owner, because it would have provided that “[a] person may not sell, rent, or

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<sup>54</sup> H.B. 1155 amend. 20, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

<sup>55</sup> See *id.* (referring to “the firearm” (emphasis added)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* This provision, specifically targeting handgun carry licensees, was presumably passed in response to *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), which declared Illinois’s concealed carry ban unconstitutional and required the state to adopt concealed-carry legislation. See *Illinois Lawmakers Reject Firearm Liability Insurance Bill*, INS. J. (Mar. 21, 2013), <http://www.insurancejournal.com/news/midwest/2013/03/21/285431.htm>.

<sup>58</sup> H.B. 1155 amend. 20.

<sup>59</sup> *Id.*

<sup>60</sup> *Illinois Lawmakers Reject Firearm Liability Insurance Bill*, *supra* note 57 (referencing State Representative Kenneth Dunkin’s remarks). At these rates, the yearly cost is very likely to be higher than the cost of the carried firearm. Dunkin also did not say whether he envisioned the cost to be per license holder, irrespective of how many weapons he or she owned, or to somehow incorporate the number of weapons owned. *Id.*

<sup>61</sup> H.B. 2589, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

<sup>62</sup> S.B. 577, 2013 Gen. Assemb., Reg. Sess. (Md. 2013).

transfer a firearm” to anyone without the prescribed coverage.<sup>63</sup> The fine for a violation of the requirement would have been up to \$1,000,<sup>64</sup> and existing firearm owners would have been given three months beyond the statute’s effective date to come into compliance.<sup>65</sup> It would not have required Maryland insurers to provide the coverage in question.<sup>66</sup>

### 7. *Massachusetts*

Massachusetts’s House Bill 3253 would have provided that anyone who “possess [sic], carries, or owns a firearm,” other than on a temporary basis at a licensed gun club, either maintain liability insurance or post a bond.<sup>67</sup> The proposal did not provide any further detail, but would have required the Massachusetts Commissioner of Insurance to promulgate regulations that included minimum policy limits.<sup>68</sup> The penalty for noncompliance would have been a fine of \$500 to \$5,000 and/or up to one year’s imprisonment.<sup>69</sup>

The sponsor “said his bill might result in insurers pricing gun liability insurance according to risk, including factors such as how many guns are owned in the home, how those weapons are stored, and whether they are kept in a locked area.”<sup>70</sup> Like the sponsor of Connecticut’s House Bill 5268, the Massachusetts bill’s sponsor envisioned the insurance mandate improving firearm safety much as he believed that compulsory automobile insurance had improved car safety.<sup>71</sup>

### 8. *New York*

New York’s Assembly Bill 3908A would have required firearm owners to maintain \$250,000 of liability coverage to cover damages resulting from “negligent acts involving the use of such firearm while it is owned by such person.”<sup>72</sup> Like other proposals, this language might have intended to require that each firearm, rather than each owner, be separately insured.<sup>73</sup> Like the D.C. and Illinois proposals, one would have been presumed to own a lost or stolen firearm until the status of the firearm was

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* It is unclear whether the fine would have been a criminal or civil one.

<sup>65</sup> *Id.* The bill was proposed on February 1, 2013. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> H.B. 3253, 188th Gen. Court., Reg. Sess. (Mass. 2013).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Harman, *supra* note 7.

<sup>71</sup> *See id.*

<sup>72</sup> Assemb. B. 3908A, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013). The original version of the bill would have required \$1,000,000 of coverage. Assemb. B. 3908, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013).

<sup>73</sup> *See* Assemb. B. 3908A (referring to “*such* firearm” (emphasis added)).

reported to the police.<sup>74</sup> Like D.C.'s proposal, it exempted peace officers from its requirements.<sup>75</sup> The proposal would have gone into effect ninety days after its passage, and compliance by firearm owners would have been required thirty days after that.<sup>76</sup> Failure to maintain insurance would have resulted in an inability to possess firearms.<sup>77</sup> Like Connecticut's House Bill 6656 and Massachusetts's House Bill 3253, the New York bill would have directed the state's Insurance Department to promulgate the rules needed for its implementation.<sup>78</sup>

### 9. Oregon

Oregon's Senate Bill 758 is the most detailed of the proposals for compulsory firearm-liability insurance made to date. It would have required anyone who owns a firearm to maintain a minimum \$250,000 of coverage for "accidental, negligent or intentional act[s]."<sup>79</sup> Under the bill, an insured would have been strictly liable up to the coverage limits for injuries caused by covered firearms, and an insurer's liability for injury and damages under the policy would have been absolute.<sup>80</sup> The bill would have permitted policies in which the insurer was able to subrogate against its insured for claims paid.<sup>81</sup>

The bill explicitly would have required coverage on a per-firearm basis and would have required transferors to verify that transferees were insured.<sup>82</sup> In addition, it would have required that owners who transfer a firearm inform the State Police of each transfer, and that insurers notify both the State Police and the Department of Consumer and Business Services (the state's insurance regulator) ten days before they cancel an insured's policy because of nonpayment.<sup>83</sup> The bill would have deemed a firearm's owner to be a person who held title or a similar traditional ownership interest in the weapon or who "possesse[d] the firearm without the express permission of [one with a traditional ownership interest]."<sup>84</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* While New York State requires registration of handguns, it does not require registration of long guns. N.Y. PENAL LAW § 400.00(2) (McKinney 2013). It is thus unclear whether noncompliance in the latter case, coupled with possession, would be punishable criminally, civilly, or at all.

<sup>78</sup> Assemb. B. 3908A.

<sup>79</sup> S.B. 758, 77th Leg. Assemb., Reg. Sess. (Or. 2013). The coverage would have had to include the insured's family members who reside in the insured's household. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* Subrogation would have been available for claims based on intentional, negligent, or accidental harms, as opposed to merely intentional harms as might be expected. *See* Baker & Farrish, *supra* note 9, at 313 (noting the intentional harm exclusion commonly found in insurance policies).

<sup>82</sup> S.B. 758.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

One with a traditional ownership interest would have been deemed the owner either until one year after he or she reported the firearm lost or stolen, or until another person insured the firearm.<sup>85</sup> The bill would have mandated a \$10,000 civil fine for each firearm that was not insured as required by the statute.<sup>86</sup> The bill would have exempted the service weapons of peace officers and members of the military.<sup>87</sup> Its firearm-owner-facing provisions would have gone into effect on January 1, 2014, with firearm owners having to comply within one year of that date.<sup>88</sup> It also would have granted the State Police and the Department of Consumer and Business Services immediate rulemaking authority upon passage.<sup>89</sup>

#### 10. *Pennsylvania*

Pennsylvania's House Bill 521 would have required applicants for and holders of concealed carry licenses to maintain \$1,000,000 of liability coverage for injury and property damage resulting from "negligent or willful acts involving the use of an insured firearm."<sup>90</sup> The bill would have explicitly exempted unlawful acts from coverage,<sup>91</sup> implying that coverage for colorable self-defense shootings would have been required, but it would have banned coverage for malicious shootings (at least those committed by the firearm's owner<sup>92</sup>).

As with other proposals, the bill's language could have been interpreted to require per-firearm, rather than per-owner, coverage.<sup>93</sup> The noncompliance penalty would have included loss of the ability to carry a concealed firearm, along with additional fines and misdemeanor charges depending on the number of times the statute was violated.<sup>94</sup> The proposed act would have become effective sixty days after its passage.<sup>95</sup> It would not have required insurers writing in Pennsylvania to offer the coverage.<sup>96</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* The bill was introduced on February 26, 2013. 2013 Session: Senate Bill 758, OREGONLIVE.COM, <http://gov.oregonlive.com/bill/2013/SB758/> (last visited Apr. 15, 2014).

<sup>89</sup> S.B. 758.

<sup>90</sup> H.B. 521, 197th Gen. Assemb., Reg. Sess. (Pa. 2013).

<sup>91</sup> *Id.*

<sup>92</sup> See *infra* text accompanying notes 97–98, 122, 151, 215 and accompanying text (discussing coverage for negligence leading to an intentional shooting as distinguished from criminal shootings).

<sup>93</sup> See H.B. 521 (referring to an "insurance identification certificate" that would have had to have been carried "with *the* insured firearm" (emphasis added)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> A spokesperson for the Pennsylvania Insurance Department noted that "mandating any coverage does not automatically create an appetite for insurers to provide that coverage." Young Ha & Don Jergler, *Gun Liability Insurance Measures Facing Uphill Battle In State Legislatures*, INS. J. (Apr. 12, 2013), <http://www.insurancejournal.com/news/national/2013/04/12/287975.htm> (internal quotation marks omitted).

### C. Existing Insurance Products for Firearm Owners

Much of the liability faced by gun owners is already insurable under available insurance products. Standard homeowners' and renters' policies typically cover negligence involving firearms, including negligence that leads to an intentional shooting (e.g., negligent entrustment or negligent storage).<sup>97</sup> Nevertheless, the language of intentional- and illegal-acts exclusions can disqualify some negligence claims against co-insureds and negligence claims involving criminal or allegedly criminal activity.<sup>98</sup> Similarly, some policies cover self-defense shootings while others exclude them.<sup>99</sup> Umbrella policies can provide further protection once the limits of a homeowner's or renter's policy have been reached.<sup>100</sup>

The following Table shows some existing insurance and insurance-like products specifically designed for firearm owners. Generally speaking, these products offer benefits to their purchasers who face liability or other expenses from the use of a lawfully possessed weapon.

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<sup>97</sup> See *Hearing on B. 20-170, The Firearm Insurance Amendment Act of 2013 Before the Comm. on Business, Consumer, and Regulatory Affairs*, 2013 Council 3 (D.C. 2013) (testimony of Chester A. McPherson, Deputy Comm'r of the Department of Insurance, Securities, and Banking) [hereinafter *Hearing on B. 20-170*]; Baker & Farrish, *supra* note 9, at 299; Cooper & Walsh, *supra* note 2; Judy Selby & Zachary Rosenberg, *What to Know About Gun Owner Liability Insurance*, BAKERHOSTETLER (Mar. 27, 2013), <http://www.bakerlaw.com/articles/law360-selby-and-rosenberg-outline-gun-control-liability-insurance-options-3-27-2013>.

<sup>98</sup> Kochenburger, *supra* note 5, Part II.C.1; see also Cooper & Walsh, *supra* note 2 (discussing how different jurisdictions treat claims when criminal activity is involved); Selby & Rosenberg, *supra* note 97 (discussing how the language of a policy impacts how it is applied when criminal or alleged activity is involved).

<sup>99</sup> Kochenburger, *supra* note 5, Part II.C.2.

<sup>100</sup> CHRISTOPHER J. MONGE, *THE GUN OWNER'S GUIDE TO INSURANCE FOR CONCEALED CARRY AND SELF DEFENSE* 42-43 (2013).



TABLE 1

Program	Coverage by Potential Liability Type		Yearly Cost	Comments
	Criminal	Civil		
CCW Safe <sup>101</sup>	Pays all legal defense attorneys' fees on member's behalf.  Individual Family (two members)		\$99 \$150	<ul style="list-style-type: none"> <li>• Applies only to colorable self-defense situations.</li> <li>• Must use one of the provider's attorneys.</li> <li>• Member is entitled to payment of criminal defense costs even if he or she is found liable.</li> <li>• Member must have a valid concealed-carry permit.</li> <li>• Also explicitly covers administrative proceedings.</li> <li>• Not classified as insurance, but as a "Legal Services Contract."</li> </ul>
Patriot Legal Protection Plan/CHLPP <sup>102</sup>	Pays all legal defense attorneys' fees on member's behalf.  Individual Family (two members) Family (three members)		\$129 <sup>103</sup> \$229 <sup>104</sup> \$329 <sup>105</sup>	<ul style="list-style-type: none"> <li>• Applies only to colorable self-defense situations.</li> <li>• Must use one of the provider's attorneys.</li> <li>• Member is entitled to payment of criminal defense costs even if he or she is found liable.</li> <li>• Applies to pistols only; does not cover long gun use.</li> <li>• Excludes discovery, court fees, expert fees, and similar expenses.</li> <li>• Excludes appeals.</li> <li>• Not classified as insurance, but as a "Legal Services Agreement."</li> </ul>

<sup>101</sup> CCW SAFE, <http://ccwsafe.com/> (last visited Apr. 15, 2014).

<sup>102</sup> *Sign-Up*, PATRIOT LEGAL PROTECTION, <https://patriotlegalprotection.com/sign-up/> (last visited Apr. 15, 2014); Telephone Interview with Christopher J. Monge, Insurance Agent and Author of *The Gun Owner's Guide to Insurance for Concealed Carry and Self Defense* (Oct. 11, 2013); Telephone Interview with Sales Representative at Patriot Legal Protection (Oct. 11, 2013).

<sup>103</sup> The cost is \$149 per year if the member does not hold a concealed-carry permit. *Sign-Up*, *supra* note 102.

<sup>104</sup> The cost is \$259 per year if one of the members does not hold a concealed-carry permit. *Id.*

<sup>105</sup> The cost is \$369 per year if one of the members does not hold a concealed-carry permit. *Id.*

Program	Coverage by Potential Liability Type		Yearly Cost	Comments
	Criminal	Civil		
Self-Defense SHIELD <sup>106</sup>	Reimburses legal defense fees on member's behalf up to coverage limit:  \$50,000 \$75,000 \$100,000  plus attorney-retainer coverage of:  \$5,000; \$7,500; or \$10,000, respectively	Pays legal fees and civil judgments on member's behalf up to coverage limit:  \$75,000 \$150,000 \$500,000	\$127 \$197 \$297	<ul style="list-style-type: none"> <li>• Applies only to colorable self-defense situations.</li> <li>• Violation of concealed-carry laws do not bar coverage (if gun ownership is otherwise lawful).</li> <li>• Criminal defense reimbursement only available in the event of acquittal or dismissal; attorney-retainer coverage always available.</li> <li>• Civil defense costs apply against coverage limits.</li> <li>• Coverage for member's family in the home.</li> <li>• Insurance-backed member benefit; member is a beneficiary of a master policy held by the U.S. Concealed Carry Association or the Home Defense Association of America.</li> <li>• Related benefits include: bail-bond funding (\$2,500; \$5,000; or \$10,000), and compensation for days spent in court (\$250, \$350, or \$500 per day).</li> </ul>
Lockton Personal Firearms Liability Insurance <sup>107</sup>	None.	Pays legal fees and civil judgments up to coverage limit:  \$100,000 \$250,000 \$500,000 \$1,000,000	\$47 \$67 \$100 \$200	<ul style="list-style-type: none"> <li>• Applies only to hunting, trapping, and target-shooting situations.</li> <li>• Civil defense costs do not apply against coverage limits.</li> </ul>

<sup>106</sup> USCCA MEMBER BOOKLET 16–26 (2013), available at [https://www.usconcealedcarry.com/pdf/USCCA-Memberkit-Booklet-2013\\_6-6-13\\_WebVersion.pdf](https://www.usconcealedcarry.com/pdf/USCCA-Memberkit-Booklet-2013_6-6-13_WebVersion.pdf); *Membership*, U.S. CONCEALED CARRY ASS'N, <https://www.usconcealedcarry.com/membership/> (last visited Apr. 15, 2014); *Self-Defense Shield*, U.S. CONCEALED CARRY ASS'N, <https://www.usconcealedcarry.com/shield/> (last visited Apr. 15, 2014).

<sup>107</sup> LOCKTON AFFINITY, LLC, LOCKTON PERSONAL FIREARMS LIABILITY WITH OPTIONAL SELF-DEFENSE INSURANCE APPLICATION (2013), available at <http://www.locktonrisk.com/nra/ns/forms/Personal%20Firearms%20Liability%20w%20opt%20SD%20App%208-13.pdf>; LOCKTON AFFINITY, LLC, PERSONAL LIABILITY INSURANCE POLICY FORM (2013), available at [http://www.locktonrisk.com/nra/ns/forms/Excess\\_Personal\\_Liability\\_Certificate\\_of\\_Insurance.pdf](http://www.locktonrisk.com/nra/ns/forms/Excess_Personal_Liability_Certificate_of_Insurance.pdf) [hereinafter LOCKTON LIABILITY

Program	Coverage by Potential Liability Type		Yearly Cost	Comments
	Criminal	Civil		
Lockton Risk Self-Defense Insurance <sup>108</sup>	Reimburses legal defense fees up to coverage limit:  \$50,000 \$50,000 \$100,000 \$100,000	Pays legal fees and civil judgments up to coverage limit:  \$100,000 \$250,000 \$500,000 \$1,000,000	\$165 \$254 \$400 \$600	<ul style="list-style-type: none"> <li>• Applies only to colorable self-defense, hunting, trapping, and target-shooting situations.</li> <li>• Criminal defense reimbursement only available in the event of acquittal or dismissal.</li> <li>• Civil defense costs do not apply against coverage limits.</li> <li>• Purchased with Lockton Personal Firearms Liability Insurance.</li> </ul>
Second Defense Alliance <sup>109</sup>	Reimburses legal fees up to combined coverage limit:  \$50,000		\$131; \$250 for two years; \$350 for three years	<ul style="list-style-type: none"> <li>• Applies only to shootings related to a home invasion.</li> <li>• Coverage for injuries is limited to \$10,000 and applies against total benefit.</li> <li>• In criminal situation, covers fees even if insured is not acquitted or case is not dismissed.</li> <li>• Excludes shootings of family members, neighbors, and landlords.</li> <li>• Not classified as insurance; coverage is provided as a benefit of program membership.</li> <li>• Benefits may be used to pay for: bail-bond premium (up to \$4,500), "Aftermath Cleanup" (up to \$2,500), burial service costs (up to \$4,500).</li> </ul>

FORM]; *Personal Firearms Liability Insurance for NRA Members*, LOCKTON AFFINITY, LLC, <http://www.locktonrisk.com/nrains/excess.htm> (last visited Apr. 15, 2014) [hereinafter *Lockton Liability Insurance*].

<sup>108</sup> LOCKTON LIABILITY FORM, *supra* note 107; LOCKTON AFFINITY, LLC, SELF-DEFENSE INSURANCE: AMENDMENT TO PERSONAL FIREARMS LIABILITY POLICY FORM (2013), available at [http://www.locktonrisk.com/nrains/forms/Self-Defense\\_Certificate\\_of\\_Insurance.pdf](http://www.locktonrisk.com/nrains/forms/Self-Defense_Certificate_of_Insurance.pdf) [hereinafter LOCKTON SELF-DEFENSE AMENDMENT]; *Lockton Liability Insurance*, *supra* note 107; *Self-defense Insurance*, LOCKTON AFFINITY, LLC, <http://www.locktonrisk.com/nrains/defense.htm> (last visited Apr. 15, 2014). Interestingly, the self-defense amendment to the general policy form underlying this policy explicitly deletes the intentional-act exclusion for the purposes of self-defense coverage. LOCKTON SELF-DEFENSE AMENDMENT, *supra* at 2.

<sup>109</sup> *Frequently Asked Questions*, SECOND DEF. ALLIANCE, <http://myseconddefensealliance.com/fa>

Program	Coverage by Potential Liability Type		Yearly Cost	Comments
	Criminal	Civil		
Firearms Legal Defense Program  Colorado, Florida, Oklahoma, and Texas <sup>110</sup>	Pays all legal defense attorneys' fees on member's behalf.			<ul style="list-style-type: none"> <li>• Applies only to shootings done "to stop a threat"; excludes "legal representation . . . [arising from] . . . the commission of any crime for which justification under state law is inapplicable."<sup>113</sup></li> <li>• Must use one of the provider's attorneys.</li> <li>• Excludes negligence.</li> <li>• Excludes appeals.</li> <li>• Excludes discovery, court fees, expert fees, and similar expenses.</li> <li>• Excludes shootings of family members and "dating relationships."</li> <li>• Classified as "Legal Service Contract," "Legal Service Plan," or insurance depending on state.</li> </ul>
	Individual home-state benefits only		\$131.40 <sup>111</sup>	
	Couple home-state benefits only		\$240 <sup>112</sup>	
	Multi-state benefits (includes Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee, Texas, Virginia)		\$35.40 add'l per person	
	Minor children		\$24	

### III. LIABILITY INSURANCE AS REGULATOR AND COMPENSATOR

Insurance transfers the risk of a fortuitous loss from one party to another in exchange for a payment of a premium by the transferor to the transferee.<sup>114</sup> In a free market, it benefits both the insured and the insurer, who presumably will only enter into the insurance contract if it is in their mutual interests to do so.<sup>115</sup>

q (last visited Apr. 15, 2014); *Member Agreement*, SECOND DEF. ALLIANCE, <http://myseconddefensealliance.com/member-agreement> (last visited Apr. 15, 2014); *Membership Benefits*, SECOND DEF. ALLIANCE, <http://myseconddefensealliance.com/benefits> (last visited Apr. 15, 2014) (follow link to "Financial and Legal Support").

<sup>110</sup> *Choose Your Program*, U.S. L. SHIELD, <https://www.uslawshield.com/choose-your-program/> (last visited Apr. 15, 2014) (select applicable state from drop-down menu).

<sup>111</sup> The cost in Texas is only \$89 per year if the member does not hold a state concealed-carry permit. *Program Details*, TEX. L. SHIELD, <http://www.texaslawshield.com/protection-for-firearms-owners> (last visited Apr. 15, 2014) (select "Texas Law Shield Membership Cost" tab).

<sup>112</sup> The cost in Texas is only \$209 per year if one member holds a state concealed-carry permit and one does not, and \$109 per year if neither holds a state concealed-carry permit. *Id.*

<sup>113</sup> It is unclear whether this exclusion applies in a situation where a self-defense defense fails. *Choose Your Program*, *supra* note 110.

<sup>114</sup> See 1 COUCH ON INSURANCE § 1.6 (Steven Plitt et al. eds., 3d ed. 2009); see also 9 *id.* § 126:29 (defining an "occurrence" in the insurance context).

<sup>115</sup> At the most basic level, the insured benefits by replacing a risk of loss with a known payout, or premium. 1A *id.* § 8.24. The insurer benefits by charging the insured more than the expected value of the payout on the insured's claims. This dynamic can change, however, in an environment where

The existence of an insurance agreement can create both positive and negative externalities. An externality is an effect that an activity undertaken by one individual has on another individual who is not in control of the activity.<sup>116</sup> A negative externality is a public loss from a private activity; a positive externality is a public gain from the activity.<sup>117</sup>

This Part examines the potential for gun-owner liability insurance to benefit those external to the insurance contract by serving both as a source of compensation for victims and as a “private regulator” of gun violence. It also discusses some difficulties with compensating and regulating via liability insurance, and its potential to inhibit desirable behavior.

#### A. *Compensating Shooting Victims Via Insurance*

Insurance can compensate victims and, in the process, promote the goals of the tort system by providing compensation on behalf of tortfeasors who otherwise cannot pay.<sup>118</sup> Unfortunately, most perpetrators of gun violence are judgment-proof and have few collectible assets.<sup>119</sup> Their bad acts are also unlikely to be covered by insurance: they rarely have liability coverage, and even if they did, their actions would be excluded from coverage by their policies’ intentional- or criminal-acts exclusions.<sup>120</sup>

Thus, in the current context, where the great majority of shootings are intentional,<sup>121</sup> the efficacy of mandatory insurance would seem to depend on whether intentional shootings are covered. The tort system, however, provides ways to reclassify some intentional acts, like those arising from improper storage or entrustment, into negligent ones.<sup>122</sup> Many claims that would otherwise be barred as intentional acts can thus result in tort liability. Notwithstanding an absence of insurance coverage, tortfeasors are liable for their intentional and negligent torts.

Nonetheless, “few gun injury claims are actually brought.”<sup>123</sup> This suggests that the individuals who commit intentional shootings and those on whom courts are willing to impose negligence liability are not those who own homes or who have the wherewithal to purchase liability

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insurance is compulsory.

<sup>116</sup> See James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 *ECONOMICA* 371, 372 (1962).

<sup>117</sup> *Id.* at 374.

<sup>118</sup> See Baker & Farrish, *supra* note 9, at 313.

<sup>119</sup> Baker & Swedloff, *supra* note 9, at 1431–32 & n.90.

<sup>120</sup> See Baker & Farrish, *supra* note 9, at 313; Baker & Swedloff, *supra* note 9, at 1431–32.

<sup>121</sup> See *infra* note 143 (showing total numbers of accidents, assaults, and incidents of self-harm).

<sup>122</sup> There are also mechanisms for reducing the moral hazard associated with covering intentional acts. See Baker & Swedloff, *supra* note 9, at 313 (discussing risk-based pricing and underwriting methods). Still, covering intentional acts is likely undesirable. Many insurance policies exclude reclassified intentional acts from coverage. See *infra* note 132.

<sup>123</sup> Baker & Swedloff, *supra* note 9, at 1431.

insurance. Their insured homes, personal possessions, and financial assets not otherwise protected by statute would presumably be assets collectible in a judgment, even if a policy exclusion barred insurance coverage. In other words, homeowners and those who could afford insurance coverage in the first instance may both be liable in tort and have assets to levy or incomes to garnish, but few suits are brought against them.<sup>124</sup> This suggests that this group neither directly causes gun violence nor negligently enables it.

An insurance mandate would thus seem to further compensation goals only if it caused some otherwise wholly or partially judgment-proof shooters to carry insurance—an improbable outcome given that the shooters are already criminals who are unlikely to worry about getting insurance even if they could afford it.<sup>125</sup>

That a great many crime guns—somewhere between 32% and 70%—are likely to have been stolen illustrates the point.<sup>126</sup> In these cases, and in most jurisdictions, the original owner could be liable if his or her negligence (in storage, entrustment, or the like) allowed the gun to get into the wrong hands.<sup>127</sup> The primary source of stolen guns is homes,<sup>128</sup> implicating homeowners' and umbrella policies. Few gun-injury suits, however, are brought against homeowners.<sup>129</sup> This suggests that homeowners are not liable in tort, either because they are storing their guns properly (which would, of course, be desirable, and diminish the need for insurance in the first place) or because liability will not attach for some other reason.<sup>130</sup> If they were liable, their having collectible assets should result in their being sued even if their insurance excluded coverage. That

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<sup>124</sup> It may be that the presence of an insurance company to efficiently pay a claim would result in more suits because it would be easier for plaintiffs to recover. Baker & Farrish, *supra* note 9, at 313. That depends, however, on the insurer not deploying its superior litigation-defense capabilities against the claimant, contrary to its almost certain duty to its insured. If the insurer defends its insured, then a plaintiff would likely have a harder time recovering than in a situation in which the alleged tortfeasor does not have an insurer's superior defense capabilities on his or her side. See *infra* Part IV.B.1; *infra* note 290 and accompanying text.

<sup>125</sup> Proponents and opponents alike agree that criminals will not insure. See *infra* Part VI.B. There may also be self-incrimination problems with requiring criminals who use guns to maintain insurance if government agencies are allowed access to insurers' records. See, e.g., Haynes v. United States, 390 U.S. 85, 100–01 (1968). The Oregon bill, which requires one who possesses a firearm without the owner's permission to maintain insurance, may have a similar problem. See *supra* text accompanying notes 79, 84.

<sup>126</sup> See JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 198–204 (1986).

<sup>127</sup> See, e.g., Mark S. Cohen, *Proof of Negligent Sale, Entrustment, or Storage of Firearms*, 37 AM. JUR. PROOF OF FACTS 3d, §§ 13, 15, 18, 24 (2013).

<sup>128</sup> See WRIGHT & ROSSI, *supra* note 126, at 206 (noting that 84% of gun thieves stole from a home).

<sup>129</sup> See Baker & Swedloff, *supra* note 9, at 1431.

<sup>130</sup> See *infra* Part III.C.2.a.

leaves as potential tort defendants the shooters who used the stolen guns improperly, and they are not worth pursuing.

In summary, compulsory liability insurance for firearm owners is not likely to advance the goal of compensating the victims of intentional gun violence. Exceptions would likely be confined to the rare cases (which may, to some, justify an insurance mandate) where negligent or criminal, but judgment-proof, firearm owners purchase insurance.<sup>131</sup> Even then, most recovery would be barred unless intentional acts were covered.<sup>132</sup> That still leaves the victims of accidental shootings. Accidental shootings, however, comprise only a small fraction of total shootings,<sup>133</sup> and many of them are coverable by existing insurance products.<sup>134</sup>

The next Section examines the potential for firearm-owner liability insurance to make gun ownership safer.

### B. *Private Regulation Via Insurance*

The goal of insurance-based regulation of an activity is to use the private marketplace to reduce the negative—and if possible, increase the positive—externalities associated with that activity. In the case of firearms, the goal of regulation-via-insurance is to reduce the social costs of ownership, i.e., criminal and accidental shootings.<sup>135</sup> Insurance regulates most directly by influencing the behavior of insureds. It also influences governmental regulation.

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<sup>131</sup> One might consider at this point the possibility that a public fund to compensate shooting victims, perhaps funded by firearm or ammunition taxes, might succeed where insurance would fail. The concept is problematic because removing the costs associated with an activity tends to encourage the activity. For example, one would expect individuals to be less careful with their guns if they knew that they or their victims would be compensated if they accidentally shot themselves or another. Analogously, some studies show the presence of automobile insurance is correlated with an increase in automobile accidents. See *infra* note 273 and accompanying text. A malicious shooter may be less concerned with shooting someone if he or she knows that the victim will be compensated by a fund, and thus less likely to sue the shooter. The government might attempt to seek reimbursement to the compensation fund from the shooter, but most shooters are judgment proof, see *supra* note 119 and accompanying text, which is the reason for having the fund in the first place. The fund would presumably not pay families following suicides for the same reason that life insurance does not pay in such cases. See *supra* note 5. Although a detailed analysis of such an idea is beyond the scope of this Article and may be suitable for a future work, the point is that, because a compensation fund would serve as insurance, many of the moral hazard and many of the related incentive problems discussed herein should be expected to apply in that context as well. See *infra* Part V.

<sup>132</sup> See *infra* Part III.B.4. Indeed, despite the potential for the tort system to enable claims for some intentional acts by reclassifying them as negligent ones, many insurance policies exclude coverage for them.

<sup>133</sup> See *infra* note 143.

<sup>134</sup> See *supra* text accompanying notes 97–100.

<sup>135</sup> Harman, *supra* note 7; Kenney, *supra* note 2. There is an ongoing debate about whether tort liability or liability insurance is better at regulating externalities. See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 257–79 (2004). As discussed, tort liability is scarce in this context. See *supra* Part III.A.

Insurers are adept at collecting and analyzing data on the frequency of various activities, and measuring the risk associated with those activities. This Section describes the ways in which they employ these competencies to regulate. It also discusses some weaknesses of these methods in the context of firearm-owner liability.

### 1. *Risk-Based Pricing*

Pricing a firearm-liability insurance policy according to factors associated with an increased risk of shooting can create incentives—lower premiums—for insureds to take care to minimize those factors.<sup>136</sup> Such a system would necessarily involve penalties—higher premiums—for those who do not mitigate known risks. For example, if the use of trigger locks on stored guns is known to decrease the risk of an accidental shooting, then gun owners who employ trigger locks (and perhaps similar safety devices) would pay less than gun owners who do not.<sup>137</sup> Those who do not practice safe gun ownership would be expected to have their weapons involved in more shootings, and their premiums would increase accordingly.

The practice of “experience rating”—basing an insured’s premiums on prior claim experience—can be effective in motivating a policyholder to reduce the risk of loss, thus reducing moral hazard.<sup>138</sup> It also “quickly reveals loss characteristics,” which are traits (generally demographics and place of residence) possessed by would-be insureds likely to have greater loss activity.<sup>139</sup> Insurers, with their superior ability to analyze data and assess likely loss exposures, can thus charge more to those possessing the offending attributes.<sup>140</sup>

Experience rating is especially effective when insurers are able to accumulate many exposures, allowing them to better forecast expected losses.<sup>141</sup> Its effectiveness wanes, however, when losses are infrequent.<sup>142</sup> This may very well be the case with firearms, especially if intentional shootings are not insured (for which there are strong arguments), where the number of incidents on which to build a rating system is a fraction of the

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<sup>136</sup> See Baker & Farrish, *supra* note 9, at 295; Baker & Swedloff, *supra* note 9, at 1419; Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 205–07 & n.15 (2012).

<sup>137</sup> Some proponents of liability insurance are promoting exactly this. See Bunn, *supra* note 4.

<sup>138</sup> See Baker & Swedloff, *supra* note 9, at 1419; Ben-Shahar & Logue, *supra* note 136, at 206–07; see also Neil A. Doherty & Clifford W. Smith, Jr., *Corporate Insurance Strategy: The Case of British Petroleum*, 6 J. APPLIED CORP. FIN. 4, 11 (1993) (defining moral hazard as “the tendency for insured parties to exercise less care and thus to experience greater losses than the uninsured”).

<sup>139</sup> Doherty & Smith, *supra* note 138, at 11.

<sup>140</sup> See *id.* at 8, 11; see also Baker & Swedloff, *supra* note 9, at 1419–20 (“[I]nsurers can collect and provide loss prevention information that may not be reflected in price differentials.”).

<sup>141</sup> Doherty & Smith, *supra* note 138, at 11.

<sup>142</sup> *Id.*



number available in the automobile context.<sup>143</sup>

Risk-based pricing, including experience rating, may also be ineffective in influencing insureds' behavior if actuarially-fair premiums would be low even for high risks because an increased-but-still-low cost may not alter one's behavior. One pair of commentators found that the actuarially-fair premiums for coverage levels similar to those required for automobile insurance would be about twenty dollars per year for the average firearm owner.<sup>144</sup> Another commentator placed the figure at about

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<sup>143</sup> Automobile insurance serves for many as the model for firearm-liability insurance. *See supra* text accompanying notes 34, 41, 71. The following tables show fatal and nonfatal injuries in 2010, as tabulated by the Centers for Disease Control, for firearms and motor vehicles. They do not include situations where no one was injured or situations where there was legal intervention by a firearm or motor vehicle to injure a felon.

<i>Motor Vehicles</i>	<b>Nonfatal</b>	<b>Fatal</b>	<b>Total</b>
<b>Accidents</b>	2,972,717	35,332	3,008,049
<b>Assaults</b>	11,145	39	11,184
<b>Self-Harm</b>	2,089	114	2,203
<b>Grand Total:</b>			3,021,436

<i>Firearms</i>	<b>Nonfatal</b>	<b>Fatal</b>	<b>Total</b>
<b>Accidents</b>	14,161	606	14,767
<b>Assaults</b>	53,738	11,078	64,816
<b>Self-Harm</b>	4,643	19,392	24,035
<b>Grand Total:</b>			103,618

*Nonfatal Injury Reports, 2001–2011*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last visited Apr. 15, 2014) (select either “Unintentional,” “Assault—All,” or “Self-Harm”; then select either “Motor Vehicle Occupant” added to “Pedestrian,” or “Firearm”; and finally select “2010” and “All Ages”); *Fatal Injury Reports, National and Regional, 1999–2010*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_us.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html) (last visited Apr 15, 2014) (select either “Unintentional,” “Homicide,” or “Suicide”; then select either “Motor Vehicle, Overall” or “Firearm”; and finally select “2010” and “All Ages”). Assuming that auto insurers have enough accident data to properly set rates, and even including intentional injuries, in 2010 there were approximately twenty-nine times as many data points on which to base auto insurance rates as there would have been to set firearm-liability rates. Excluding incidents of self-harm would increase the ratio to approximately thirty-eight times as many. Excluding all intentional incidents would increase the ratio to approximately 204 times as many data points per year on which to base rates. And this ignores insurers' nearly nine decades' of experience setting rates in the auto context and practically nonexistent experience setting rates in the firearm context. The number of potential accident claims on which to build a reliable rating system for firearm-liability insurance may be too small, and in any event not nearly as robust as that of the automobile-insurance industry, even if intentional shootings are included.

<sup>144</sup> Gilles & Lund, *supra* note 8, at 21, 23 n.34. These commentators also opined that requiring gun owners to pay more than the actuarially fair amount or to purchase more insurance than is required of car owners would pose constitutional problems. *Id.* at 23 n.33. The proposals made to date would generally have required more coverage than the minimum amount required of drivers. *Compare id.* (estimating premiums using the mandatory automobile coverage level of \$25,000 per injured person required by forty-eight states), *with supra* Part II.B (describing several proposals requiring at least \$250,000 of coverage).

fifty-seven dollars per year per gun, using data on firearm injuries and comparisons to automobile claims.<sup>145</sup> A study of coverage for gun-related harm provided by existing insurance products revealed that the presence of a firearm in the home did not affect the cost of homeowners' or renters' insurance, even though most policies cover firearm-liability claims.<sup>146</sup> Even "life insurance companies do not appear to consider gun-related risks in underwriting and pricing their products."<sup>147</sup>

The same study's authors also found that "there are relatively few instances in which gun-risk businesses are classified differently from other, similar businesses."<sup>148</sup> They are classified differently only when there exists greater risk of product liability, commercial crime, fire, and similar business-driven risk; an increased risk of payout for general firearm-liability claims is not a factor, including in situations where firearms are kept on premises for ready use for security purposes.<sup>149</sup> Relatedly, general liability premiums for establishments open to the public have not increased after the liberalization of concealed-carry laws.<sup>150</sup> Including intentional acts in coverage, however, would increase the number of shootings covered by liability insurance, which in turn would likely make the cost of coverage higher.<sup>151</sup> A concept related to risk-based pricing is requiring insureds to share the cost of claims paid on their behalf.

## 2. Risk Sharing

Risk sharing refers to the use of deductibles and copayments to share some of the cost of a claim with the insured. The idea is to preserve some of the insured's incentive to take care *ex ante* by leaving some of his or her "skin in the game."<sup>152</sup>

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<sup>145</sup> Tom Harvey, *Gun Insurance Would Not Be Expensive*, GUN INS. BLOG (Jan. 2, 2013), <http://www.guninsuranceblog.com/gun-insurance-would-not-be-expensive/>.

<sup>146</sup> Baker & Farrish, *supra* note 9, at 299–300.

<sup>147</sup> *Id.* at 298. All this said, the costs of existing programs for firearm owners are higher than the estimated figures mentioned in this paragraph. *See supra* Part II.C. Those programs, however, are provided by very small operations with relatively large per-insured overhead by comparison to that which could be expected if a statutory mandate required all gun owners in a state or the nation to maintain liability insurance. *See infra* Part IV.B (discussing the development of service efficiencies).

<sup>148</sup> Baker & Farrish, *supra* note 9, at 300.

<sup>149</sup> *See id.* at 301–07, 308–10. Although this study's analysis of general liability costs for gun-related businesses is useful to the present analysis, many of the potential claims that it analyzed are now mooted by the PLCAA. *See supra* Part II.A.1. To the extent that the PLCAA moots otherwise cognizable claims, insurance should be even less expensive.

<sup>150</sup> Cooper & Walsh, *supra* note 2.

<sup>151</sup> *See* Baker & Farrish, *supra* note 9, at 299, 312. It is unknown, however, exactly how many more shootings would be covered because many—though not all—intentional shootings can already be re-characterized as negligent ones for insurability purposes. *See supra* text accompanying notes 97–98; *infra* text accompanying note 215. Further, it is unclear how many intentional shooters would carry insurance. *See infra* note 323 and accompanying text.

<sup>152</sup> *See* KENNETH J. ARROW, ASPECTS OF THE THEORY OF RISK BEARING 47, 55 (1965); Baker &

Traditional cost-sharing techniques may be less effective in the firearm context, however. If gun-liability insurance is to resemble auto liability insurance, as many suggest,<sup>153</sup> then deductibles would not apply.<sup>154</sup> Oregon's proposed liability system, for example, would have explicitly mandated coverage for intentional acts (which comes with its own problems<sup>155</sup>) and made absolute the insurer's duty to pay, subject to possible subrogation against the insured.<sup>156</sup> Oregon's concern is understandable: liability for firearm-related torts against gun owners already exists, but few claims are brought because most firearm tortfeasors are judgment proof.<sup>157</sup> A risk-sharing mechanism would thus partially, though perhaps only marginally, undermine one of the purposes for requiring insurance in the first instance: providing victims with a source of compensation, at least in theory, for their injuries.<sup>158</sup>

### 3. *Loss-Prevention Services*

Insurers facing claims have incentives to study gun violence and determine whether there may be effective ways to reduce its frequency and injuriousness.<sup>159</sup> They can pass this loss-minimizing knowledge on to their insureds and encourage or require compliance with certain loss-prevention methods, and then monitor compliance with those methods.

Insurers may have an advantage over their insureds in identifying the best ways to reduce risk of loss if they are able to collect a sufficient amount of data to apply their data-processing capabilities.<sup>160</sup> It is not a foregone conclusion, however, that this would be feasible in the context of firearm-related risks.<sup>161</sup> Nevertheless, insurers, who also have skin in the game, have "extra incentive to reach out to insureds" to advise them on

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Swedloff, *supra* note 9, at 1420; Ben-Shahar & Logue, *supra* note 136, at 208–09.

<sup>153</sup> See Kenney, *supra* note 2; *supra* text accompanying notes 34, 41, 71.

<sup>154</sup> Baker & Swedloff, *supra* note 9, at 1429–30.

<sup>155</sup> See *infra* Part V.B.1.a (discussing moral hazard and adverse selection).

<sup>156</sup> See *supra* notes 79–81 and accompanying text.

<sup>157</sup> Baker & Swedloff, *supra* note 9, at 1431–32 n.90.

<sup>158</sup> One might argue that this proves too much because a covered tortfeasor's deductible would be a small portion of the total payment to the victim, and especially small in relation to the insured's wealth. Although these observations may be true, they assume that the tortfeasor is insured in the first place and that a compensable claim exists. Part VI addresses a mandate's likely low uptake by gun owners. Parts III.A and III.C.2.a address the unlikelihood of liability attaching to a gun owner who is not the criminal shooter, but rather one against whom a negligent storage or similar claim is asserted. Given that liability rarely attaches to the presumably nonjudgment-proof gun owners in this latter category, and insurance coverage would therefore not apply, the judgment-proof criminal shooters remain. On the off chance that such shooters get insurance, any reduction in insurer-paid compensation should be expected to directly reduce the victim's payment.

<sup>159</sup> See Baker & Farrish, *supra* note 9, at 312–13.

<sup>160</sup> See Baker & Swedloff, *supra* note 9, at 1421; Doherty & Smith, *supra* note 138, at 8–9.

<sup>161</sup> See Kochenburger, *supra* note 5, at 1285; *supra* note 143 and accompanying text.

loss-prevention methods.<sup>162</sup> To reduce their losses, they may fund or conduct research to identify claim-reducing strategies.<sup>163</sup>

Insurers may insist that their insureds both implement their findings and consent to compliance monitoring.<sup>164</sup> As with other individual mandates, however, such monitoring would be very intrusive, requiring “routine, appropriately timed, and frequent” in-home inspections to ensure that, among other things, applications have been completed truthfully, no new firearms have been acquired (if insurance is on a per-firearm basis<sup>165</sup>), and loss-prevention requirements have been complied with.<sup>166</sup> This would be offensive to many,<sup>167</sup> and would make enforcing compliance with the loss-prevention methods exceptionally difficult.<sup>168</sup>

#### 4. *Refusal to Insure*

A corollary to mandating loss-prevention activities is the refusal to insure if those activities are not implemented by the insured.<sup>169</sup> Closely related is the refusal to provide coverage for certain types of losses.<sup>170</sup> The excluded losses are typically those “for which coverage would create a severe moral hazard and where noncoverage is the only effective way to create harm-prevention incentives.”<sup>171</sup> The quintessential excluded losses are those arising from intentional harmful activity.<sup>172</sup>

Refusal to insure may be problematic for two somewhat opposing reasons. First, one of the major stated goals of the proposals in question is to reduce, or at least provide compensation to the victims of, unjustified shootings.<sup>173</sup> Although as a matter of public policy, one cannot ordinarily insure against one’s own intentional acts, some legislative proposals

<sup>162</sup> Baker & Swedloff, *supra* note 9, at 1422.

<sup>163</sup> See Ben-Shahar & Logue, *supra* note 136, at 212.

<sup>164</sup> See Baker & Farrish, *supra* note 9, at 295, 312–13; Ben-Shahar & Logue, *supra* note 136, at 211–12; Doherty & Smith, *supra* note 138, at 8.

<sup>165</sup> See *supra* notes 44, 49, 55, 62, 72, 82, 93 and accompanying text.

<sup>166</sup> Cf. Sherry A. Glied et al., *Consider It Done? The Likely Efficacy of Mandates for Health Insurance*, 26 HEALTH AFFAIRS 1612, 1618–19 (2007) (drawing from experiences with health and other forms of insurance to discuss factors that lead to compliance with individual mandates).

<sup>167</sup> Cf. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 282 (1996) (referring to “increased social control” by insurers).

<sup>168</sup> See Baker & Farrish, *supra* note 9, at 314; see also Harman, *supra* note 7 (noting that monitoring is easier in the automobile context because insurers know about the safety devices built into cars).

<sup>169</sup> Ben-Shahar & Logue, *supra* note 136, at 209. An insurer can also charge more if nonmandatory loss-prevention activities are not complied with. This is discussed with risk-based pricing, *supra* Part III.B.1.

<sup>170</sup> Ben-Shahar & Logue, *supra* note 136, at 215.

<sup>171</sup> *Id.*; see *infra* Part V.B.1.a (delineating why insurance and subrogation cannot be rationally applied to criminal gun violence).

<sup>172</sup> JERRY & RICHMOND, *supra* note 17, at 440–41; Baker & Farrish, *supra* note 9, at 296; Ben-Shahar & Logue, *supra* note 136, at 215.

<sup>173</sup> See *supra* note 5 and accompanying text.

discussed earlier would have explicitly mandated such coverage.<sup>174</sup> Other proposals presumably intended to cover harm from unintentional behavior, like negligent storage or entrustment, that leads to an intentional shooting. Thus, the coverage exclusions needed for insurance to function as an effective regulator either would be disallowed under the mandating statute,<sup>175</sup> or would subvert the underlying goal of covering as many shootings as possible. The second issue with regulating-via-refusing-to-insure is that it serves as part of a problematic (in this context) gatekeeping function, which is discussed next.

### 5. Gatekeeping

When insurance is a prerequisite for another activity, insurers regulate by serving as gatekeepers of that activity.<sup>176</sup> “Going through the gate requires meeting the insurance companies’ standards [e.g., complying with an insurer’s loss-prevention requirements], as well as paying the necessary premiums. This gatekeeping role gives insurance companies the potential to serve as significant regulators (while at the same time making access to ‘private’ insurance an intensely ‘public’ issue).”<sup>177</sup> At the extreme, insurers can effectively make illegal a gated activity for which insurance is mandated by not offering any coverage.

Given that none of the heretofore-proposed firearm-liability regimes would have specifically required that insurers provide the mandated coverage,<sup>178</sup> such de facto illegality is a real concern. Preventing access to firearms by those who cannot meet an insurer-imposed loss-prevention standard or afford a premium may “help curb the tendency of some people to obtain arms for insubstantial reasons.”<sup>179</sup> Indeed, many individuals, including the sponsors of some proposed coverage systems, have acknowledged that they support a firearm-liability-insurance mandate because it would inhibit gun ownership.<sup>180</sup> The theory is that it would do

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<sup>174</sup> See *supra* text accompanying notes 48, 54, 79, 90 (describing proposed statutes in Washington, D.C., Illinois, Oregon, and Pennsylvania). But see *supra* text accompanying note 91 (exempting intentional but illegal acts from the Pennsylvania statute).

<sup>175</sup> This would defeat the ability to regulate by refusing to insure and result in increased moral hazard, which may in turn lead to more shootings. See *infra* Part V.B.1.a.

<sup>176</sup> Baker & Farrish, *supra* note 9, at 294.

<sup>177</sup> *Id.* at 295.

<sup>178</sup> See *supra* Part II.B.

<sup>179</sup> Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 128 (1987). But see *supra* text accompanying notes 144–45 (discussing the potentially low cost of the insurance).

<sup>180</sup> See, e.g., Kenney, *supra* note 2; Wasik, *supra* note 2; *supra* note 42 and accompanying text; see also Baker & Farrish, *supra* note 9, at 313 (noting in connection with homeowners’ policies that “owning a gun could lead to a premium surcharge, which could remove some guns from circulation”); Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 53, 57–58 (quoting Nelson Shields, co-founder of National Council to Control Handguns, as saying, “Our ultimate goal—total control of handguns in the United States—is going to take time. . . . The first problem is to slow

so selectively, making ownership impossible only for the highest risks whom insurers do not want to cover.<sup>181</sup>

But regulation via gatekeeping can implicate constitutional concerns now that the U.S. Supreme Court has declared that the Second Amendment protects an individual right to own a firearm.<sup>182</sup> The government's delegating to a private party the ability to determine who can exercise a constitutional right is troublesome. Constitutional overreach by a private party to whom governmental gatekeeping powers have been delegated should be as problematic as direct governmental overreach.<sup>183</sup> It should likewise be unacceptable for the government to impose a locked gate (i.e., an insurance requirement in the absence of insurers to write the coverage) between an individual and his or her rights.

States can require licensed insurers, as a condition of offering a given coverage line within their borders, to include firearm-liability coverage in that line's policies.<sup>184</sup> States cannot, however, either require insurers to write stand-alone firearm-liability insurance as a condition of writing other lines, or force insurers to operate within their borders.<sup>185</sup> Making liability coverage a prerequisite for firearm ownership without ensuring the availability of the insurance may thus create an effective ban on firearm ownership.<sup>186</sup> Such an effective ban is likely impermissible.<sup>187</sup>

If an insurer can set higher standards for insurability than the government, it can "prohibit you from getting insurance *and* a gun—if

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down the increasing number of handguns being produced and sold in this country. . . . And the final problem is to make possession of *all* handguns and *all* handgun ammunition . . . totally illegal").

<sup>181</sup> See Wasik, *supra* note 2. A state could require an insurer to "take all comers," or not deny any applicant coverage. The cost of insurance that an insurer would ordinarily deem too high a risk to write is certain to be very high, which may also be problematic. See *infra* text accompanying note 197.

<sup>182</sup> District of Columbia v. Heller, 554 U.S. 570, 622, 636 (2008).

<sup>183</sup> Cf. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 77, 85, 88 (1980) (denying a private property owner's ability to curtail free speech in a public shopping center); Marsh v. Alabama, 326 U.S. 501, 505, 507, 509 (1946) (prohibiting a private firm from committing civil rights violations in a company-owned town because such violations would be unconstitutional if committed by the government in an ordinary town). But see Lund, *supra* note 179, at 128 (arguing that the private insurance market would be effective in regulating where the government could not).

<sup>184</sup> Kochenburger, *supra* note 5, at 1292.

<sup>185</sup> *Id.*

<sup>186</sup> See *supra* text accompanying notes 30, 37, 59, 66, 96 and text following notes 39, 43, 52. Although a state's insurance department may have the authority to mandate coverage, only four of the proposed statutes explicitly empower their departments to do so. See *supra* text accompanying notes 47, 68, 78, 89. Unsympathetic insurance regulators could also make it difficult for an insurer to write the requisite coverage.

<sup>187</sup> See Ezell v. City of Chicago, 651 F.3d 684, 711 (7th Cir. 2011) (declaring unconstitutional a municipal ordinance that required training at a shooting range in order to lawfully possess a firearm while simultaneously banning shooting ranges). If states mandate insurance and no insurance is available, they may offer the insurance themselves, *infra* text accompanying notes 194–97, or drop the mandate, in which case the situation is back at the status quo ante. It may be that some mandates did not pass because insurers made clear that they did not want to offer the coverage.

[the] insurer deems you uninsurable.”<sup>188</sup> This may be a problem in and of itself if the burden is high enough. It is likely to be impermissible if the condition for insurability is one that infringes an explicitly recognized constitutional right.<sup>189</sup> Such would be the case, for example, if the prerequisite for owning a firearm were insurance and the prerequisite for obtaining the insurance were the employment of trigger locks or other devices that render a firearm inoperable.<sup>190</sup> The Supreme Court expressly struck down a statute with such a requirement because it effectively made self-defense too difficult.<sup>191</sup>

Even if an insurer does not deny coverage when an insured fails to follow its loss-prevention guidelines, it may want to charge a high premium for coverage. This may be a legitimate decision from the insurer’s standpoint if its actuarial calculations justify such a rate. It may, however, be an intentional effort by lawmakers and regulators to price out of the market those who are otherwise qualified to own a firearm. By setting high minimum coverage requirements or simply regulating rates, insurers would be “creating a permanent cost with owning each gun.”<sup>192</sup> Although the latter case—where legitimate would-be gun owners are priced out of the market by design—is likely more offensive,<sup>193</sup> both are de facto bars to the legitimate exercise of a right and should receive the same treatment as outright gatekeeping-driven refusals to insure.

One solution to the unwillingness or inability of insurers to cover otherwise-qualified would-be firearm owners might be for the state to insure the residual market.<sup>194</sup> Governments generally provide for residual

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<sup>188</sup> Wasik, *supra* note 2; *see also* Lund, *supra* note 179, at 128 (“[T]he private insurance market would quickly and efficiently make it prohibitively expensive for people with a record of irresponsible ownership of guns to possess them legally . . .”).

<sup>189</sup> *See* Gilles & Lund, *supra* note 8, at 21 (“The state’s burden of justification should be a heavy one when it places greater burdens on the exercise of a constitutional right than on the exercise of a non-constitutional right that involves very similar trade-offs between individual and social interests.”).

<sup>190</sup> *See supra* text accompanying notes 35, 70.

<sup>191</sup> *See* District of Columbia v. Heller, 554 U.S. 570, 630, 635 (2008).

<sup>192</sup> Pawar, *supra* note 5; *see* Gilles & Lund, *supra* note 8, at 21; Wasik, *supra* note 2. Ironically, the priced-out individuals may have the greatest need for the protection that a gun affords.

<sup>193</sup> *See* United States v. Nat’l Treasury Emp. Union, 513 U.S. 454, 457 (1995) (striking down a ban on federal employees accepting honoraria, implemented without invidious purpose, because it placed a significant financial burden on free-speech rights). *But compare* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking down, on equal-protection grounds, a facially neutral provision in the Alabama Constitution that was intentionally designed to disenfranchise Black voters), *with* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (declining to hold unconstitutional, on equal-protection grounds, a zoning decision with a discriminatory impact where no discriminatory purpose was shown).

<sup>194</sup> The residual market is typically thought of as that group of would-be insureds that private insurers are unwilling or unable to cover, but which it is decided as a matter of policy should nonetheless have access to coverage. Sometimes the government will insure these risks, sometimes the cost is spread among a state’s insurers as a whole, and sometimes a combination of both methods is used. *See Residual Markets*, INS. INFO. INST. (2013), [http://www.iii.org/issues\\_updates/residual-](http://www.iii.org/issues_updates/residual-)

markets as a matter of policy; because they are attempting to regulate a constitutional right, however, they may be required to do so as a prerequisite to mandating firearm-liability insurance. In addition, if insurers are forced to bear some of the cost of insuring the residual market,<sup>195</sup> passing the costs on to their other insureds may once again be problematic.<sup>196</sup> Thus, in the end, the states may have to bear the costs of insuring the residual market, or at least subsidize premiums enough so that the insurance requirement is not overly burdensome. State subsidies, in turn, would once again run contrary to the avowed regulatory goal of passing the costs of firearm injuries on to firearm owners. It is inherently contradictory to the goals of a firearm-liability-insurance mandate that those whose policies would be subsidized would also presumably be the high risks that mandatory insurance would price out of the market.<sup>197</sup>

#### 6. *Ex Post Underwriting*

Ex post underwriting “consists of refusing to pay out claims based on policies that were issued after the insured materially misrepresented some information at the underwriting phase.”<sup>198</sup> In theory, because an ex post refusal to pay a claim would mean that an insured would have to pay it, the insured should have great incentive to provide truthful information up front. Regulating via ex post underwriting, however, would work against the goals of mandating firearm insurance for similar reasons as would risk sharing: it would reduce the compensation available to victims by changing the situation from one in which there may be a payment, at least in theory, to the status quo of there being none in practice.<sup>199</sup>

#### 7. *Influencing Public Regulation*

The previous methods of regulation via insurance involved modifying the behavior of insureds to reduce losses. Another key way in which insurers regulate is by influencing public regulation.<sup>200</sup> Not surprisingly:

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markets.html (last visited Apr. 15, 2014); *see also* Harman, *supra* note 7 (asking whether “the state of Massachusetts [is] willing to become a big insurer of weapons”).

<sup>195</sup> *See Residual Markets*, *supra* note 194 (“Residual market programs are rarely self-sufficient. Where the rates charged to high-risk policyholders are too low to support the program’s operation, insurers are generally assessed to make up the difference.”).

<sup>196</sup> Gilles & Lund, *supra* note 8, at 20.

<sup>197</sup> *See supra* note 181 and accompanying text.

<sup>198</sup> Ben-Shahar & Logue, *supra* note 136, at 215–16.

<sup>199</sup> *See supra* notes 119–20, 157. Although there are ways in theory to restore some of the incentive without sacrificing compensation—like subrogating against insureds (by levying their assets or garnishing their wages)—these mechanisms should only be expected to function if they would also be expected to operate properly in the tort environment, absent insurance.

<sup>200</sup> Baker & Swedloff, *supra* note 9, at 1423–24; Ben-Shahar & Logue, *supra* note 136, at 213. Insurers can also encourage the private market—gun manufacturers, makers of storage devices, etc.—to make their products safer.



A liability insurance industry responsible for paying millions of dollars in gun-related claims in any given year would have an incentive to learn more about gun violence and, if it determined that there were cost-effective prevention measures, to impose those prevention measures on insureds . . . through engagement with public regulators.<sup>201</sup>

For example, insurers may lobby legislators or regulatory agencies to require that firearms that are not in use be stored with trigger locks.<sup>202</sup>

The marginal effect of insurer involvement in such lobbying may be less than expected. First, the United States already has a robust gun-control lobby that actively seeks restrictions on firearm ownership and use. Second, the actual effect on overall safety of such insurer-driven regulations is questionable; for example, the verdict is still out in the area of automobile regulation, where insurers have lobbied actively.<sup>203</sup> Third, insurers may have a monetary incentive to lobby for regulations that would *increase* claims, as long as the claims become more predictable, because they can then charge higher premiums;<sup>204</sup> more claims mean more and/or more severe injuries. Finally, a common goal of insurer regulation-via-lobbying—often characterized as “reform”—is the implementation of liability caps,<sup>205</sup> which would have the same undesired effect of reducing the ability of insurance to compensate as some of the insured-focused private regulation discussed above.

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Liability for firearm torts already exists in the absence of insurance. The calls for mandating that firearm owners purchase liability insurance imply that some believe that insurance could deter gun violence where the tort system has been unable to.<sup>206</sup> Yet, the traditional methods by which insurance regulates are likely to be less effective in the instant context. Risk-based pricing and loss-prevention services may have some positive, but ultimately marginal, effects. Mandating loss-prevention activities would also be difficult to monitor and enforce. Putting some or all of the

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<sup>201</sup> Baker & Farrish, *supra* note 9, at 312–13.

<sup>202</sup> See 38 R.C.N.Y. § 1-05(n)(3) (2013) (requiring that “[a]ll rifles and shotguns shall not be readily capable of firing”). Such a requirement may be unconstitutional. See *supra* notes 190–91 and accompanying text.

<sup>203</sup> See *infra* Part V.A.

<sup>204</sup> See Robert Kneuper & Bruce Yandle, *Auto Insurers and the Air Bag*, 61 J. RISK & INS. 107, 110–11 (1994) (describing this as the reason that auto insurers favored mandatory air-bag laws while only lukewarmly supporting mandatory seat-belt laws, and why life and health insurers did not support air-bag requirements despite (or because of) an estimated \$1.1 billion reduction in life-insurance costs).

<sup>205</sup> Baker & Farrish, *supra* note 9, at 296, 311.

<sup>206</sup> This assumes that the calls are genuine. See *supra* note 180 and accompanying text.

liability onto insureds via risk sharing, refusing to insure, *ex post* underwriting, and gatekeeping would undermine the compensatory goals of insurance by moving liability back to those who cannot bear it in the first place. Gatekeeping also faces potential constitutional difficulties, which may result in government subsidy of at least some individuals' insurance. Finally, insurer influence on government regulation is unlikely to have a positive impact on gun violence, and it may have a negative one.

This Section outlined some concerns about the ability of insurance to make gun ownership safer and to remunerate heretofore uncompensated victims of gun violence. The next Section discusses other concerns relating to addressing gun violence via insurance.

### C. Collateral Concerns About Remediating Gun Violence Via Insurance

This Section surveys some potential collateral issues with mandating liability insurance for firearm owners. It does not intend to be a comprehensive analysis, but rather a partial list of items that lawmakers should consider before mandating gun-owner liability insurance.

#### 1. Insuring in the Absence of a Market

Other than a few small-scale programs and the coverage that is provided as a part of homeowners' and renters' insurance, a liability-insurance market specifically for firearm owners does not exist.<sup>207</sup> As the President of the Insurance Information Institute has noted, "It's easier to write such laws than to actually put them into practice."<sup>208</sup> States have limited ability to compel insurers to write firearm-liability insurance within their borders.<sup>209</sup> High compliance costs would mean that there would be little profit or financial gain for insurers, at least at the outset and if they charge otherwise actuarially-fair premiums.<sup>210</sup>

Inexperience in the market would likely lead to similar problems. Insurance works by pooling risk, so "there is little experience—that is, there is no data—for either carriers or regulators to analyze and evaluate the underwriting and claims experience for this type of coverage."<sup>211</sup> This inexperience would make it impossible for insurers or insurance regulators to make coverage available<sup>212</sup> in the timeframes—as low as zero or thirty

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<sup>207</sup> Harman, *supra* note 7; *see supra* Part II.C.

<sup>208</sup> Harman, *supra* note 7.

<sup>209</sup> *See supra* notes 184–85 and accompanying text.

<sup>210</sup> *See* Kochenburger, *supra* note 5, at 1285. Insurers would likely want to build a cushion into their pricing to compensate for the uncertainty arising out of insuring a risk that they have little experience pricing on a large scale.

<sup>211</sup> *Hearing on B. 20-170, supra* note 97.

<sup>212</sup> The inexperience would interfere with their readiness in creating and approving standard forms, attempting to set pricing, etc. One proposed statute would have made the State Police responsible for implementation of its mandate. *See supra* text accompanying note 58. It is difficult to

days in some cases—that most of the statutes proposed thus far would have required.<sup>213</sup> Such timeframes would also make it difficult for purchasers to compare coverage options.

## 2. *Pointless or Duplicate Coverage*

Although there is little market experience on which to base firearm-owner liability coverage, there are some instances where insurance is unnecessary either because the law does not recognize any underlying liability or because coverage already exists.

### a. *Lack of a Claim to Cover*

There are some otherwise insurable situations in which liability cannot attach or where alternate coverage already exists. For handguns, the CSLA has created a safe-storage incentive better than any private insurer could hope: if a handgun is stored with a secure gun storage or safety device, its owner receives near-total immunity from liability.<sup>214</sup>

For other storage circumstances, it is uncertain that liability coverage would catalyze the tort system to address the criminal shootings that chiefly motivate calls for mandatory insurance, even considering tort law's ability to convert some intentional shootings into negligent ones for liability purposes.<sup>215</sup> Negligent entrustment claims are recognized by most jurisdictions,<sup>216</sup> as are negligent storage claims, where a minor gets hold of a firearm.<sup>217</sup> But many jurisdictions (including some that have considered mandatory-coverage statutes) will not recognize a claim for negligent storage where the firearm falls into an adult's hands<sup>218</sup> especially where the acquired firearm is stolen from a legal owner and subsequently used for criminal activity.<sup>219</sup> Even where liability is recognized, “the degree of care

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imagine how a police agency can implement an insurance statute, suggesting that the goals of the statute may be to hamper firearm ownership or make it impossible. Such a purpose is likely constitutionally problematic. *See supra* text accompanying note 182.

<sup>213</sup> *See supra* text accompanying notes 53, 61, 65, 76, 95. Such short implementation deadlines again suggest that the purpose of the statutes in question may be the troublesome purpose of inhibiting gun ownership. *See Kenney, supra* note 2. A 180-day or longer deadline would be more tenable. *See supra* text accompanying notes 31, 88.

<sup>214</sup> *See supra* Part II.A.2.

<sup>215</sup> *See supra* text accompanying notes 97–98, 122, 151.

<sup>216</sup> *See, e.g.,* Cohen, *supra* note 127, §§ 20–24.

<sup>217</sup> *See, e.g.,* Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1217 (2000) (“Numerous courts have held that gun owners may be liable for negligent storage where a child obtains a gun and uses it accidentally to cause harm.”). Some jurisdictions have passed child-access-prevention (“CAP”) laws that make it a crime, with some exceptions, to allow minors to access stored firearms. JOHNSON ET AL., *supra* note 13, at 893, 899; McClurg, *supra*, at 1202–03. Violation of such a law may lead to negligence per se liability.

<sup>218</sup> *See, e.g.,* Brisco v. Fuller, 623 So. 2d 196, 198 (La. Ct. App. 1993); Richardson v. Crawford, No. 10-11-00089-CV, 2011 WL 4837849, at \*8 (Tex. App. Oct. 12, 2011).

<sup>219</sup> In these jurisdictions, criminal activity is seen as a superseding intervening cause of the

demanded by some courts is so lax as to amount to no duty at all,” and of the courts that “have approved liability in stolen gun cases, . . . almost all of them involve situations where the assailant who ‘stole’ the gun was a member of the household where the gun was stored.”<sup>220</sup> In other words, the kinds of would-be negligence claims that are most naturally linked to the primary target of mandatory firearm insurance proposals—firearm crime, much of which is committed with stolen weapons<sup>221</sup>—fall outside the scope of tort liability in most jurisdictions. This does not bode well for insurance’s ability to compensate or regulate in these areas.

Jurisdictions recognizing the doctrines of contributory negligence and modified comparative fault may see a further reduced number of compensable claims,<sup>222</sup> especially considering that a substantial proportion of shooting victims are shot during the commission of a crime.<sup>223</sup> Of the

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shooting. Thus, absent a special relationship to the victim or other circumstances to put the gun owner on special notice, the owner’s alleged negligence in storing a gun cannot be a proximate cause of harm caused by a third party’s criminal misuse of it. *See, e.g.,* Jones v. Secord, 684 F.3d 1, 10 (1st Cir. 2012); Romero v. Nat’l Rifle Ass’n, 749 F.2d 77, 79, 81 (D.C. Cir. 1984); Bloxham v. Glock Inc., 53 P.3d 196, 201 (Ariz. Ct. App. 2002); James v. Wilson, 95 S.W.3d 875, 885 (Ky. Ct. App. 2002); Valentine v. On Target, Inc., 727 A.2d 947, 950–51 (Md. 1999); Lelito v. Monroe, 729 N.W.2d 564, 566–67 (Mich. Ct. App. 2006); Finocchio v. Mahler, 37 S.W.3d 300, 303–04 (Mo. Ct. App. 2000); Strever v. Cline, 924 P.2d 666, 670–74 (Mont. 1996); Blunt v. Klapproth, 707 A.2d 1021, 1030–31 (N.J. Super. Ct. App. Div. 1998); Bridges v. Parrish, 742 S.E.2d 794, 796–97 (N.C. 2013); Louria v. Brummett, 916 S.W.2d 929, 930–31 (Tenn. Ct. App. 1995); Ambrosio v. Carter’s Shooting Ctr., Inc., 20 S.W.3d 262, 269 (Tex. Ct. App. 2000); Raymond v. Craig, No. 67339-4-I, 2012 WL 5897607, at \*5–6 (Wash. Ct. App. Nov. 26, 2012); McGrane v. Cline, 973 P.2d 1092, 1094 (Wash. Ct. App. 1999); *see also* Johnstone v. City of Albuquerque, 145 P.3d 76, 83 (N.M. Ct. App. 2006) (holding that suicide, like criminal activity, is a supervening intervening cause); *At PGNH’s Request, the Senate Judiciary Committee Voted to Kill HB388—a Well-Intentioned Bill with Unintended Consequences*, PGNH (May 22, 2013), [http://www.pgnh.org/at\\_pgnhs\\_request\\_the\\_senate\\_judiciary\\_committee\\_vote\\_d\\_to\\_kill\\_hb388\\_a\\_well\\_intentioned\\_bill\\_with\\_unintended\\_consequences](http://www.pgnh.org/at_pgnhs_request_the_senate_judiciary_committee_vote_d_to_kill_hb388_a_well_intentioned_bill_with_unintended_consequences) (calling attention to a withdrawn New Hampshire bill that would have provided that “[n]o person who stores or leaves on premises under that person’s control a loaded or unloaded firearm shall be held liable in a subsequent civil case for the criminal acts of another person who illegally obtains possession or control of such firearm and uses such firearm in the commission of a felony or a misdemeanor”). The jurisdictions not listed immediately above either more easily allow negligent firearm storage claims or did not have obvious case law on the topic. In any case, “the ‘no liability’ cases outnumber the ‘pro liability’ cases.” McClurg, *supra* note 217, at 1236.

Suicide is almost always viewed as a superseding intervening cause. *E.g.,* Chalhoub v. Dixon, 788 N.E.2d 164, 168 (Ill. App. Ct. 2003); Estate of Cummings v. Davie, 40 A.3d 971, 974–75 (Me. 2012); *Johnstone*, 145 P.3d at 83. *But see* McClurg, *supra* note 217, at 1224 (noting that special knowledge of the victim’s potential for suicide may lead to an enhanced duty to store carefully); *id.* at 1224 n.267 (noting the same in the negligent entrustment context).

<sup>220</sup> McClurg, *supra* note 217, at 1220–21, 1234.

<sup>221</sup> *See supra* text accompanying note 126.

<sup>222</sup> *See, e.g.,* Cohen, *supra* note 127, § 28. Suicides are all but certain to be noncompensable in contributory-negligence and modified-comparative-fault jurisdictions—it is unlikely that a firearm owner would be more culpable than the unfortunate victim. A pure comparative-fault system may allow for some blame to fall on a stolen firearm’s owner if special circumstances are present. *See* McClurg, *supra* note 217, at 1220–21, 1234.

<sup>223</sup> *See* Marianne W. Zawitz & Kevin J. Strom, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF

jurisdictions that have proposed firearm-owner insurance regimes, the District of Columbia and Maryland follow the pure contributory-negligence approach to torts,<sup>224</sup> and Connecticut, Illinois, Massachusetts, and Pennsylvania follow the modified approach that bars negligence liability if the plaintiff is more than fifty percent at fault.<sup>225</sup> Assumption-of-risk doctrines may bar still more claims, particularly in cases of hunting and other shooting-sport accidents.<sup>226</sup> While some situations cannot result in a coverable claim because background tort law precludes liability, indirect coverage for the harms caused by many shootings already exists.

#### b. Redundant Coverage

Homeowners' and renters' insurance, and the associated umbrella policies that can be purchased to increase their limits, cover general liability (as opposed to merely liability associated with the home), including that arising from negligent shootings.<sup>227</sup> Although some of these policies exclude coverage for the types of claims at issue, some firearm-friendly and "self-defense friendly" insurers will likely continue to cover shootings arising from the policyholder's negligence.<sup>228</sup>

Health insurance will also compensate the costs of treatment for one's gunshot injuries, albeit often with a copayment or deductible. With the "individual responsibility requirement" of the Patient Protection and Affordable Care Act having come online, millions more individuals are

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JUSTICE, FIREARM INJURY AND DEATH FROM CRIME, 1993-97, at 4 (2000) (noting that, of the one-third of firearm-homicides where it was recorded, "19% [of victims] were killed during the commission of another crime"); *see also* MILWAUKEE HOMICIDE REVIEW COMM'N, 2011 HOMICIDES AND NONFATAL SHOOTINGS: DATA REPORT FOR MILWAUKEE, WI 24 (2012) (showing that 62% of homicide victims had six or more arrests, and that the median number of arrests was eight); Gilles & Lund, *supra* note 8, at 19 n.11 ("[P]ersons engaging in life-threatening violent behavior are heavily embedded in a general pattern of criminal behavior; crime is a part of their general lifestyle." (quoting Delbert S. Elliot, *Life-Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. COLO. L. REV. 1081, 1091 (1998))) (internal quotation marks omitted); Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, N.Y. TIMES, Apr. 28, 2006, at A1 (observing that, of the 1,662 murders committed in New York City from 2003 through 2005, "[m]ore than 90 percent of the killers had criminal records; and of those who wound up killed, more than half had them").

<sup>224</sup> *See* *Wingfield v. People's Drug Store, Inc.*, 379 A.2d 685, 687-88 (D.C. 1977); *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1150 (Md. 2013). The other states are Alabama, North Carolina, and Virginia. *See* *Alabama Power Co. v. Schotz*, 215 So.2d 447, 452 (Ala. 1968); *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504, 510 (N.C. 1980); *Baskett v. Banks*, 45 S.E.2d 173 (Va. 1947).

<sup>225</sup> CONN. GEN. STAT. § 52-572h(b) (2013); MASS. GEN. LAWS, ch. 231, § 85 (2013); 42 PA. CONS. STAT. § 7102(a) (2013); *Lazenby v. Mark's Constr.*, 923 N.E.2d 735, 747 (Ill. 2010). Thirty-three states follow a 50% or 51% comparative-fault system. MATTHIESEN, WICKERT & LEHRER, S.C., CONTRIBUTORY NEGLIGENCE/COMPARATIVE FAULT LAWS IN ALL 50 STATES 3-6 (2013), available at <http://www.mwl-law.com/wp-content/uploads/2013/03/contributory-negligence-comparative-fault-laws-in-all-50-states.pdf>.

<sup>226</sup> *See* 79 AM. JUR. 2d *Weapons and Firearms* § 45 (2013).

<sup>227</sup> *See supra* notes 97, 100 and accompanying text. Recall that some intentional shootings can be reclassified as ones arising from negligence. *See supra* text accompanying notes 97, 122.

<sup>228</sup> *See* MONGE, *supra* note 100, at 39, 43.

expected to be covered by health insurance.<sup>229</sup>

### 3. *Discouraging Honest—and Beneficial—Gun Ownership*

Just as there are situations where it may appear desirable to use mandatory insurance to deter or account for the costs of gun ownership, and others where coverage would be pointless or duplicative, there is some gun ownership with which insurance should not interfere. As one economist reasoned:

Adding the cost of insurance would further discourage honest gun ownership. That would make matters worse, not better. And is it so obvious that all guns are harmful to others and that gun ownership should be made more expensive to every owner? When an honest, law-abiding citizen uses a gun in self-defense, it often protects those nearby who are unarmed. Perhaps gun ownership should be subsidized for honest people. I don't think this is a good idea, but raising the cost of gun ownership, particularly for good and honest people who are likely to use a gun only in self-defense, is not a free lunch. . . . [L]iability insurance makes gun ownership more expensive for honest, law-abiding people while encouraging dishonest and dangerous people to own guns in ways we cannot see.<sup>230</sup>

The detrimental effect of discouraging beneficial firearm ownership may be substantial. Estimates drawn from studies directly measuring the yearly number of defensive gun uses (“DGUs”) that thwart a criminal attack (against the gun user or someone else) range from about 770,000 to over 3,000,000.<sup>231</sup> Another trio of commentators, using a Census Bureau survey of crime victimization that did not directly ask about defensive gun use, still inferred 108,000 DGUs.<sup>232</sup> Yet another study, which used

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<sup>229</sup> Relative to pre-Affordable Care Act figures, the number of uninsured nonelderly individuals is expected to be lower by 14 million, 20 million, 26 million, and eventually 30 million by 2014, 2015, 2016, and 2022, respectively. CONG. BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION 13, tbl.3 (2013). The share of the nonelderly population that is insured is expected to increase from 80% in 2012 to 89% in 2022. *Id.* tbl.3.

<sup>230</sup> Kenney, *supra* note 2 (quoting economist Russ Roberts, John and Jean DeNault Research Fellow at the Hoover Institution).

<sup>231</sup> See JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY, ch. 12, at 16 tbl.12-2 (online chapters forthcoming 2014) (manuscript on file with author) (describing thirteen studies [hereinafter “Thirteen Studies”] that estimated 764,036; 771,043; 777,1553; 1,098,409; 1,414,544; 1,460,000; 1,487,342; 1,621,377; 1,797,461; 2,141,512; 2,549,862; 3,052,717; and 3,609,682 DGUs annually).

<sup>232</sup> Philip J. Cook, Jens Ludwig & David Hemenway, *The Gun Debate's New Mythical Number: How Many Self-Defense Uses Per Year?*, 16 J. POL'Y ANALYSIS & MGMT. 463, 468 (1997); see also JOHNSON ET AL., *supra* note 231, ch.12, at 15 (noting that applying Cook, Ludwig, and Hemenway's

previous studies as starting points, estimated a range of 256,500 to 1,210,000 DGUs per year.<sup>233</sup>

Even the lowest of these yearly figures is about equal to the number of yearly firearm injuries.<sup>234</sup> The most trustworthy estimates, closer to 700,000 DGUs,<sup>235</sup> dwarf the number of firearm injuries. While almost all DGUs can fairly be expected to prevent a crime, not all will prevent an injury or protect property. Nevertheless, one study found that almost thirty percent of defenders believed that, had they not thwarted their attackers with a firearm, someone “almost certainly” or “probably” would have lost his or her life.<sup>236</sup> Studies have also found substantially lower injury and

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methodology to the most recent version of the National Crime Victimization Survey would yield about 97,000 DGUs annually). Studies based on underlying surveys that did not ask directly about DGUs, such as the Cook, Ludwig, and Hemenway study, have been criticized on that basis. *See id.* at 15.

Interestingly, and graciously, Cook, Ludwig & Hemenway acknowledged that the main DGU estimate that they sought to discredit, Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184 tbl.2 (1995) (one of the Thirteen Studies, estimating 2,549,862 DGUs), “was calculated by researchers affiliated with a major research university . . . using widely accepted methods and published in a topflight, peer-reviewed criminology journal,” and that “[t]heir survey appears to have been conducted according to current standards, and the results have been reproduced in several subsequent surveys.” Cook, Ludwig & Hemenway, *supra*, at 464. Another commentator opined that:

I am as strong a gun-control advocate as can be found among the criminologists in this country. . . . I would eliminate all guns from the civilian population and maybe even from the police. I hate guns. . . .

Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear. . . .

The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.

Marvin E. Wolfgang, *A Tribute to a View I Have Long Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188, 188 (1995).

Cook and Ludwig also conducted a separate study in which they estimated 1.46 million DGUs annually. PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 62–63 tbl.6.2 (1996). They argued, however, that that their results were implausibly high and that it was impossible to accurately measure DGUs. *Id.* at 68–75.

<sup>233</sup> *See* Tom W. Smith, *A Call for a Truce in the DGU War*, 87 J. CRIM. L. & CRIMINOLOGY 1462, 1468 (1997) (using as its starting points the DGU estimates arrived at in Cook, Ludwig & Hemenway, *supra* note 232, at 468, and Kleck & Gertz, *supra* note 232, at 184, tbl.2). Perhaps not coincidentally, the midpoint of Smith’s range, 733,000, is close to the low end of the figures obtained in the Thirteen Studies directly asking about DGUs. *Id.*

<sup>234</sup> *Compare supra* note 143 (listing the total number of firearm injuries for 2010 at 103,618), with text accompanying note 232 (presenting a study estimating 108,000 DGUs annually).

<sup>235</sup> *See* JOHNSON ET AL., *supra* note 231, ch.12, at 4; Smith, *supra* note 233, at 1468.

<sup>236</sup> Kleck & Gertz, *supra* note 232, at 176. Recall that even those favoring gun control acknowledge the soundness of this study’s methods. *See* Wolfgang, *supra* note 232, at 191–92.

property-loss rates among gun-using crime victims.<sup>237</sup>

Defensive gun use thus creates positive externalities. It should not be discouraged. By targeting all firearm owners, however, that is what an insurance mandate is likely to do. Indeed, just as an argument can be made that firearm owners should account to victims and society for the costs of their firearms, one can be made that defenders who prevent crime should be compensated for the injury that they forestall and the value that they save. In fact, private firearm use against criminals can be more effective and safer for third parties than police firearm use; private gun owners are more likely to thwart criminal attacks and less than one-fifth as likely as police to shoot an innocent person mistakenly thought to be a criminal.<sup>238</sup>

In sum, great care should be taken before inhibiting the societal benefits of positive firearm use. It is, as is the aspiration for gun-owner liability insurance, essentially a functional form of private regulation.<sup>239</sup>

#### IV. LIABILITY INSURANCE AS ENABLER

The previous Part discussed the role of liability insurance as a loss compensator and private regulator, and highlighted some shortcomings of

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<sup>237</sup> PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15–16 (2013) (Alan I. Leshner et al. eds., 2013); *see, e.g.*, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 115–16 (Charles F. Wellford et al. eds., 2005) (stating that defending with a gun reduces the probability of injury in assaults and robberies by 49% and 46%, respectively, and property loss in robberies by 83%, versus not defending, and that resisting without a gun is substantially more likely to lead to injury than not resisting at all). The former report was ordered by President Barack Obama and commissioned by the Centers for Disease Control and Prevention (CDC). PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE, *supra*, at 11–12. The latter report was developed by the National Academies at the request of a consortium of federal agencies and private foundations, including the CDC and the Joyce Foundation, both of which have historically “taken positions strongly favoring increased gun control.” JOHNSON ET AL., *supra* note 231, ch.12, at 2.

<sup>238</sup> *See* Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 733 (1995); Don B. Kates, Jr., *The Value of Civilian Handgun Possession as Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113, 130 (1991); John R. Lott, Jr., *Now that the Brady Law Is Law, You Are Not Any Safer than Before*, PHILA. INQUIRER, Feb. 1, 1994, at A9. These findings are not surprising. Barring great fortuity, police necessarily show up at a crime scene after a crime has begun, whereas a crime victim or a person present when a crime begins can more accurately identify the attacker. *See* Jeffrey R. Snyder, *A Nation of Cowards*, 113 PUB. INTEREST 40, 50 (1993).

<sup>239</sup> That some of the mandatory-insurance proposals would exempt peace officers suggests that the bills are attempts to inhibit individual firearm ownership rather than target the collateral harms caused by guns. *See supra* text accompanying notes 48, 75, 87. After all, even peace officers make mistakes. Indeed, based on the higher error rate among police officers, *see supra* note 238 and accompanying text, by the reasoning of mandatory insurance proponents, police departments should have to insure. Although state and local governments can act as insurers for mistaken shootings even if they do not seek to escape liability, a benefit of insurance would be that insurers are good at administering the claims, streamlining the settlement process, and avoiding the need for litigation that can be especially painful for the victim and his or her family. *See infra* Part IV.B. *But see supra* note 124 (describing how the presence of insurance may make collecting on a potential liability more difficult).



an insurance mandate along these dimensions with respect to its ability to reduce unlawful gun violence. It concluded with a word of caution that mandatory insurance may inhibit desirable gun use. This Part discusses the role of insurance in enabling socially beneficial activities, serving as a source of societal gain. Insurance's primary enabling features stem from its efficiencies in risk bearing and claims administration.<sup>240</sup>

#### A. Risk Reduction

Most importantly, “[i]nsurance allows individuals to transfer risks to insurance companies, thus reducing uncertainty about their net worth and standard of living.”<sup>241</sup> Insurers’ superior ability to diversify risk and access capital gives them an advantage over insureds in bearing risk.<sup>242</sup>

For example, without insurance a great many homeowners could not bear the risk of owning a home. For many, a large portion of their wealth is in the form of home equity.<sup>243</sup> A single catastrophe could wipe out a family’s savings. Homeowners’ insurance allows an individual, in exchange for a premium that amounts to a fraction of the value of his or her home, to transfer the risk of catastrophic loss to the insurer. The insurer is relatively unconcerned with an individual loss because the premiums of its other insureds cover the cost of the catastrophe;<sup>244</sup> it is able immediately to pay the insured’s claim by relying on its capital reserves.

Insurance can similarly enable firearm owners to engage in lawful, but not risk-free, activities, including the exercise of their constitutional and statutory rights. These activities include defending oneself or others from attack,<sup>245</sup> engaging in hunting and other sporting activities,<sup>246</sup> keeping a firearm in the home,<sup>247</sup> and participating in a citizen’s watch.<sup>248</sup> The legal

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<sup>240</sup> It can also help educate insureds on how to minimize their risks. See *supra* Part III.B.3. However, education may lead to something like a false confidence. Cf. Jon S. Vernick et al., *Effects of High School Driver Education on Motor Vehicle Crashes, Violations, and Licensure*, 16 AM. J. PREVENTIVE MED. 40, 44–45 (1999) (presenting the results of a study showing that education for high school drivers is correlated with higher accident rates).

<sup>241</sup> Doherty & Smith, *supra* note 138, at 5.

<sup>242</sup> *Id.* Inexperience in the marketplace, however, may cause premiums to be higher than what is actuarially fair. See *supra* text accompanying notes 210–11.

<sup>243</sup> See Michael Neal, Nat’l Ass’n of Home Builders, *Homeownership Remains a Key Component of Household Wealth*, HOUSINGECONOMICS.COM (Sept. 3, 2013), <http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=215073&channelID=31>.

<sup>244</sup> If catastrophic risk becomes concentrated in a single area, insurers will offload some of it by reinsuring. Neil A. Doherty, *Innovations in Managing Catastrophe Risk*, 64 J. RISK & INS. 713, 714 (1997).

<sup>245</sup> The insurance programs discussed in Part II.C are primarily intended to serve this purpose.

<sup>246</sup> See Dana Bash, *Cheney Accidentally Shoots Fellow Hunter*, CNN (Feb. 13, 2006), <http://www.cnn.com/2006/POLITICS/02/12/cheney/>.

<sup>247</sup> See *supra* text accompanying notes 97, 227.

<sup>248</sup> See *George Zimmerman Wants State of Florida to Pay for Defense Expenses*, NBC NEWS (Aug. 27, 2013), [http://usnews.nbcnews.com/\\_news/2013/08/27/20203855-george-zimmerman-wants-](http://usnews.nbcnews.com/_news/2013/08/27/20203855-george-zimmerman-wants-)

fees and expenses of defending lawsuits arising from these activities can be crushing.<sup>249</sup> Nonetheless, these activities can provide societal benefits such as preventing serious crimes,<sup>250</sup> creating jobs and generating tax revenue,<sup>251</sup> and keeping dangerous and harmful wild animal populations in check.<sup>252</sup> Sometimes an organization, like a shooting range or hunting club, will buy the insurance, enabling its members and customers to engage in firearm-related activities and practice their skills.<sup>253</sup>

Insurance can also make possible organizational activities, including those run by governments, which generate societal benefits. For example, the Boy Scouts teaches firearm safety and marksmanship<sup>254</sup> and provides insurance to protect itself and its volunteers from liability related to those activities.<sup>255</sup> In the public sphere, insurance is enabling schools to arm their staff to protect against a repeat of the Newtown, Connecticut, tragedy.<sup>256</sup> Inversely, some school administrators are finding that their

state-of-florida-to-pay-for-defense-expenses?lite.

<sup>249</sup> See *id.* (reporting that neighborhood-watch volunteer George Zimmerman, who was acquitted in a shooting that took place in his watch area, spent nearly \$300,000 defending himself, and is seeking reimbursement of his legal expenses pursuant to a Florida law).

<sup>250</sup> See *supra* Part III.C.3.

<sup>251</sup> See NAT'L SHOOTING SPORTS FOUND., FIREARMS AND AMMUNITION INDUSTRY ECONOMIC IMPACT REPORT 2012, at 1 (2012).

<sup>252</sup> See, e.g., GA. DEP'T. OF NATURAL RES., AN ASSESSMENT OF THE DEER POPULATION ON JEKYLLE ISLAND, GEORGIA AND THE MANAGEMENT IMPLICATIONS 12–13 (2011), available at [http://www.savejekyllisland.org/dnr\\_deer\\_management\\_plan.pdf](http://www.savejekyllisland.org/dnr_deer_management_plan.pdf) (stating that deer overpopulation was resulting in deer attacks on humans, vehicle collisions, landscaping damage, and other problems, and promoting sharpshooting and hunting as the preferred and cost-effective ways to control the number of deer); William F. Allan & Joann K. Wells, *Characteristics of Vehicle-Animal Crashes in Which Vehicle Occupants Are Killed*, 6 TRAFFIC INJURY PREVENTION 56, 56–59 (2005) (reporting that vehicle-deer collisions cause about 200 deaths and \$1.1 billion in property damage per year); *State Wildlife Bounty Laws by State*, BORN FREE USA, [http://www.bornfreeusa.org/b4a2\\_bounty.php](http://www.bornfreeusa.org/b4a2_bounty.php) (last visited Mar. 5, 2014) (listing state bounties on harmful animals); see also Matthew Schuerman, *Birth Control for Deer?*, AUDUBON (Feb. 8, 2002), [http://archive.audubonmagazine.org/webstories/deer\\_birth\\_control.html](http://archive.audubonmagazine.org/webstories/deer_birth_control.html) (reporting that deer contraception costs about \$1,000 for two years). This discussion would be incomplete without a mention of wild pigs, which are notoriously destructive and have led some states to adopt liberal hunting policies where they are concerned. See, e.g., *Damage by Pigs*, MISS. ST. UNIV. (June 27, 2013), <http://wildpiginfo.msstate.edu/damage-caused-by-pigs.html> (estimating annual agricultural and environmental damage at \$1.5 billion); *Rules for Shooting Feral Swine*, MICH. DEP'T NATURAL RES., [http://www.michigan.gov/dnr/0,4570,7-153-10370\\_12145\\_55230-230093--,00.html](http://www.michigan.gov/dnr/0,4570,7-153-10370_12145_55230-230093--,00.html) (last visited Feb. 17, 2014) (explaining that Michigan allows the year-round shooting of wild pigs).

<sup>253</sup> See Baker & Farrish, *supra* note 9, at 304–05.

<sup>254</sup> *Shooting Sports*, BOY SCOUTS AM., <http://www.scouting.org/home/outdoorprogram/shootingsports.aspx> (last visited Apr. 15, 2014); *Venturing Standards for Use of Firearms*, BOY SCOUTS AM., <http://www.scouting.org/sitecore/content/Home/OutdoorProgram/Safety/shooting.aspx> (last visited Apr. 15, 2014).

<sup>255</sup> See *Insurance Coverage*, BOY SCOUTS AM., <http://www.scouting.org/scoutsourc/healthandsafety/alerts/insurance.aspx> (last visited Apr. 15, 2014).

<sup>256</sup> See, e.g., John Eligon, *A Missouri School Trains Its Teachers to Carry Guns, and Most Parents Approve*, N.Y. TIMES, Apr. 15, 2013, at A10. Many understandably find the idea of armed schools distasteful. The point here is that insurance is enabling an activity that school administrators deem beneficial.

insurers would drop them if they armed their teachers, and therefore cannot engage in what they believe to be a safety-enhancing endeavor.<sup>257</sup> Perhaps not surprisingly, given the negligible impact on expected liability that the presence of firearms has on homeowners', personal liability, life, and commercial liability insurance,<sup>258</sup> some determined administrators found that "the search for another insurance provider was easier than expected," and even resulted in decreased premiums.<sup>259</sup>

## B. *Service Efficiencies*

Once an insurer develops expertise in an area, routinizes its business, and develops claims-handling efficiencies, it tends to pass the benefits of its experience onto its insureds. Indeed, this is one of the main reasons for purchasing insurance.<sup>260</sup> Two key ways in which insureds benefit is from their insurers' skills in defending claims and managing the claims process.

### 1. *Defending Insureds*

In addition to paying for or reimbursing their insureds' legal fees, it is standard practice for, and often an obligation of, insurers to directly defend their insureds against claims or to require the use of known subject-matter-expert lawyers.<sup>261</sup> In the process, they develop a great deal of defense experience from which their insureds benefit:

One specific area . . . in which insurers are almost certain to have superior expertise is the defense of lawsuits. Access to the insurer's lawyers and other defense resources can reduce the expected costs of third-party liability claims. Insurers regularly defend [cases on the subject matter of the policies that they write], whereas individual policyholders see them

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<sup>257</sup> See, e.g., Steven Yaccino, *Schools Seeking to Arm Employees Hit Hurdle on Insurance*, N.Y. TIMES, July 8, 2013, at A9. Of course, not everyone agrees that arming teachers would enhance safety. See, e.g., John Eligon, *A State Backs Guns in Class for Teachers*, N.Y. TIMES, Mar. 9, 2013, at A1. Both views have points in their favor. Compare *id.* (describing two instances in which firearms carried in schools—one by a maintenance worker and another by a police officer—accidentally discharged), with Allison Sherry, *Independence Institute Scholar Praises Utah's Laws to Prevent School Shootings*, DENVER POST: SPOT BLOG (Jan. 30, 2013, 3:35 PM), <http://blogs.denverpost.com/thespot/2013/01/30/independence-institute-scholar-praises-utahs-laws-prevent-school-shootings/89781/> (noting that Utah has allowed teachers to be armed for "several years" and that there has never been an attack at a Utah school).

<sup>258</sup> See *supra* text accompanying notes 146–50.

<sup>259</sup> Yaccino, *supra* note 257.

<sup>260</sup> Doherty & Smith, *supra* note 138, at 8, 10.

<sup>261</sup> See Baker & Swedloff, *supra* note 9, at 1421, 1429; Ben-Shahar & Logue, *supra* note 136, at 214. If intentional acts are excluded from coverage, but a plaintiff framed a lawsuit in negligence terms, conflict-of-interest rules would prohibit the insurer from controlling the defense. See Baker & Swedloff, *supra* note 9, at 1433 & n.99; *supra* text accompanying notes 97–98, 215. In this case, the insurer would have to provide independent counsel. Baker & Swedloff, *supra* note 9, at 1433 & n.99.

infrequently.<sup>262</sup>

A firearm owner with no experience defending a shooting-liability claim would have, at a very stressful time in his or her life, trouble finding a lawyer with the required subject-matter expertise. If he or she had the money to pay for the defense, it could be ruinous; if not, he or she would likely have a relatively difficult time borrowing the funds on favorable terms when facing a lawsuit. Having insurance beforehand can solve these problems.

## 2. Claim Management

In addition to specialization, insurers enjoy economies of scale in managing the claims process.<sup>263</sup> Insureds are, in effect, buying not only liability coverage, but also claim-processing, loss-assessment, and claim-settlement services that insurers can provide at significantly lower cost.<sup>264</sup>

Insurers deploy their expertise to efficiently and accurately determine fault, verify losses, assess both pecuniary and nonpecuniary losses, and negotiate payouts according to industry standards.<sup>265</sup> Once they determine that a claim is valid, they monitor the remediation process. For property damage, they can monitor repairs and maintain control over which contractors do the repairs.<sup>266</sup> Although managing the treatment process for gunshot victims would be more hands-off, and more difficult because it involves third-party coverage, insurers can audit treatment choices to ensure that they were reasonable and necessary.

## V. ADVERSE SELECTION AND MORAL HAZARD

The previous Parts discussed the likely impact of firearm-owner liability insurance on the positive and negative externalities associated with gun ownership. They also discussed the potential for insurance to result in each type of externality.

This Part continues in that vein by directly examining insureds' likely reactions to both the ability to acquire insurance and the presence of insurance after it has been acquired. In economic terms, the former is called adverse selection and the latter moral hazard. Adverse selection is the "tendency for insurance to be purchased by people who are disproportionately likely subsequently to experience an insured-against event."<sup>267</sup> Moral hazard is the tendency for insurance to reduce an

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<sup>262</sup> Doherty & Smith, *supra* note 138, at 9.

<sup>263</sup> *Id.* at 4, 6, 8.

<sup>264</sup> *Id.* at 6, 8.

<sup>265</sup> Ben-Shahar & Logue, *supra* note 136, at 213–14.

<sup>266</sup> *Id.*

<sup>267</sup> Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 271 n.164 (1996). Although an insurance mandate may compel some firearm owners to buy insurance, the riskier owners

insured's incentive to prevent or minimize losses, and thus to engage in riskier-than-normal behavior, because insurance will cover the losses.<sup>268</sup>

The following Section provides background by temporarily turning from firearms to a different type of dangerous tool, and examining whether that compulsory automobile insurance has led to more responsible driving. The subsequent Section examines the likely effect of mandatory firearm-liability insurance on gun owners' behaviors.

#### A. *The Automobile-Insurance Story*

It is a widespread assumption—held by some sponsors of bills that would have mandated firearm-owner liability insurance<sup>269</sup>—that laws requiring drivers to carry liability insurance have led to safer roads and better driving habits. The evidence is not clear-cut, however.

Auto insurance is thought to have increased safety primarily through experience rating and influencing public regulation.<sup>270</sup> In the absence of experience rating, compulsory insurance would be expected to increase moral hazard among drivers because it would remove the threat of financial loss that would otherwise hold recklessness in check. Automobile liability insurance premiums usually increase after accidents, however, so part of the inquiry becomes whether they increase enough. Auto insurers are also heavily involved in lobbying for safety regulations.<sup>271</sup> Again, now that potential financial liability from accidents is insured against, the primary question is whether the reduced expectation of harm motivates drivers to drive more recklessly because they have less fear of injury.

A review of studies, which can be grouped into those examining the effects of mandatory insurance and those examining the effects of safety regulation, is instructive. In the former category, some studies have found that neither compulsory insurance (with its experience rating) nor financial incentives for safer driver behavior have had a predictable or sustained impact on safety.<sup>272</sup> Others have found, as the theory of moral hazard

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still have incentive to buy more coverage. Also, one might buy the insurance for the gun that he or she intends to use, but not for those that he or she keeps hidden away.

<sup>268</sup> *Id.* at 239.

<sup>269</sup> See *supra* text accompanying notes 34, 41, 71.

<sup>270</sup> See, e.g., Baker & Swedloff, *supra* note 9, at 1427–28; Ben-Shahar & Logue, *supra* note 136, at 221–23.

<sup>271</sup> See, e.g., Ben-Shahar & Logue, *supra* note 136, at 222–23 (discussing the well-known example of auto insurers lobbying for air bags).

<sup>272</sup> See Sajjad A. Hashmi, *The Effect of Compulsory Automobile Liability Insurance on Highway Safety*, 7 BUS. SOC'Y. 13, 15, 17 (1967) (showing no correlation between compulsory liability insurance and highway safety); Leon S. Robertson, *Insurance Incentives and Seat Belt Use*, 74 AM. J. PUB. HEALTH 1157, 1157–58 (1984) (asserting that financial incentives, via insurance or otherwise, for seat belt use have, at best, a short term effect).

would predict, a correlation between compulsory insurance and an increase in accident injuries and loss costs.<sup>273</sup> With firearm-liability premiums likely to be lower than those for automobile liability,<sup>274</sup> the negative incentive effects may be worse in the firearm setting.

The findings are more optimistic when it comes to the effects of safety regulations, though in some ways more worrisome. Although some studies conclude that safety regulations have led to more accidents and no decrease in overall injuries,<sup>275</sup> there is general accord that safety devices have decreased injuries.<sup>276</sup>

Troublingly, and again in accord with moral hazard theory, improved vehicle safety for occupants (whose behavior, recall, is also unrestrained by fear of financial loss) causes drivers to be more reckless, and the saving of auto occupants' lives results in more pedestrian and other non-occupant deaths.<sup>277</sup> This type of trade-off would be especially problematic in the gun-use context. Further, insurers' financial incentives, and therefore their lobbying incentives, do not always correlate with greater safety. Indeed, their lobbying efforts have been shown to result in increased loss costs.<sup>278</sup>

In sum, the impact of insurance on auto safety is at best unclear. At worst, it has made driving less safe for both drivers and bystanders. As even one insurance-industry representative has discussed, "As a public policy matter, liability insurance is ineffective and ultimately proves to be unpopular. . . . [T]he reality indicates that the hoped-for results don't really occur."<sup>279</sup> It often "only enrich[es] middlemen while fail[ing] to address

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<sup>273</sup> See, e.g., Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Safety*, 47 J.L. & ECON. 357, 373–78 (2004) (discussing increased traffic fatalities); Tony Attrino, *Compulsory Auto Laws Blasted*, NAT'L UNDERWRITER, Sept. 7, 1998, at 2, 65 (discussing rising loss costs). It is difficult to find studies conclusively stating that compulsory insurance has led to increased road safety via experience rating. See Baker & Swedloff, *supra* note 9, at 1428. Some commentators nevertheless seem, at least tentatively, to believe that it has. See, e.g., Ben-Shahar & Logue, *supra* note 136, at 220–21; Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677, 684 (1975).

<sup>274</sup> See *supra* text accompanying notes 144–50.

<sup>275</sup> See, e.g., Peltzman, *supra* note 273, at 677, 721.

<sup>276</sup> See, e.g., PETER W. HUBER & ROBERT E. LITAN, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 206 (1991); NAT'L SAFETY COUNCIL, *INJURY FACTS* 102–03 (2011); Robert W. Crandall & John D. Graham, *Automobile Safety Regulation and Offsetting Behavior: Some New Empirical Estimates*, 74 AM. ECON. REV. 328, 330 (1984); Kneuper & Yandle, *supra* note 204, at 109 & n.2.

<sup>277</sup> See HENRY N. BUTLER ET AL., *ECONOMIC ANALYSIS FOR LAWYERS* 380 (3d ed. 2014); Crandall & Graham, *supra* note 276, at 328, 330; Peltzman, *supra* note 273, at 677, 717.

<sup>278</sup> See *supra* text accompanying note 204.

<sup>279</sup> Harman, *supra* note 7 (citing David Snyder, Vice President of International Policy at the Property Casualty Insurers Association of America). These studies do not speak of automobile liability insurance's success at compensating injured parties who otherwise could not collect. Some may decide that more injuries, even to innocent pedestrians, are acceptable if it means that more people are compensated overall. Such a decision should not be made lightly.

[its] social aim.”<sup>280</sup>

With lessons from the automotive sector in mind, the following Section considers how adverse selection and moral hazard might manifest itself in the context of gun ownership.

### B. *The Likely Firearm Insurance Story*

The greatest fear surrounding mandatory liability coverage for firearm owners is that it could lead to more gun violence. An increase in the reckless treatment of guns, driven by a decreased fear of financial consequences,<sup>281</sup> is more disconcerting than analogous events in the automobile context because a shooting is far more likely to result in death than an automotive injury.<sup>282</sup> The problem is likely to be exacerbated if premiums are low.<sup>283</sup>

This Section considers whether and how gun owners’ expected behaviors might change as a result of insurance availability. It discusses the insuring of: (1) losses caused by intentional (including malicious and defensive) shootings by gun owners; (2) losses caused by shootings resulting from the owner’s negligence; and (3) firearms themselves against theft.

#### 1. *Intentional Shootings by Firearm Owners*

Intentional shootings by gun owners include criminal and defensive shootings. The incentive issues associated with each are considered in turn.

##### a. *Intentional Criminal Shootings*

Liability insurance currently does not cover intentional criminal harms.<sup>284</sup> This is “the kind of behavior that is so unacceptable that [insurers are] not going to offer liability insurance for it.”<sup>285</sup> In a few

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<sup>280</sup> *Id.*

<sup>281</sup> See Bunn, *supra* note 4 (quoting the American Insurance Association as saying “[i]t could have the opposite of its intended effect’ . . . . The laws may lead to reckless actions by gun owners who ‘will not have their own assets, property or income at stake’ . . . . It would be a sad irony if the outcome of such a mandate was more gun violence”).

<sup>282</sup> See *supra* note 143 (showing, in the compiled table, that shooting injuries are about 3, 49, and 16 times more likely to result in death for accidents, assaults, and self-harm incidents, respectively, than corresponding automobile injuries).

<sup>283</sup> See, e.g., Gilles & Lund *supra* note 8, at 21; *supra* text accompanying notes 144–45.

<sup>284</sup> See Stephanie K. Jones, *Interest in Personal Gun Liability Insurance Protection Increasing*, INS. J. (Apr. 11, 2013), <http://www.insurancejournal.com/news/national/2013/04/11/288010.htm> (“Insurers don’t cover illegal acts, ever, period.” (quoting Dr. Robert Hartwig, President of the Insurance Information Institute)). *But cf. id.* (citing some rare exceptions and partly analogous situations).

<sup>285</sup> Jay MacDonald, *Gun Owners Seek Out Self-Defense Insurance*, BANKRATE.COM (Feb. 1, 2013), <http://www.bankrate.com/finance/insurance/gun-owners-seek-self-defense-insurance.aspx> (quoting Tom Baker, William Maul Measey Professor of Law and Health Sciences, University of

instances, covering illegal acts could encourage malicious shootings by transferring the risk of tort liability and the costs of defense to insurers.<sup>286</sup> It is difficult, however, to imagine that an individual who is intent on shooting another would be deterred by tort liability or the prospect of increased premiums if he or she is not deterred by criminal sanctions for homicide.

One approach for avoiding adverse selection and moral hazard in intentional shootings might be for the insurer to subrogate against the insured for claims arising out of criminal shootings.<sup>287</sup> Yet, even this solution is only likely to work in the rare cases where such a shooting is committed by an individual with assets and on whom a court is willing to impose liability.<sup>288</sup> And the only real benefits in those cases would be that the victim could efficiently settle with the insurer rather than litigate with the shooter, and that the insurer would have an advantage over the victim in collecting from the shooter.<sup>289</sup> These benefits could be offset, however, by the insurer's superior skill in fighting the claim.<sup>290</sup>

Covering intentional criminal shootings is thus a bad idea because insurance should not be expected to deter such shootings, and may encourage them.<sup>291</sup> If it is mandated, so should subrogation, which would (mostly in theory, given that so many shooters are judgment-proof) allocate some of the financial costs of the shooting back onto the shooter.

#### b. *Defensive Shootings*

Although defensive shootings are intentional, they are fortuitous inasmuch as a victim does not plan to be attacked. Their social palatability generally ranges from worried acceptance to affirmative encouragement. Where one's views fall on this spectrum presumably depends on how much faith one has in an individual's ability to defend him- or herself and others without causing collateral injuries. As the evidence presented above

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Pennsylvania Law School). Suicides fall into the same category. In a gun-owner suicide, a liability policy would essentially serve as a life insurance policy.

<sup>286</sup> See *supra* text accompanying note 241. In any case, recall that it is unlikely that tort liability will be a meaningful factor in deterring or compensating for intentional shootings. See *supra* Part III.

<sup>287</sup> Baker & Farrish, *supra* note 9, at 313 n.63.

<sup>288</sup> See *supra* text accompanying notes 123–24.

<sup>289</sup> Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 66, 74 (David M. Engel & Michael McCann eds., 2009); see *supra* Part IV.B.2.

<sup>290</sup> See *supra* Part IV.B.1. An insurer would presumably have a duty to defend its insured at least until the insured was found guilty. A no-contest or other plea resulting in a penalty would also suffice.

<sup>291</sup> See *supra* text accompanying notes 272–73. Nonetheless, some proposals would have explicitly or impliedly covered such shootings. See *supra* text accompanying notes 28, 48, 54, 79. Pennsylvania's proposal was the only one that would have explicitly excluded unlawful acts from coverage. See *supra* text accompanying note 91. One pair of commentators believes that mandating coverage of criminal shootings would probably be unconstitutional. See Gilles & Lund, *supra* note 8, at 19.



shows, citizens are both effective and precise in their defensive gun uses.<sup>292</sup>

Although a number of homeowners' and general liability policies may cover (i.e., make exceptions to their intentional-act exclusions) losses resulting from the reasonable use of force to protect persons and/or property,<sup>293</sup> the DGUs measured in the surveys conducted to date did not occur under a mandatory firearm insurance regime. Indeed, many of the gun owners likely did not know that their self-defense acts could potentially be covered by homeowners' or other liability insurance.

The imposition of a separate compulsory liability system would alert gun owners to the presence of insurance. If this knowledge leads to less care in making the choice to use a weapon in a self-defense situation, then the insurance would be socially undesirable. If it leads to a reduction in over-cautiousness,<sup>294</sup> however, which in turn leads to more instances of legitimate and effective defense, insurance would be desirable.<sup>295</sup>

## 2. Shootings Resulting from Firearm Owners' Negligence<sup>296</sup>

The typical goal of liability insurance is to cover insureds' negligence.<sup>297</sup> Cases where a firearm is under the owner's direct or indirect control—where it has not been stolen or entrusted to another—are the most analogous to the automobile context. In these situations, one can reasonably expect insureds' behavior to parallel that of insured drivers—they are likely to become less careful.<sup>298</sup>

Negligent entrustment and negligent storage situations are more nuanced. Many of these situations involve a minor injuring someone. In

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<sup>292</sup> See *supra* Part III.C.3.

<sup>293</sup> See MONGE, *supra* note 100, at 39–45; Kochenburger, *supra* note 5, Part II.C.2.

<sup>294</sup> Such over-cautiousness is not without merit. See Patrik Jonsson, *George Zimmerman Arrest: Proof that the System Worked—or Failed?*, CHRISTIAN SCI. MONITOR (Apr. 12, 2012), <http://www.csmonitor.com/USA/2012/0412/George-Zimmerman-arrest-Proof-that-the-system-worked-or-failed> (quoting Professor Nicholas J. Johnson as saying that “[t]he thing that’s clear now to everybody is that no matter where you are, whether you’re in Florida or some other American jurisdiction, if you shoot someone and claim self-defense, and the circumstances are questionable, you have unleashed a nightmare for yourself”).

<sup>295</sup> Cf. *State v. Villanueva*, 311 P.3d 79, 82–83 (Wash. Ct. App. 2013) (holding that respondent properly was awarded reimbursement legal defense costs and lost wages following acquittal based on finding of use of firearm in self-defense). Such a situation, where increased consumption driven by the presence of insurance creates a positive outcome, is called “efficient moral hazard.” See generally John A. Nyman, *Consumer-Driven Health Care: Moral Hazard, The Efficiency of Income Transfers, and Market Power*, 13 CONN. INS. L.J. 1 (2006).

<sup>296</sup> Though the term “liability insurance” implies that the insured must be liable for insurance coverage to apply, some proponents may also envision the coverage to cover acts where the gun owner took proper care. The moral-hazard concerns described in this Section should apply to those gun owners as well.

<sup>297</sup> See *supra* note 97 and accompanying text.

<sup>298</sup> See *supra* Part V.A. One pair of commentators believes that mandating coverage of such accidental shootings would be constitutionally problematic unless it was done via homeowners' and renters' policies. See Gilles & Lund, *supra* note 8, at 19–20.

these cases, the owner is often already subject to criminal liability, the fear of which should mostly or entirely negate any inclination to take less care because of the presence of insurance coverage.<sup>299</sup> In situations that do not involve minors, however, the moral hazard problem would be at its apex because there would be little doubt of coverage where insureds do not commit any intentional acts. In cases where tort liability would stick, insurance would take a non-judgment-proof party's skin out of the game. A judgment-proof party would not have skin in the game in the first place, but here the incentive to take care is presumably already low, perhaps only to be made even lower if he or she actually obtains insurance.<sup>300</sup>

### 3. *Insuring Firearms Against Theft*

At least one commentator has suggested that firearm owners should be required to carry theft insurance on their weapons, believing that this "would provide an effective incentive for proper firearm storage."<sup>301</sup> It is difficult to fathom how reducing the cost of having a firearm stolen would increase the likelihood that it is stored so as to prevent theft. One would expect the opposite result in this textbook example of moral hazard.<sup>302</sup>

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This Part considered the likely behavior of gun owners who maintained mandatory firearm-liability insurance. The next Part goes further, asking what the uptake of insurance would be in the first instance.

## VI. DEFIANCE

Using the backdrop of current law and proposals put forth to date, this Article has thus far discussed the expected interplay between a compulsory firearm-owner liability insurance regime, the environment in which it operates, and the insurers and insureds whom it would affect. This Part tests the premise that firearm owners would comply with an insurance mandate to a degree where one might deem it a success.

For a mandatory insurance system to function, the targets of the system

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<sup>299</sup> See McClurg, *supra* note 217, at 1202.

<sup>300</sup> See *supra* Part III.A.

<sup>301</sup> Pohlman, *supra* note 5.

<sup>302</sup> The carrying by a single insured of theft insurance on his or her firearms, in addition to firearm-liability insurance, might also lead to a risk for the insurer that is greater than the sum of its parts: liability insurance would increase the incentive to store improperly inasmuch as it would shield the owner against tort liability, but the owner would still be out the cost of the firearm. Theft insurance would take care of the firearm's cost, further increasing the incentive to store the firearm in the open where it can be found and used to injure someone. A multi-policy *penalty*, where an insured who carries both theft and liability insurance would pay a premium that is greater than the sum of what the premiums would be if he or she maintained only one or the other type of coverage, may make sense under these circumstances.

actually have to insure. Satisfying this basic premise has proven difficult in the automobile context,<sup>303</sup> and promises to be far more problematic in the firearm context.

Although there is little doubt that criminals will not insure, it is first worth discussing whether otherwise ordinary and law-abiding Americans would resist a large-scale insurance mandate.

#### A. *Insurance As De Facto Registration*

An effect of mandatory insurance would be to provide insurance companies with a substantial amount of information about insureds. Even if insurers were uninterested in the number and types of firearms owned by each insured,<sup>304</sup> it appears that many of the proposals put forth by legislators to date intended to mandate firearm-specific coverage.<sup>305</sup> The amount of data stored by insurers is vast, and it is standard practice for them to share the data for purposes of developing pricing models and ensuring that insureds are truthful on their coverage applications.<sup>306</sup>

A question asked by many gun owners will be whether, and to what extent, the firearm-specific information will be protected. Constitutionally mandated protection would satisfy the greatest number of firearm owners, but even that would not satisfy many: courts can reinterpret it<sup>307</sup> and it may

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<sup>303</sup> The Insurance Research Council estimates that 13.8% and 14.3% of motorists were uninsured in 2009 and 2008, respectively, and that rates vary between states from 4.5% to 28%. Press Release, Ins. Research Council, Recession Marked by Bump in Uninsured Motorists: IRC Analysis Finds One in Seven Drivers Are Uninsured (Apr. 21, 2011), available at [http://www.insurance-research.org/sites/default/files/downloads/IRCUM2011\\_042111.pdf](http://www.insurance-research.org/sites/default/files/downloads/IRCUM2011_042111.pdf); see also Attrino, *supra* note 282, at 2 (“With an estimated 15 percent of the national population driving without liability insurance, a report from the National Association of Independent Insurers questions the effectiveness of compulsory auto insurance laws.”).

<sup>304</sup> See *supra* text accompanying notes 146–49.

<sup>305</sup> See *supra* text accompanying and surrounding notes 44, 49, 55, 62, 72, 82–83, 93. Oregon’s statute would have further required owners to report firearm transfers to the police. See *supra* text accompanying note 83.

<sup>306</sup> Cf. SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY 136–42 (2000) (describing the Medical Information Bureau’s sharing of insureds’ medical information); Ben-Shahar & Logue, *supra* note 136, at 206 n.18 (stating that insurers send “two billion detailed records” on insureds’ premium and loss history to a central rating bureau that turns it into information used for pricing and loss-mitigation purposes); *C.L.U.E. Report*, LEXISNEXIS, [https://personalreports.lexisnexis.com/fact\\_act\\_claims\\_bundle/landing.jsp](https://personalreports.lexisnexis.com/fact_act_claims_bundle/landing.jsp) (last visited Feb. 19, 2014) (describing the Comprehensive Loss Underwriting Exchange reports available from LexisNexis); *The Facts About MIB*, MIB.COM, [http://www.mib.com/facts\\_about\\_mib.html](http://www.mib.com/facts_about_mib.html) (last visited Feb. 19, 2014) (describing itself as an insurer-supported “information exchange . . . [that deals in] coded reports represent[ing] different medical conditions and other conditions (typically hazardous hobbies and adverse driving records) affecting the insurability of the applicant”). The MIB’s website is worth perusing for the insight it provides, albeit in euphemistic terms, into the extent to which insurers share information.

<sup>307</sup> As Professor Nicholas J. Johnson wrote,

not be strong enough to prevent improper law-enforcement access.<sup>308</sup>

Many firearm owners fear registration because they believe that it is a prerequisite to firearm confiscation. Many are likely to view an insurance mandate—which will at least identify as a firearm owner anyone who insures, and may identify the specific firearms owned—as a backdoor method of registration. Such a concern is understandable given the admissions to this effect by proponents of both compulsory insurance and gun control,<sup>309</sup> and that “[t]he progression from registration to confiscation has occurred both domestically and internationally.”<sup>310</sup>

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Before the ink was dry on the Supreme Court’s 5-4 decision in *Heller*, holding that the Second Amendment guarantees an individual the right to bear arms, speculation began about how robust and enduring that right would turn out to be. With only one vote between the opinion by Justice Scalia and something entirely different, the stage is set for confirmation controversies involving a nominee’s commitment to stare decisis, strict construction, originalism, and other coded inquiries intended to determine whether the nominee would vote to uphold, undermine, or reverse the result in *Heller*. This is entirely understandable. It seems inevitable in modern America that today’s losers on big constitutional questions will view a changed lineup on the Court as more promising than the long work and long shot of a constitutional amendment.

Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 839 n.9 (2008).

<sup>308</sup> See James X. Dempsey & Lara M. Flint, *Commercial Data and National Security*, 72 GEO. WASH. L. REV. 1459, 1468–69 (2004) (describing government use of private data). And then there are the massive domestic-spying efforts of the National Security Agency (NSA), to which no law seems to apply. See, e.g., Charlie Savage & Scott Shane, *Top-Secret Court Castigated N.S.A. on Surveillance*, N.Y. TIMES, Aug. 22, 2013, at A1 (stating that a secret court had declared the NSA’s domestic spying unconstitutional in 2011, but that the spying continues). Personal privacy is another reason for individuals to keep their personal information out of insurers’ hands. But leaks happen, and they are all but impossible to contain. Not only may containment be unlawful, see, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (holding that the federal government could not enjoin major newspapers from publishing classified documents), but the speed with which information can spread on the Internet may make it impossible; see Michael Roppolo, *FOIAed Again: “Gun Map” Newspaper Seeks More Info on Firearms Owners*, FOXNEWS.COM (July 3, 2013), <http://www.foxnews.com/us/2013/07/03/foiaed-again-gun-map-newspaper-seeks-more-info-on-firearms-owners/> (describing the posting to the Internet of personal information about holders of New York handgun permits).

<sup>309</sup> See Emily Miller, *New Jersey Bill Is Outright Gun Ban on .22-Caliber Rifles and Leads to Confiscation*, WASH. TIMES (Feb. 28, 2014), <http://www.washingtontimes.com/news/2014/feb/28/new-jersey-bill-is-outright-gun-ban-on-22-caliber-/?page=all#pagebreak> (describing an incident in the New Jersey legislature where a speaker was caught on a hot microphone saying, “We needed a bill that was going to confiscate, confiscate, confiscate”); *supra* note 180 and accompanying text; see *infra* text accompanying note 326.

<sup>310</sup> Johnson, *supra* note 307, at 868; see James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Control’s Next (and Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 105–06 (1998). Confiscations have happened domestically in the last few decades in New Orleans, Washington, D.C., New York City, California, and New Jersey. See *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 130 (3d Cir. 2010) (holding that state authorities’ confiscation of an out-of-state gun-owner’s firearm did not violate his Due Process rights); Stephen P. Halbrook, “*Only Law Enforcement Will Be Allowed to Have Guns*”:

Rightly or wrongly, Americans have more ingrained reasons to defy insurance mandates that they believe may lead to confiscation. These include an exceptional cultural attachment to firearms, a belief that they have a right to own a gun coupled with a penchant for defensiveness of their rights, and a belief that firearms are important for their security in a context where government is unable or unwilling to protect them.<sup>311</sup>

In other words, there are reasons to believe that many otherwise-law-abiding firearm owners would respond to an insurance mandate the same way that they have responded to mandatory gun registration: by defying it.

Worldwide defiance ratios of mandatory gun-registration programs average 2.6 withheld guns for each registered one.<sup>312</sup> U.S. defiance rates, however, are estimated to be much higher in the limited examples available from jurisdictions not known for their pro-gun attitudes: in connection with state or city “assault weapon” bans, New Jersey saw 98% to greater-than-99% defiance, Boston and Cleveland saw 99% defiance, and California saw 90% defiance or more.<sup>313</sup> An estimated 90% of secondary-market handgun transfers in Massachusetts are unrecorded despite mandatory registration.<sup>314</sup> If the New York Police Department’s estimates about the

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*Hurricane Katrina and the New Orleans Firearm Confiscations*, 18 GEO. MASON U. C.R. L.J. 339, 339 (2008) (describing how police officers confiscated lawfully-possessed guns in the wake of Hurricane Katrina); Johnson, *supra* note 307, at 868–69 & nn.143–45 (noting numerous examples of registration leading to confiscation). It was also attempted in Massachusetts. See David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1558–65 (2012) (discussing a failed legislative attempt to confiscate all handguns); see also Cheryl K. Chumley, *NYC Alarms with Notice: “Immediately Surrender Your Rifle,”* WASH. TIMES (Nov. 28, 2013), <http://www.washingtontimes.com/news/2013/nov/28/nyc-alarms-notice-immediately-surrender-your-rifle/> (discussing the efforts of New York City law enforcement authorities in confiscating firearms in the city that violated newly enacted magazine-capacity laws). Internationally, confiscation happened in, among other countries, England, Canada, and Australia—the nations that are arguably most like ours. Johnson, *supra* note 307, at 869 & nn.146–48.

Earlier cases of domestic and international firearm confiscation have been outright malign. See, e.g., JOHNSON ET AL., *supra* note 13, at 289–93 (describing the confiscation of arms from, and subsequent terrorizing of, freed slaves); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 600 (1995) (describing Communist and Nazi firearm registrations and confiscations); Doug Giles, *Bitter, Clingy Gun Owners of America*, TOWNHALL.COM (Apr. 26, 2008), <http://townhall.com/columnists/doug-giles/2008/04/26/bitter%2c-clingy-gun-owners-of-america/page/full> (describing situations where firearm confiscations were followed by genocides).

<sup>311</sup> See, e.g., Johnson, *supra* note 307, at 848–51, 855–56, 860–63 & nn.47, 52–53, 56, 58, 60, 113, 116 (discussing the psychological tendencies of many gun-owners to defy registration mandates, largely arising from a fear of confiscation).

<sup>312</sup> Aaron Karp, *Completing the Count: Civilian Firearms*, in SMALL ARMS SURVEY 2007: GUNS AND THE CITY 39, 55 (Eric G. Berman et al. eds., 2007).

<sup>313</sup> Jacobs & Potter, *supra* note 310, at 106; see Seth Mydans, *California Gun Control Law Runs into Rebellion*, N.Y. TIMES, Dec. 24, 1990, at A1 (stating that an estimated 97.6% of firearms defined as assault weapons had not been registered in California with a week remaining before the expiration of the one-year registration period).

<sup>314</sup> Jacobs & Potter, *supra* note 310, at 106–07.

total number of unregistered firearms in the city are to be believed, then New York City, where all firearms must be registered, has a defiance rate in the range of 95%.<sup>315</sup> In New York State, an official statement from the Governor's Office said of a new registration requirement that "[m]any of these assault-rifle owners aren't going to register; we realize that," and acknowledged that the Office knew of a planned boycott and expected "widespread violations" of the new law.<sup>316</sup> In addition, a looming insurance mandate is likely to drive would-be defiers to stock up on guns before the mandate goes into effect.<sup>317</sup> Indeed, it may be that people are buying guns *now* given that insurance mandates are being discussed.

While an insurance requirement is admittedly one step removed from pure registration, many are likely to view it as a small step. It is reasonable to assume that individuals willing to risk jail time to keep a firearm unregistered will be willing to risk a lower penalty to keep an otherwise-legal firearm uninsured. Whatever the ultimate defiance rate would be, with roughly three hundred million privately-owned firearms in the country,<sup>318</sup> the number of unregistered weapons is likely to be enormous.<sup>319</sup>

Noncompliance is also likely to affect the behavior of withholders. In alignment with the safety goals of mandatory insurance, those who defy insurance requirements can be expected to guard their firearms more closely from theft to avoid being found guilty of status crimes.<sup>320</sup> On the

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<sup>315</sup> This estimate suffers from two imprecisions. First, it is calculated by comparing the roughly 93,164 registered firearms in the City in 2011, Jo Craven McGinty, *The Rich, the Famous, the Armed*, N.Y. TIMES, Feb. 20, 2011, at MB6, to the estimated two million illegal firearms in the City in 1993, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, PROMISING STRATEGIES TO REDUCE GUN VIOLENCE 100 (1999). Second, the estimate of two million illegal firearms in the City should be viewed with some skepticism given that the City's total population in 1993 was somewhere between 7.3 and 8 million. *New York City Dep't of City Planning, Population 2000 Census Summary*, NYC.GOV, <http://www.nyc.gov/html/dcp/html/census/pop2000.shtml> (last visited Feb. 19, 2014). If the figure is in fact correct, it suggests that many New Yorkers who claim to favor more gun control and would likely support an insurance mandate would nonetheless defy it. "[A]n inventory this large suggests that many New Yorkers have had guns, have been acquiring guns, and have been deciding to keep guns illegally for a long time." Johnson, *supra* note 307, at 852.

<sup>316</sup> Fredric U. Dicker, *Hit Us with Your Best Shot, Andy!*, N.Y. POST (Jan. 21, 2013), <http://nypost.com/2013/01/21/hit-us-with-your-best-shot-andy/>.

<sup>317</sup> See Clark A. Wohlferd, Recent Development, *Much Ado About Not Very Much: The Expiration of the Assault Weapons Ban as an Act of Legislative Responsibility*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 471, 479–80 & n.64 (2005) (noting that, prior to a ban of so-called "assault weapons," individuals and dealers "stocked up on weapons in order to circumvent the impending ban").

<sup>318</sup> JOHNSON ET AL., *supra* note 231, ch.12, at 7.

<sup>319</sup> Using the international defiance rate, which is likely very low for the United States, suggests more than 216 million uninsured weapons. While some of the unregistered weapons could conceivably be found, a great many are "no-paper" firearms—those which have no paper trail leading to the current owner—in the country that are effectively impossible to locate absent some action by their owners. Johnson, *supra* note 307, at 869–71.

<sup>320</sup> See Johnson, *supra* note 307, at 861–62.

other hand, if the withheld firearms are stolen, their now-criminal<sup>321</sup> owners will have no incentive to report the theft to law enforcement.<sup>322</sup> Turning a great many firearm owners into criminals can lead to other unwanted consequences, discussed in the next Section.

### B. *Impact on Criminal Behavior*

Proponents and skeptics of gun-liability insurance mandates agree that perpetrators of firearm violence will neither insure nor be deterred from firearm use because of an insurance requirement.<sup>323</sup> The usefulness of insurance thus depends on the time it takes for an insured owner to report a firearm lost or stolen.<sup>324</sup> While encouraging owners to report firearms that have left their control may indeed be beneficial, a direct statutory command is more likely to achieve that end,<sup>325</sup> especially given the presumed unwillingness of individuals to report the theft of an illicitly uninsured firearm, and without the problems with involving the insurance machinery.

Mandatory insurance is also advocated as a mechanism to prevent straw purchases—situations where one who may otherwise lawfully purchase a firearm buys one for someone who may not. The theory is that: (1) the prospect of having to commit insurance fraud (by not checking whether the buyer has insurance or by reporting a stolen or lost firearm that has actually been given to another) would deter straw purchasers; and (2) insurance would serve as a form of registration that would either require a purchaser to keep paying premiums on straw-sold guns or report

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<sup>321</sup> See *supra* text accompanying notes 46, 52, 57, 69. Beyond criminal liability, owners would face civil penalties of up to \$10,000. See *supra* text accompanying notes 29, 86.

<sup>322</sup> Johnson, *supra* note 307, at 864, 871. One potential solution to this problem of unreported thefts is to provide a safe harbor for the reporting of such thefts.

<sup>323</sup> See Gilles & Lund, *supra* note 8, at 19 & n.11; Pawar, *supra* note 5; Taranto, *supra* note 7; Wasik, *supra* note 2. But see Pohlman, *supra* note 5 (stating that a criminal record would be one factor to go into a premium calculation). It is unclear how this calculation would work for the types of criminals that are of concern here given that felons (and domestic-violence misdemeanants) are already prohibited from possessing firearms and that insurers cannot be expected to insure the firearm possession of those who may not possess firearms. 18 U.S.C. § 922(g) (2012). There may also be self-incrimination problems with mandating insurance for criminals. See *supra* note 125.

<sup>324</sup> Four states' proposals explicitly tied the coverage window to the reporting of a firearm's theft or loss. See *supra* text accompanying notes 50, 56, 74, 85. For the other states, tort law's proximate-cause doctrines would presumably govern.

<sup>325</sup> Cf. Cassandra R. Cole et al., *The Uninsured Motorist Problem: An Investigation of the Impact of Enforcement and Penalty Severity on Compliance*, 19 J. INS. REG. 613, 614 (2001) (arguing that requiring insurance is more effective than providing financial incentives to maintain insurance). A bill that would have required gun owners to report a theft or loss within seven days was recently vetoed in California. Josh Richman, *A List of California Gun Bills Signed or Vetoed by Gov. Jerry Brown*, INSIDEBAYAREA.COM (Oct. 11, 2013), [http://www.insidebayarea.com/news/ci\\_24291225/list-california-gun-bills-signed-or-vetoed-by](http://www.insidebayarea.com/news/ci_24291225/list-california-gun-bills-signed-or-vetoed-by).

an excessive number of guns lost or stolen.<sup>326</sup> It is unlikely, however, that someone who is undeterred by the potential of a ten-year prison sentence for making a straw purchase<sup>327</sup> would be daunted by the addition of insurance fraud liability, and using insurance as a gun-registration tactic would exacerbate the fears of confiscation and increase the incentive for defiance that are inevitably created by any registration regime.<sup>328</sup> In any case, given that straw sales account for a small portion of crime guns,<sup>329</sup> the drawbacks of an insurance mandate are likely to outweigh any benefit from the marginal cases where insurance may dissuade straw sales.

An insurance mandate also has the potential to create a black market where people pay more for never-insured, no-paper firearms that have never been recorded in an insurer's systems.<sup>330</sup> Not only do Americans own several-hundred million firearms with which to fuel this market, but "our borders are permeable, . . . guns and ammunition are relatively easy to manufacture,"<sup>331</sup> and the illicit international arms trade is robust.<sup>332</sup>

Two potential benefits of a shift from a legal market from the perspective of those who favor more difficult access to firearms are that an insurance requirement would make firearms more expensive for those who would use them for crime and create incentives for gun owners to retain them.<sup>333</sup> Though these effects assume both that the demand for firearms is elastic and that the illicit international trade (and existing domestic gun stock) would not adequately meet the post-insurance-mandate demand, they are likely relatively safe bets.<sup>334</sup> More dangerous are the possibilities that "some contraband imported guns will be more lethal than the ones

<sup>326</sup> See John Wasik, *Gun Liability Insurance: Still a Viable Proposal*, FORBES (Dec. 29, 2012), <http://www.forbes.com/sites/johnwasik/2012/12/29/gun-liability-insurance-still-a-viable-proposal/>; Pawar, *supra* note 5.

<sup>327</sup> 18 U.S.C. § 922(a)(2), (6); see *United States v. Moore*, 109 F.3d 1456, 1460–61 (9th Cir. 1997) (en banc) (describing the "straw man doctrine").

<sup>328</sup> See *supra* Part VI.A.

<sup>329</sup> See Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233, 1277 (2009) (stating, in perhaps the most detailed analysis of the source of crime guns to date, that straw purchases likely account for only about one percent of crime guns); Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 POLICING 220, 230–32 (1998) (stating that seven percent of the crime guns traced in a Los Angeles study originated from straw purchases); Philip J. Cook et al., *Underground Gun Markets* 11 & n.21 (Nat'l Bureau of Econ. Research, Working Paper No. 11737, 2005) (stating that "straw purchasing is rare in Chicago's underground gun market").

<sup>330</sup> See Johnson, *supra* note 307, at 844, 856–59, 862, 877; *supra* Part VI.A.

<sup>331</sup> Johnson, *supra* note 307, at 843 & n.24.

<sup>332</sup> See Maria Huag, *Conflict and Corruption: Global Illicit Small Arms Transfers*, in SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM 165, 167 (Peter Batchelor & Keith Krause eds., 2001) (estimating the value at \$1 billion annually).

<sup>333</sup> See Johnson, *supra* note 307, at 844, 877.

<sup>334</sup> *But see* Daniel D. Polsby, *The False Promise of Gun Control*, THE ATLANTIC (Mar. 1, 1994), <http://www.theatlantic.com/magazine/archive/1994/03/the-false-promise-of-gun-control/306744/> (arguing that demand for crime guns is inelastic).



they replaced,” as happened after gun bans went into effect in England and Ireland;<sup>335</sup> that the demand for never-insured guns would lead to the increased influence of organized crime, including gangs, dealing in such firearms;<sup>336</sup> or that individuals will simply make guns to supply the black market.<sup>337</sup> Although the net effect of these possibilities is difficult to measure, they have been observed in other contexts.

## VII. CONCLUSION

Compulsory firearm-owner liability insurance should not be expected reliably to serve as either a source of compensation for shooting victims or a private regulator of firearm violence. It may exacerbate the problems it seeks to alleviate by incentivizing firearm owners to take less care with their weapons and insurers to lobby for regulations that result in more injuries and cap liability. It is also demonstrably improbable that enough otherwise-law-abiding firearm owners would comply with a mandate for it to be effective.

Insurance can, however, enable socially desirable, but not risk-free, firearm-related activities by those who would otherwise be unable to bear the risks inherent in those activities. It can also ensure that firearm-related liability claims are administered efficiently and without fraud. Such insurance would tend to be purchased by those engaging in the beneficial activities.

One of the best ways to incentivize an activity is to compensate it or to remove its financial consequences. Well-meaning legislators, regulators, and industry members would therefore best serve their constituencies by encouraging optional insurance that covers potential liability arising from socially useful activities, rather than pushing for unhelpful mandates that may aggravate the firearm violence that they seek to remedy.

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<sup>335</sup> Johnson, *supra* note 307, at 844–45 (citing Karp, *supra* note 312, at 44).

<sup>336</sup> *Id.* at 877–78.

<sup>337</sup> *See id.* at 845–47 (describing the ease with which a firearm can be manufactured using relatively simple tools).