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## Liability Insurance and Gun Violence Symposium

Peter Kochenburger

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## Article

### Liability Insurance and Gun Violence

PETER KOCHENBURGER

*Gun violence and mass shootings have dominated headlines during the last several years. These tragedies, including the Sandy Hook Elementary School shooting, received national and international attention and prompted new demands to address gun violence in the United States. Among the many proposals advanced by the media, advocacy groups, legislators, and academics is mandating liability insurance for all gun owners. Proponents point to insurance's risk assessment and mitigation functions as providing financial incentives and penalties to encourage policyholders to purchase, store, and use firearms in the safest manner possible, with explicit analogies to mandatory auto insurance, and insurance generally, where prudent behavior results in lower premiums and the riskier pay more. Numerous legislative proposals were put forth in 2013; none passed.*

*This Article's purpose is to provide a more in-depth scrutiny than has been previously presented on the merits of mandating liability insurance for gun owners. My perspective is through the lens of liability insurance and regulation, and this Article thereby reviews the major issues associated with such proposals—including the likelihood that many defendants in gun-related claims will not carry insurance even if required by law. I conclude that, despite the obvious enforcement problems, insurance's ability to address and reduce gun violence is a potentially valuable tool. We do not have enough research and information to dismiss its use based on often ill-supported assumptions about what insurance "should" do and how consumers, insurers, and regulators would react to a liability insurance mandate.*

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# Liability Insurance and Gun Violence

PETER KOCHENBURGER\*

## I. INTRODUCTION

On December 14, 2012, Adam Lanza entered Sandy Hook Elementary School in Newtown, Connecticut, and murdered twenty children and six adults.<sup>1</sup> This mass shooting, the worst grade school rampage in U.S. history, reignited the gun control debate and led to immediate calls for stricter control laws and equally vocal, if less numerous, demands for providing armed guards or police in schools as well as arming teachers.<sup>2</sup> Within four months, Connecticut passed one of the most comprehensive gun control laws in the country, the reverberations of which continued well past the end of the legislative session in June 2013.<sup>3</sup>

Throughout 2013, the popular media and insurance-related press also discussed using insurance as a potential tool to manage many of the threats

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<sup>1</sup> The *New York Times* and the *Hartford Courant* have extensive online material about this tragedy and its aftermath. *Times Topics: Newtown, Conn., School Shootings (Adam Lanza)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/s/school\\_shootings/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/school_shootings/index.html) (last visited Apr. 15, 2014); *Tragedy in Newtown: Continuing Coverage*, HARTFORD COURANT, <http://www.courant.com/news/connecticut/newtown-sandy-hook-school-shooting/> (last visited Apr. 15, 2014). In November 2013, the Office of the State's Attorney for Danbury, Connecticut—which was responsible for criminal prosecutions in Newtown—issued its report. STEPHEN J. SEDENSKY III, REPORT OF THE STATE'S ATTORNEY FOR THE JUDICIAL DISTRICT OF DANBURY ON THE SHOOTINGS AT SANDY HOOK ELEMENTARY SCHOOL AND 36 YOGANANDA STREET, NEWTOWN, CONNECTICUT ON DECEMBER 24, 2012 (2013), available at [http://www.ct.gov/csao/lib/csao/Sandy\\_Hook\\_Final\\_Report.pdf](http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf). In December 2013, the Connecticut State Police released much more extensive reports and related multimedia files. *Sandy Hook Elementary School Shooting Reports*, CONN. DEPARTMENT EMERGENCY SERVS. & PUB. PROTECTION, <http://cpsandyhookreport.ct.gov> (last visited Apr. 15, 2014).

<sup>2</sup> E.g., Sheryl Gay Stolberg, *Report Sees Guns as Path to Safety in Schools*, N.Y. TIMES, Apr. 3, 2013, at A18; Associated Press, *Connecticut Community Approves Armed Guards for Schools*, NEW HAVEN REG. (Mar. 27, 2013), <http://www.nhregister.com/general-news/20130327/connecticut-community-approves-armed-guards-for-schools>; Wayne LaPierre, *Making Our Nation's School Children Safer*, NRA-ILA INST. FOR LEGIS. ACTION (June 1, 2013), <http://www.nraila.org/news-issues/articles/2013/6/making-our-nations-school-children-safer.aspx>.

<sup>3</sup> “An Act Concerning Gun Violence Prevention and Children’s Safety” was signed into law on April 4, 2013. 2013 Conn. Acts 47 (Reg. Sess.). Various provisions of the Act were challenged on Constitutional grounds; a federal district court upheld the law in January 2014. *Shew v. Malloy*, 994 F. Supp. 2d 234, 239 (D. Conn. 2014).

or harms that firearms and gun ownership can cause.<sup>4</sup> By February 2013, insurance requirements for gun ownership were introduced in at least seven states and the District of Columbia, but did not survive in any of them.<sup>5</sup> This is not surprising, as only a small percentage of bills ever emerge from any legislature,<sup>6</sup> and the legislation linking gun ownership to insurance was usually either vague or likely unworkable on its face.<sup>7</sup> However, while these efforts were easy to criticize—and for some to ridicule—their origin lay in a long-accepted recognition that liability insurance often plays an important role in regulating potentially dangerous products.

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<sup>4</sup> E.g., Rick Green, *Time Is Ripe to Consider Liability Insurance for Gun Owners*, HARTFORD COURANT (Jan. 21, 2013), [http://articles.courant.com/2013-01-21/news/hc-green-gun-liability-newtown-20130121\\_1\\_gun-owners-liability-insurance-gun-safety](http://articles.courant.com/2013-01-21/news/hc-green-gun-liability-newtown-20130121_1_gun-owners-liability-insurance-gun-safety); John Stoehr, *Changing the Rhetoric from Gun Control to Gun Insurance*, GLOBALPOST.COM (Jan. 18, 2013, 4:16 PM), <http://www.globalpost.com/dispatches/globalpost-blogs/commentary/gun-control-gun-insurance-NRA>; 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/>; see also Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, N.Y. TIMES, Feb. 22, 2013, at A1 (discussing state proposals to mandate liability insurance for gun owners); Brian MacQuarrie, *Warren Joins Menino Push for Tougher Gun Control Laws*, BOS. GLOBE, Jan. 19, 2013, at B3 (discussing legislative support for a Massachusetts bill that would require liability insurance); Elizabeth Bunn, *U.S. Insurers Resist Push to Make Gun Owners Get Coverage*, BLOOMBERG.COM (Feb. 19, 2013), <http://www.bloomberg.com/news/2013-02-19/u-s-insurers-resist-push-to-make-gun-owners-get-coverage.html> (detailing insurers' opposition to liability insurance proposals); Bonnie Cavanaugh, *Insurance Industry Closely Watches Proposed Firearms Liability Laws*, PROP. CASUALTY 360 (Apr. 12, 2013), <http://www.propertycasualty360.com/2013/04/12/insurance-industry-closely-watches-proposed-firearm> (discussing the insurance industry's perspectives on proposed liability insurance mandates). The three hour legislative subcommittee public hearing on Connecticut's bill to mandate liability insurance for gun owners on March 13, 2013, is demonstrative of the hostilities toward such proposals. *Insurance & Real Estate Committee*, CONN. NETWORK (Mar. 19, 2013), <http://ct-n.com/ondemand.asp?ID=8809>. The bill died immediately after the hearing.

<sup>5</sup> H.B. 6656, Gen. Assemb., Jan. Sess. (Conn. 2013); B. 20-0170, 2013 Council, Reg. Sess. (D.C. 2013); H.B. 1155 amend. 20, 98th Gen. Assemb., Reg. Sess. (Ill. 2013); S.B. 577, 2013 Gen. Assemb., Reg. Sess. (Md. 2013); H.B. 3253, 188th Gen. Court, Reg. Sess. (Mass. 2013); Assemb. B. 3908, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013); H.B. 521, Gen. Assemb., Reg. Sess. (Pa. 2013). For a discussion of the proposal for an insurance requirement in California, see *infra* note 7. Bills cited in this Article may have been subsequently amended or removed entirely from a state's legislative calendar.

<sup>6</sup> See Karen Suhaka, *Comparing State Legislatures by Counting Bills*, BILLTRACK50.COM, <https://www.billtrack50.com/blog/election/comparing-state-legislatures-by-counting-bills/> (last visited Apr. 15, 2014) (suggesting that a number of states have bill success rates as low as ten percent, with even the most successful states being around fifty percent).

<sup>7</sup> See, e.g., Assemb. B. 3908 (“Any person in this State who shall own a firearm shall . . . obtain . . . a policy of liability insurance in an amount not less than *two hundred and fifty thousand dollars* specifically covering any damage resulting from any negligent acts involving the use of such firearm while it is owned by such person.” (emphases added)). When introduced in February 2013, California Assembly Bill 231 contained a liability insurance requirement, 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>, but the requirement was dropped long before a modified version of the bill passed in the fall, Assemb. B. 231, Gen. Assemb., Reg. Sess. (Cal. 2103).

Liability insurance protects the financial assets of policyholders engaged in socially useful activities (e.g., home ownership, driving vehicles, undertaking a profession, running a business); provides a source of compensation to injured claimants; encourages the design and use of safer products; and serves as a private regulator as insurers assess, accept or reject, and price risk for individual policyholders.<sup>8</sup> Liability insurance theoretically could provide similar benefits to private gun ownership. However, there are three major obstacles: two are surmountable, though politically difficult, and one is more intractable.<sup>9</sup> First, if most firearm injuries are intentionally caused and result from illegal actions, then the standard liability policy excludes coverage for the policyholder. Second, there is a weak—or nonexistent—correlation between the safety incentives that liability insurers could encourage and their coverage obligations under their insurance policies. Third, even if states required insurers to provide liability coverage for intentional harm caused by firearms, and likewise required gun owners to purchase it, some individuals would not comply.

This Article's purpose is to contribute to the ongoing public policy debate on insurance and gun violence. It links legislative proposals that require liability insurance for gun owners to existing insurance policy language, explains the practical consequences of how seemingly minimal changes in wording can affect coverage, and describes how insurers are already narrowing liability coverage for intentionally caused harm, with important consequences for insuring firearm use. Many opponents of mandatory firearm insurance have overstated their case and this Article suggests how, despite the difficulties described, states could fashion an insurance framework to cover firearm violence. This Article acknowledges significant limitations to any proposal to mandate and enforce compulsory liability insurance for gun owners, but argues it is too soon to dismiss the many potential advantages of such a liability insurance system for significantly reducing gun violence.

This Article reviews approximately twenty different policy forms from the largest personal lines writers in the country to document the diminishing coverage for intentional harm and negligence claims surrounding intentional acts. Rather than use the standard methodology of focusing largely on differences in case law related to insuring intentional harm, this approach more accurately captures the state of the insurance

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<sup>8</sup> See Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1416–23 (2013) (discussing the ways in which liability insurance influences moral behavior). See generally RICHARD V. ERICSON ET AL., *INSURANCE AS GOVERNANCE* (2003) (explaining the regulatory roles of insurance).

<sup>9</sup> This Article does not address Second Amendment concerns, which are important considerations in any proposal to mandate liability insurance. This issue is reviewed briefly in another article published within this Symposium Issue, George Mocsary, *Insuring Against Guns?*, 46 CONN. L. REV. 1209, Part III.B.5 (2014). Professor Mocsary is a leading Second Amendment scholar.

market, and thus (typically) the state of available insurance coverage. While case law obviously is important, it is derivative of the actual intentional harm exclusions in insurance policies and does not reflect the marketplace reduction in coverage for intentional harm; there is often a significant time lag between the policy language scrutinized by courts and commentators and the language many insurers currently utilize.<sup>10</sup>

## II. LIABILITY INSURANCE AND GUN VIOLENCE<sup>11</sup>

### A. *Benefits of Liability Insurance*

There is a long and often favorable story to tell of how insurance has enhanced public safety. Just as insurers helped to encourage safer automobiles,<sup>12</sup> they may likewise be able to enhance gun safety by funding research, utilizing data collected through their underwriting and claim handling processes, supporting public information campaigns, and lobbying legislatures and government agencies.<sup>13</sup> Even more important is insurers' potential "gatekeeping function" in denying coverage to high-risk individuals,<sup>14</sup> as well as their ability to adjust premiums based on the mitigating effects of owning a less risky type of firearm, utilizing gun safety devices, storage requirements, and enrollment in firearm safety courses.<sup>15</sup>

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<sup>10</sup> Too little attention is paid to insurance policy language in this area, as well as the ability of state regulators and legislators to regulate policy terms. *See infra* Part II.C.1.

<sup>11</sup> For purposes of this Article, "violence" means injuries and deaths involving a firearm, including suicides.

<sup>12</sup> The Insurance Institute for Highway Safety, which was founded in 1959 by three insurance associations, focuses on crash safety research and advocacy. *About the Institutes*, INS. INST. FOR HIGHWAY SAFETY & HIGHWAY LOSS DATA INST., <http://www.iihs.org/iihs/about-us> (last visited Apr. 15, 2014). Not all commentators agree with this sanguine view of insurer participation in auto safety; Professor Mocsary's article references this debate. Mocsary, *supra* note 9, Part V.A.

<sup>13</sup> *Cf.* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 210, 212, 219, 224 (2012) (providing examples of insurers funding research facilities to study effective construction techniques, collecting "information concerning the circumstances that gave rise to [a workplace] injury," educating insureds about how to reduce risk, and lobbying for air bags).

<sup>14</sup> For a brief summary of insurers' gatekeeping function, see Tom Baker & Thomas O. Farrish, *Liability Insurance and the Regulation of Firearms*, in *SUING THE GUN INDUSTRY* 294–95 (Timothy D. Lytton ed., 2005). An insurance mandate could place insurers in the position of determining whether an individual can lawfully own a gun, creating delicate Second Amendment issues. Mocsary, *supra* note 9, Part III.B.5.

<sup>15</sup> *See* Ben-Shahar & Logue, *supra* note 13, at 205–08 (discussing the ability of insurers to adjust their premiums based on the severity of the risk of the insured's activity); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (acknowledging that not all weapons are equal and some have less justification for public use than others); Jennifer Bonnett & Wes Bowers, *How Newtown Changed Us*, LODI NEWS-SENTINEL (Dec. 14, 2013), [http://www.lodinews.com/news/article\\_d6ce3ad0-9049-5071-b291-a3a47c2fe432.html](http://www.lodinews.com/news/article_d6ce3ad0-9049-5071-b291-a3a47c2fe432.html) (discussing how one California school district acknowledged that education courses about different types of guns and mechanisms can help law enforcement and reduce liability

Indeed, encouraging or mandating liability insurance to cover more firearms-related injuries would shift some of the costs associated with this harm to property casualty insurers, thereby creating greater financial incentives for them to utilize their expertise in classifying and spreading risk, promoting gun safety, and engaging in other risk mitigation strategies. Within the insurance world, health, life, and disability insurers currently bear the financial costs of firearm violence,<sup>16</sup> at least to the extent that victims have such insurance coverage.<sup>17</sup> Property casualty insurers have minimal exposure now, as many tortfeasors injuring others with firearms may not have homeowners or renters insurance and, as discussed below, specific provisions in their liability policies are likely to exclude coverage for those that do.<sup>18</sup>

Insurers' loss prevention and risk classification roles would be similarly limited under their first party property coverages, as the major risks and harm associated with careless storage of a firearm—serious injury or death—are not related to physical damage to insured property, at least not in any meaningful sense. For example, a homeowners insurer might provide premium credits for smoke detectors and other safety devices in a home because, should a related loss occur, its policies would likely pay for much of the damage. In contrast, while incentives for utilizing certain types of gunlocks or storage methods could reduce suicides and homicides, when they do occur, the insurer's policy would likely not be triggered and the insurer would not be obligated to pay claims arising out these actions.

Another major purpose of liability insurance is to provide a source of compensation to injured parties.<sup>19</sup> Naturally then, some advocates maintain that liability insurance could play a similar, socially valuable role for victims of gun violence, pointing to, for example, requirements in virtually every state that automobile owners carry a minimum amount of liability insurance.<sup>20</sup> Liability insurance is frequently required by law in

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due to gun violence). The ability and need to collect this data is also what worries some opponents of mandatory insurance requirements for gun owners.

<sup>16</sup> These costs associated with firearm violence may translate into increased premiums. See Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, 72 J. RISK & INS. 359, 363, 369–71 (2005) (indicating that an “increased cost of essential insurance policies” results from firearm violence and specifically analyzing the relationship between life insurance costs and firearm deaths).

<sup>17</sup> See EMBRY M. HOWELL & PETER ABRAHAM, URBAN INST., *THE HOSPITAL COSTS OF FIREARM ASSAULTS 2* (2013) (“Victims of firearm assault are disproportionately more likely to be uninsured.”).

<sup>18</sup> See *supra* Part II.C.

<sup>19</sup> KENNETH S. ABRAHAM, *THE LIABILITY CENTURY* 77–80 (2008).

<sup>20</sup> Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, N.Y. TIMES, Feb. 22, 2013, at A1; Ian Simpson, *Gun Liability Insurance Could Be Mandatory for Firearms Owners Under New State Proposals*, HUFFINGTON POST (Feb. 6, 2013), [http://www.huffingtonpost.com/2013/02/06/gun-liability-insurance\\_n\\_2632321.html](http://www.huffingtonpost.com/2013/02/06/gun-liability-insurance_n_2632321.html); see also *State-by-*

other contexts as well, including professional liability (e.g., medical malpractice),<sup>21</sup> use of dangerous products (e.g., hazardous waste),<sup>22</sup> and residential facilities (e.g., nursing homes or child care facilities).<sup>23</sup>

Critics of these legislative proposals argue that liability insurance can only cover negligent conduct and not intentional acts: “Property and casualty insurance does not and cannot cover gun crimes.”<sup>24</sup> This is a crucial issue, because if proponents of such legislative proposals believe liability insurance can help compensate gun victims and promote firearm safety, then it must do so either within the existing negligence-based framework of traditional liability insurance or within a new type of coverage. Neither option is easy.

The usefulness of mandating liability insurance depends in part on how many victims could benefit. Here, proponents have a major obstacle because the vast majority of gun deaths in the United States result from suicide or homicide.<sup>25</sup> In 2010, for example, the Centers for Disease

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*State Minimum Coverage Requirements*, AM. INST. CPAS, <http://www.360financialliteracy.org/Topics/Insurance/Cars-and-Auto-Insurance/State-by-State-Minimum-Coverage-Requirements> (last visited Apr. 15, 2014) (indicating that every state has “laws that either explicitly or in effect require you to purchase at least some auto insurance” and describing the minimum coverage required in each state).

<sup>21</sup> *E.g.*, CONN. GEN. STAT. § 20-11b (2013).

<sup>22</sup> *E.g.*, IND. CODE ANN. § 13-22-2-3 (LexisNexis 2011).

<sup>23</sup> *E.g.*, OKLA. STAT. ANN. tit. 10, § 404.3 (West 2013) (child care facilities); VA CODE ANN. § 32.1-127 (2013) (nursing homes).

<sup>24</sup> Bunn, *supra* note 4 (quoting the American Insurance Association) (internal quotation marks omitted). The American Insurance Association is a leading property casualty trade association, which “represents approximately 300 insurers that write more than \$117 billion in premiums each year.” *Id.*

<sup>25</sup> Obtaining accurate information on the number and causes of non-fatal gun injuries is difficult. In 1996, Congress cut CDC funding for much of its gun-related mortality and injury research. Walter Hickey, *How the NRA Killed Federal Funding for Gun Violence Research*, BUS. INSIDER (Jan. 16, 2013), <http://www.businessinsider.com/cdc-nra-kills-gun-violence-research-2013-1>. Only recently has the CDC been permitted to continue a portion of its work in this area. *Id.*; see Sydney Lupkin, *CDC Ban on Gun Research Caused Lasting Damage*, ABC NEWS (Apr. 9, 2013), <http://abcnews.go.com/Health/cdc-ban-gun-research-caused-lasting-damage/story?id=18909347> (“President Obama may have ended the 17-year ban on gun violence research at the U.S. Centers for Disease Control and Prevention, but even if Congress restores research funds, experts say the damage runs deeper than funding cuts.”).

Moreover, gun control advocates and opponents hotly debate demographic definitions and how firearm injury causes are classified. Compare Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y. TIMES, Sept. 29, 2013, at A1 (indicating that a “review of hundreds of child firearm deaths found that accidental shootings occurred roughly twice as often as the records indicate, because of idiosyncrasies in how such deaths are classified by the authorities,” resulting in “scores of accidental killings . . . not reflected in the official statistics that have framed the debate over how to protect children from guns”), with Dave Kopel, *How Your Tax Dollars Demonize Your Guns*, NRA MEDIA, <http://www.nrapublications.org/index.php/9485/how-your-tax-dollars-demonize-your-guns/> (last visited Apr. 15, 2014) (arguing that a study funded by the National Institutes of Health concluding that “gun ownership . . . correlates with more gun violence” was flawed, in part due to an inaccurate categorization of what constitutes “‘possessing’ a gun” and a failure to “measure gun ownership accurately”), and CDC Data Refutes New Anti-Gun Study’s Claims, NRA-ILA INST. FOR LEGIS. ACTION (Nov. 1, 2013), <http://www.nraila.org/news-issues/articles/2013/11/cdc-data-refutes-new-anti-gun-studys-claims.aspx> (noting the position of gun control opponents that “[f]irearm-related

Control (CDC) reported that out of 31,672 firearm deaths, 61.2% were due to suicide, 35% were caused by assault or homicide,<sup>26</sup> and only 1.9% resulted from “accidental discharge of firearms.”<sup>27</sup> This breakdown is relatively consistent over the years, as indicated by the table below containing CDC data from 2008 to 2011:

**TABLE 1**<sup>28</sup>

Deaths Caused by Firearms	Number				Percent of total			
	2008	2009	2010	2011	2008	2009	2010	2011
Accidental discharge of firearms	592	554	606	851	1.9%	1.8%	1.9%	2.6%
Suicide by firearm	18,223	18,735	19,392	19,766	57.7%	59.8%	61.2%	61.5%
Assault (homicide) by firearm	12,179	11,493	11,078	11,101	38.5%	36.7%	35.0%	34.5%
Undetermined intent	273	232	252	222	0.9%	0.7%	0.8%	0.7%
<b>Total</b>	<b>31,593</b>	<b>31,347</b>	<b>31,672</b>	<b>32,163</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

deaths among children have decreased since the mid-1990s,” and questioning gun control advocates’ assertion that firearm-related deaths among children have “spiked 60% in a decade” in light of a “mistake” in an underlying Centers for Disease Control study where there was a failure “to stipulate what ages [were] include[d] in its definition of ‘children’”).

<sup>26</sup> Sherry L. Murphy et al., *Deaths: Final Data for 2010*, 61 NAT’L VITAL STAT. REP., no. 4, 2013, at 1, 11, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_04.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_04.pdf).

<sup>27</sup> See *id.* at 40 tbl.10 (reporting that 606 deaths resulted from “[a]ccidental discharge of firearms”). The remaining 0.8% was classified as “undetermined intent.” See *id.* at 41 tbl.10 (citing the CDC’s National Vital Statistics Report, which stated that 252 out of 31,328 total “[d]eaths caused by firearms” in 2010 were a result of “[u]ndetermined intent”). Firearm deaths are an imperfect proxy for understanding the causes and results of gun violence. However, the insurance issues discussed in this Article generally apply equally to gun violence resulting in non-fatal injuries as well as deaths. The Firearm and Injury Center at the University of Pennsylvania Health System analyzed firearm injuries and deaths and broke them down by a variety of factors, including age and ethnicity. FIREARM & INJURY CTR. AT PENN, FIREARM INJURY IN THE U.S. (2011) [hereinafter PENN FIREARM STUDY], available at <http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf>.

<sup>28</sup> Donna L. Hoyert & Jiaquan Xu, *Deaths: Preliminary Data for 2011*, 61 NAT’L VITAL STAT. REP., no. 6, 2012, at 1, 18–19 tbl.2, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_06.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf); Kenneth D. Kochanek et al., *Deaths: Final Data for 2009*, 60 NAT’L VITAL STAT. REP., no. 3, 2011, at 1, 39–40 tbl.10, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_03.pdf); Arialdi M. Miniño et al., *Deaths: Final Data for 2008*, 59 NAT’L VITAL STAT. REP., no. 10, 2011, at 1, 36–37 tbl.10, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59\\_10.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_10.pdf); Murphy et al., *supra* note 26, at 40–41 tbl.10.

Yet, for the reasons discussed in Part II.C, “accidental discharge” is the only firearm-related cause of death or injury that liability insurance would likely cover—at least as written under the current negligence-based framework.

### B. *Reducing Gun Use in Suicides*

As noted above in Table 1, suicides account for roughly sixty percent of gun deaths. While the exact link between gun ownership and the propensity to attempt suicide may still be disputed,<sup>29</sup> it is clear that individuals attempting suicide by using a gun are far more likely to succeed than those attempting suicide by any other means.<sup>30</sup> The fatality rate for gun-related suicide attempts is reportedly between seventy and ninety percent, in comparison to between ten and fifteen percent by other means.<sup>31</sup> Insurance’s private regulatory or safety enhancing roles could help reduce this rate, particularly in preventing or delaying gun access to those never intended to use them (e.g., children and teenagers). Public health experts stress that since many suicide attempts are impulsive acts, delaying access to a lethal weapon for even a brief period of time will reduce suicide rates, as the suicidal impulses fade when the acute phase of a crisis passes.<sup>32</sup> Risk-based premiums, or the refusal to insure at all, could be linked to storage requirements, trigger lock mechanisms, smart guns, or similar technologies that could impede someone’s immediate ability to use a gun.<sup>33</sup>

Unfortunately though, as with intentional shootings, there is not a discernable link between the coverages afforded by a liability (or property) insurance policy and suicides. This returns us to the initial problem: a

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<sup>29</sup> Compare Matthew Miller et al., *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33 ANN. REV. PUB. HEALTH 393, 401 (2012) (asserting that the risk of suicide in homes with a firearm is “typically 2–10 times that of homes without firearms, depending on the sample population . . . and on the way in which the firearms are stored”), with Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?*, 30 HARV. J.L. & PUB. POL’Y 649, 690–93 (2007) (observing “no relationship between the extent of suicide and the extent of gun ownership”).

<sup>30</sup> See Sabrina Tavernise, *With Guns, Killer and Victim Are Usually Same*, N.Y. TIMES, Feb. 14, 2013, at A1 (stating that “[s]uicidal acts with guns are fatal in 85 percent of the cases, while those with pills are fatal in just 2 percent of cases,” and adding that “[t]he chances of dying rise drastically when a gun is present, because guns are so much more likely to be lethal”).

<sup>31</sup> PENN FIREARM STUDY, *supra* note 27, at 22.

<sup>32</sup> See, e.g., Miller et al., *supra* note 29, at 401–03 (stating that the availability of “highly lethal” weapons can play a dominant role in suicide rates).

<sup>33</sup> These safety mechanisms carry the disadvantage of making it more difficult for a person to use a gun in self-defense. While not referencing insurance, the *Penn Firearm Study* discusses the value of safety devices that “reduce unintended discharge” or use: “Making firearms safer would reduce injuries from unintentional use and possibly from criminal use. The processes for stimulating such changes in design can include market forces and litigation, consumer education, product oversight, and regulation.” PENN FIREARM STUDY, *supra* note 27, at 38–39.

suicide would rarely trigger the decedent's and his family's liability insurance policy, regardless of whether a firearm was stored in the safest manner possible,<sup>34</sup> and therefore the policy has no role in compensating victims of a suicide, such as family and friends left behind. This disconnect between an insurer's financial responsibility under its policy and the actions we seek to minimize—suicide attempts, and gun violence more generally—makes it difficult to see why the insurance industry would bring its money and influence to support this campaign.<sup>35</sup>

### C. Liability Insurance and Intentional Harm

Since liability policies typically cover most negligent acts resulting in bodily injury unless specifically excluded,<sup>36</sup> claims arising out of a (truly) negligent use of a firearm are already covered. However, CDC reports show that firearm deaths resulting from accidental discharges of firearms were about two percent of the total gun deaths reported from 2008 to 2010.<sup>37</sup> In contrast, gun deaths classified as an assault or homicide during this period constituted about thirty-five to thirty-nine percent of all firearm-related deaths.<sup>38</sup> The CDC defines “homicide” as used in its reports as “injuries inflicted by another person with intent to injure or kill, by any means.”<sup>39</sup>

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<sup>34</sup> I am not considering instances where a visitor in a home utilizes a policyholder's gun to commit suicide and the visitor's estate sues the homeowners for allowing access to the firearm.

<sup>35</sup> Insurers might contribute as part of a public service or charitable campaign, but this would likely be much less of a commitment than if they were compensating insured losses. One major insurer, however, believes the industry can do more in enhancing gun safety. Shortly after the Newtown tragedy, General Re's CEO, Franklin Montross, wrote in a column:

I think the insurance industry can play an important role in both the education and the enhancement of gun safety . . . . The insurance industry can't change the number of guns in existence. We can influence how they are stored and encourage training so they are used safely. Tackling this issue should benefit society and reinforce the insurance industry's commitment to risk engineering and risk mitigation.

ARTICLE FROM THE CHAIRMAN: GUN SAFETY, GEN. REINSURANCE CORP. (2013), <http://media.genre.com/documents/GunSafety201301-en.pdf>. Mr. Montross did not reference liability insurance. *Id.*

<sup>36</sup> None of the homeowners policies I reviewed contained a firearm exclusion. Firearm exclusions are occasionally found in commercial general liability policies, either in the body of the policy or as an endorsement, and have been upheld by courts. *E.g.*, *Underwriters Ins. Co. v. Purdie*, 193 Cal. Rptr. 248, 253–54, 256 (Ct. App. 1983); *Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, Inc.*, 289 P.3d 735, 737–39 (Wash. Ct. App. 2012).

<sup>37</sup> See *supra* Table 1.

<sup>38</sup> See *supra* Table 1.

<sup>39</sup> *Definitions for WISQARS™ Fatal*, CDC, <http://www.cdc.gov/ncipc/wisqars/fatal/help/definition.s.htm> (last visited Apr. 15, 2014). This definition “[e]xcludes injuries due to legal intervention and operations of war. Justifiable homicide is not identified in WISQARS.” *Id.* The CDC's definition varies from that used by some state or local medical examiners which may classify as a “homicide” any

Liability insurance policies exclude homicides, as defined by the CDC, and intentional assaults through several policy provisions that will be addressed in Subsection 1 below. If a liability insurer successfully asserts such defenses, then the insurance policy would not serve as a source of compensation. Thus, for liability insurance to be an important tool or method to compensate gun violence victims, or to enhance gun safety, coverage for intentional harm caused by a firearm would seem to be necessary.

Insurers argue, with justification, that an insurable event should be “fortuitous,” an “accident,” and not intentionally caused by the policyholder, lest insurers and society bear the moral hazard of allowing an insured to financially benefit<sup>40</sup> from a destructive or harmful act of their own volition.<sup>41</sup> Insuring such actions would (so the argument goes) increase the amount of harmful and illegal conduct as well as cause insurance premiums to increase for all policyholders.<sup>42</sup>

### 1. *The “Occurrence” and Intentional Harm Provisions*

Liability insurers primarily guard against covering intentional harm through two policy provisions: (1) the requirement that there be an “occurrence”; and (2) the intentional harm exclusion.<sup>43</sup> The policy definition of an “occurrence” is largely consistent throughout the industry. For example, the standard ISO<sup>44</sup> homeowners form covers “bodily injury

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shooting death caused by another, regardless of intent. These reporting discrepancies may distort firearm death and injury statistics. Luo & McIntire, *supra* note 25.

<sup>40</sup> The benefit in a liability policy is typically the payment of defense costs and settlement/indemnity amounts for which the insured would otherwise be responsible.

<sup>41</sup> ABRAHAM, *supra* note 19, at 14–17; 1 WILLARD PHILLIPS, A TREATISE ON THE LAW OF INSURANCE 608 (William S. Hein & Co. 4th ed., reprint 2006) (1854); WILLIAM R. VANCE, HANDBOOK OF THE LAW OF INSURANCE 64–65 (W. Publ’g Co. 2d ed., 1930); EMMETT J. VAUGHAN & THERESE M. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 517 (10th ed. 2008).

<sup>42</sup> ABRAHAM, *supra* note 19, at 14–17. *But see* Sinclair Oil Co. v. Columbia Cas. Co., 682 P.2d 975, 981 (Wyo. 1984) (“We know of no studies, statistics or proofs which indicate that contracts of insurance to protect against liability for punitive damages have a tendency to make willful or wanton misconduct more probable, nor do we know of any substantial relationship between the insurance coverage and such misconduct.”). I discuss this issue in Section III.C.1.

<sup>43</sup> This exclusion is often referred to as the “intentional acts” exclusion. This term is misleading, as usually it is intentionally caused *harm* or damage that triggers the exclusion, and not whether the *act* leading up to the harm was deliberate.

<sup>44</sup> ISO, formerly the Insurance Services Office, performs a variety of services for insurers, including serving as a statistical agent, collecting and correlating claim information to specific policy coverage, and drafting policy language (forms) and seeking approval from state regulators for their use. *Overview of ISO Products and Services*, ISO, [http://www.iso.com/Products/Overview-of-ISO-Products-and-Services.html](http://www.iso.com/Products/Overview-of-ISO-Products-and-Services/Overview-of-ISO-Products-and-Services.html) (last visited Apr. 15, 2014). While many of the larger insurers draft and submit their own forms, they often draw heavily from ISO language. ISO drafted language is utilized extensively for personal lines policies, as well as commercial general liability and commercial auto lines. *ISO’s Policy Language and Rules*, ISO, <http://www.iso.com/Products/Overview-of-ISO-Products-and-Services/ISO-s-Policy-Language-and-Rules.html> (last visited Apr. 15, 2014).

and property damage caused by an ‘occurrence,’” which is defined as “an accident.”<sup>45</sup> “Accident” is not defined in most liability policies, but a large body of case law has addressed it—and often not consistently even within the same state.<sup>46</sup> In *Auto-Owners Insurance Co. v. Harvey*,<sup>47</sup> the Indiana Supreme Court ruled that intentionally pushing someone who then fell into the water and drowned could still be considered an “accident,” and thus an “occurrence,” if the fact finder determined that the insured did not intend the injury.<sup>48</sup> In contrast, the Seventh Circuit previously held, based on its interpretation of Indiana law, that even absent intent to kill, there was no “occurrence” when the policyholder shot the victim on purpose.<sup>49</sup> Perhaps these cases could be distinguished factually, but more relevantly, they help demonstrate that injuries caused by an intentional *act* often create coverage uncertainty based on the facts, policy language, choice of law, and judicial

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<sup>45</sup> ISO, HOMEOWNERS 3-SPECIAL FORM (HO 00 03 05 11) (2011) [hereinafter ISO HOMEOWNERS 3 FORM]. ISO policy numbers identify the type of form. Here, HO stands for homeowners, 03 is the designation for the “special form” policy which, despite its name, is the standard homeowners policy utilized in the United States, and 05 11 is the approximate date the policy was implemented (May 2011). A recent U.S. Government Accountability Office report summarizes the various ISO HO forms, noting that the ISO HO 03 is “the most commonly written policy.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 14-179, HOMEOWNERS INSURANCE: MULTIPLE CHALLENGES MAKE EXPANDING PRIVATE COVERAGE DIFFICULT 4 tbl.1 (2014).

State Farm, the largest homeowners insurer in the United States, defines occurrence as “an accident, including exposure to conditions, which results in: a. ‘bodily injury’ or b. ‘property damage.’” STATE FARM FIRE & CAS. CO., HOMEOWNERS POLICY 2 (1992), available at [http://docs.nv.gov/doi/documents/home\\_policies/StateFarmForms/FP-7955.pdf](http://docs.nv.gov/doi/documents/home_policies/StateFarmForms/FP-7955.pdf) [hereinafter STATE FARM HOMEOWNERS POLICY]; see also NAT’L ASS’N OF INS. COMM’RS, 2012 TOP 25 GROUPS AND COMPANIES BY COUNTRYWIDE PREMIUM 2 (2013), available at [http://www.naic.org/documents/research\\_top\\_25\\_market\\_share\\_pc.pdf](http://www.naic.org/documents/research_top_25_market_share_pc.pdf) (noting that State Farm has a 20.74% market share). Thanks to the efforts of insurance regulators in Nevada and Missouri, personal lines policy forms from the major insurers in their states can be found on their websites. *Policy Forms Used by the 10 Largest Homeowners’ Insurance Groups in Nevada*, NEV. DIV. INS., <http://doi.nv.gov/Consumers/Homeowners-Insurance/Policy-Forms/> (last visited Apr. 15, 2014); *Homeowners Policies*, MO. DEP’T INS., [http://insurance.mo.gov/consumers/home/homeowners\\_policies.php](http://insurance.mo.gov/consumers/home/homeowners_policies.php) (last visited Apr. 15, 2014). As Professor Daniel Schwarcz notes, insurance contracts are typically not available to a policyholder until after the policy is purchased—and sometimes months later. See Daniel Schwarcz, *Reevaluating Standard Insurance Policies*, 78 U. CHI. L. REV. 1263, 1319–23 (2011) (outlining the difficulties in obtaining pre-purchase access to policy forms). Professor Schwarcz’s research and his advocacy before the National Association of Insurance Commissioners contributed to these initial regulatory efforts.

<sup>46</sup> “The difficulty in precisely defining the scope of coverage in liability policies providing coverage for ‘accidents’ is not a problem of recent vintage. . . . [F]ew insurance policy terms have ‘provoked more controversy in litigation than the word ‘accident.’” *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 266 (Fla. 2003) (alterations in original) (quoting *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1075 (Fla. 1998)).

<sup>47</sup> 842 N.E.2d 1279 (Ind. 2006).

<sup>48</sup> *Id.* at 1285. The insured’s involuntary manslaughter conviction only demonstrated the intent to cause an unlawful touching and not necessarily the desire to cause injury. *Id.* at 1287.

<sup>49</sup> See *State Farm Fire & Cas. Co. v. Morgan*, 64 Fed. App’x 537, 540 (7th Cir. 2003) (“Her volitional acts of aiming the gun at Morgan and pulling the trigger were not accidents, and therefore are not covered under the Policy. That she may not have intended to kill Morgan . . . is irrelevant.”).

interpretation. This uncertainty is one reason why relying on liability insurance to cover intentional shootings is problematic, even absent an intent to kill or cause serious harm.<sup>50</sup>

Almost all liability insurance policies have intentional harm exclusions.<sup>51</sup> However, there is more variation in this language than there is for “occurrence.” These differences carry important consequences for the coverage of allegedly intentional acts still considered “accidents” and, correspondingly, whether an “intentional” injury or death caused by a firearm will be covered—particularly for negligence claims against an insured arising out of a co-insured’s intentional conduct.

To illustrate how minor differences in wording can lead to very different results, suppose Otto and Sophie are the parents of fourteen-year-old Freddy. Otto has a gun collection but is careless in locking it up and often leaves the firearms loaded. One day Freddy has a friend over and they get into a bad argument. In a fury, Freddy takes a pistol from the unlocked cabinet, yells “This is how serious I am!,” and shoots near his friend’s head, intending to fire a “warning shot” (or so he later claims). Unfortunately his aim is off and he hits and seriously wounds his now former friend. The friend and his parents sue Freddy, Otto, and Sophie, who promptly notify their homeowners insurer, requesting coverage for the claim.

Now, consider the likelihood that the family would be covered for this claim—which, if the injury is serious and the damages high, may also determine whether the shooting victim receives any financial compensation. Otto, Sophie, and Freddy would all be considered insureds under both the most current ISO homeowners policy form, the ISO HO 00 03 05 11, and a State Farm policy.<sup>52</sup>

ISO’s “Expected or Intended Injury” exclusion states:

*Personal Liability* . . . do[es] not apply to the following:

*1. Expected Or Intended Injury*

“Bodily injury” or “property damage” which is expected or intended by an “insured”, even if the resulting “bodily injury” or “property damage”:

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<sup>50</sup> For a detailed review of case law in this area, see RINA CARMEL ET AL., ABA SECTION OF LITIG., CAUGHT IN THE CROSS FIRE: IMPACT OF COVERAGE ISSUES, DEFENSE ISSUES, AND FIREARM LEGISLATION FOR GUN CLAIMS, (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_inscle\\_materials/written\\_materials/p5\\_1\\_caught\\_in\\_the\\_crossfire.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_inscle_materials/written_materials/p5_1_caught_in_the_crossfire.authcheckdam.pdf).

<sup>51</sup> Baker & Farrish, *supra* note 14, at 299.

<sup>52</sup> The definition of “insured” includes the named insured (on the policy) and relatives of the insured who reside in the household. ISO HOMEOWNERS 3 FORM, *supra* note 45, at 1; STATE FARM HOMEOWNERS POLICY, *supra* note 45, at 1.

- a. Is of a different kind, quality or degree than initially expected or intended; or
- b. Is sustained by a different person, entity or property than initially expected or intended.

However this Exclusion . . . does not apply to “bodily injury” or “property damage” resulting from the use of reasonable force by an “insured” to protect persons or property.<sup>53</sup>

State Farm’s intentional harm exclusion is less detailed:

*Coverage L (Personal Liability) and Coverage M (Medical Payments to Others) do not apply to:*

a. *bodily injury or property damage:*

- (1) which is either expected or intended by the *insured*; or
- (2) which is the result of willful and malicious acts of the *insured* . . . .<sup>54</sup>

In evaluating coverage for Freddie, an insurer utilizing ISO’s “expected or intended injury” exclusion would have a fair (though not conclusive) argument to successfully deny coverage for the shooting, even assuming Freddie was able to prove that he did not intend to hit and seriously injure his friend. That exclusion applies not only to bodily injury specifically intended, but also injury that “is of a different kind, quality or degree than initially expected or intended.”<sup>55</sup> This broad exclusion would allow the insurer to argue that the admittedly intentional act of shooting a loaded gun in close proximity to an individual during a heated argument triggers this exclusion, even though the bodily injury actually caused was of a “different kind, quality or degree” than anticipated.<sup>56</sup> In contrast, assuming the policyholders successfully demonstrated Freddie only meant to scare his friend, State Farm would have a much more difficult time

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<sup>53</sup> ISO HOMEOWNERS 3 FORM, *supra* note 45, at 19. Terms appearing within quotations are defined within the form. *Id.* at 1–2.

<sup>54</sup> STATE FARM HOMEOWNERS POLICY, *supra* note 45, at 15–16. The “willful and malicious acts of the insured” exclusionary clause could, of course, defeat coverage as well. However, judicial interpretations on how and when it applies are mixed, and its applicability is uncertain, especially in cases involving minors, as well as actions that were not blatantly malicious. *See, e.g.,* Norris v. State Farm Fire & Cas. Co., 16 S.W.3d 242, 244–46 (Ark. 2000) (finding exclusion was not applicable due to ambiguity); State Farm Fire & Cas. Co. v. Schwich, 749 N.W.2d 108, 113 (Minn. Ct. App. 2008) (ruling that exclusion applied, but noting “[c]ases involving malicious acts are usually ‘factually more extreme,’ the actor knows or should have known that harm was substantially certain to result, but acts with a deliberate and calculated indifference to the risk of injury”).

<sup>55</sup> ISO HOMEOWNERS 3 FORM, *supra* note 45, at 19.

<sup>56</sup> The policyholder could, however, assert that no harm or injury of any type was intended.

demonstrating that the resulting *harm* was expected or intended.

There is a further step. If Otto and Sophie are sued under a negligence theory, say negligent supervision, the coverage results would also be different. Under the ISO form, if Freddie is deemed to have intended the harm, as defined in the policy, then there is no coverage for any insured, since the exclusion uses the term “*an* insured.”<sup>57</sup> Intentional harm “expected or intended” by one insured negates coverage for all insureds, regardless of whether their actions were only negligent.<sup>58</sup> In contrast, the State Farm policy only excludes bodily injury “which is either expected or intended by *the* insured.”<sup>59</sup> So, even if Freddie is not covered for his actions due to the intentional harm exclusion, the State Farm policy would still respond to negligence claims against his parents and possibly provide compensation to the victim.<sup>60</sup>

Unfortunately, at least for policyholders and third party claimants, the more limited State Farm exclusion goes against the trend in homeowners policies of expanding the intentional harm exclusion, as we see with the ISO form.<sup>61</sup> Among major carriers, Travelers, Nationwide, and The Hartford follow the ISO exclusion.<sup>62</sup> Allstate excludes “bodily injury or

<sup>57</sup> ISO HOMEOWNERS 3 FORM, *supra* note 45, at 19 (emphasis added).

<sup>58</sup> *Id.*

<sup>59</sup> STATE FARM HOMEOWNERS POLICY, *supra* note 45, at 16 (emphasis added).

<sup>60</sup> The importance of the “an insured” (or any insured) versus “the insured” language is well recognized in case law. *See, e.g.*, Allstate Ins. Co. v. Davis, 430 F. Supp. 2d 1112, 1134 (D. Haw. 2006) (holding that Allstate need not indemnify or defend any other person other than “the insured”); Minkler v. Safeco Ins. Co. of Am., 232 P.3d 612, 614 (Cal. 2010) (recognizing the differing opinions on “an insured” versus “the insured” with regards to a severability-of-interests provision); Catholic Diocese of Dodge City v. Raymer, 840 P.2d 456, 461–62 (Kan. 1992) (reviewing opinions concerning severability-of-interest provisions and concluding that exclusions are only applied to “the insured”); Co-operative Ins. Cos. v. Woodward, 45 A.3d 89, 94 (Vt. 2012) (discussing the language and policy differences between “an insured” and “the insured”); *see also* Hazel Glenn Beh, *Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand by You?*, 68 TENN. L. REV. 1, 33–36 (2000) (discussing distinctions between “an,” “any,” and “the” insured).

<sup>61</sup> The last ISO homeowners form to contain the more limited exclusion similar to that used in State Farm was its HO 00 03 04 91, which was implemented in April 1991. In three subsequent forms—HO 00 03 10 00 (October 2000), HO 00 03 05 01 (May 2001), and HO 00 03 05 11 (May 2011)—ISO has utilized the intentional harm exclusion cited above. The American Association of Insurance Services (“AAIS”), an ISO competitor that also develops policy forms, contains an international harm exclusion in its homeowners policy that is at least as expansive as the ISO’s. AAIS HOMEOWNERS PROGRAM (policy form on file with author). Though a discussion of this issue is outside the scope of this Article, the expansion of the intentional harm exclusion mirrors other changes in personal lines policies that are circumscribing coverage in some important areas, but usually not noticed or commented on by even diligent readers of their own policies or other commentators. Schwarcz, *supra* note 45, at 1303–08.

<sup>62</sup> *See* TRAVELERS, HOMEOWNERS SPECIAL FORM HO-3 (06-06), at 19 (2006) [hereinafter TRAVELERS HOMEOWNERS POLICY], available at [http://docs.nv.gov/doi/documents/home\\_policies/TravelersForms/Travelers\\_HO-3.pdf](http://docs.nv.gov/doi/documents/home_policies/TravelersForms/Travelers_HO-3.pdf) (employing the term “an ‘insured’”); NATIONWIDE, HOMEOWNERS 3 FORM (HO 3 (01 00)), at 21 (2000), available at <http://insurance.mo.gov/consumers/home/documents/HO3-0100-01.pdf> (same); THE HARTFORD, HOMEOWNERS 3 SPECIAL FORM (HO 00 03 10 00), at 17 (2000), available at [http://docs.nv.gov/doi/documents/home\\_policies/HartfordForms/Hartford\\_HO\\_00](http://docs.nv.gov/doi/documents/home_policies/HartfordForms/Hartford_HO_00)

property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person,” and contains the ISO “different kind or degree than intended” language.<sup>63</sup> USAA and Liberty Mutual utilize language very similar to Allstate’s, and the “foreseeable result” and “reasonably expected” additions in their policies expand the intentional harm exclusion and provide additional grounds for the insurer to deny coverage.<sup>64</sup> Zurich, through its Farmers Insurance subsidiary, goes even further.<sup>65</sup>

This brief discussion of intentional harm exclusions shows that standard personal lines liability policies: (1) exclude intentionally caused

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\_03\_10\_00.pdf (same). Travelers, Nationwide, and The Hartford hold approximately 4.39%, 3.75%, and 1.42% of the homeowners market in the United States, respectively. NAT’L ASS’N OF INS. COMM’RS, *supra* note 45, at 2.

<sup>63</sup> ALLSTATE INDEMNITY CO., STANDARD HOMEOWNERS POLICY AP783, at 16, available at [http://docs.nv.gov/doi/documents/home\\_policies/AllStateForms/AP783.pdf](http://docs.nv.gov/doi/documents/home_policies/AllStateForms/AP783.pdf). Allstate has approximately 9.12% of the homeowners market in the United States. NAT’L ASS’N OF INS. COMM’RS, *supra* note 45, at 2.

<sup>64</sup> See USAA, HOMEOWNERS 3R(02) SPECIAL FORM (07-08), at 24 (2008) [hereinafter USAA HOMEOWNERS POLICY], available at [http://docs.nv.gov/doi/documents/home\\_policies/USAAForms/HO-3R\(02\)\(07-08\).pdf](http://docs.nv.gov/doi/documents/home_policies/USAAForms/HO-3R(02)(07-08).pdf) (using “reasonably expected”); LIBERTY MUTUAL, SAFECO HOMEOWNERS POLICY (HOMC-7030/EP 1/09), at 14 (2009), [hereinafter LIBERTY MUTUAL HOMEOWNERS POLICY], available at [http://docs.nv.gov/doi/documents/home\\_policies/LibertyMutualForms/HOM-7030.pdf](http://docs.nv.gov/doi/documents/home_policies/LibertyMutualForms/HOM-7030.pdf) (using “foreseeable result”). The market share for USAA and Liberty Mutual is 4.91% and 5.89%, respectively. NAT’L ASS’N OF INS. COMM’RS, *supra* note 45, at 2.

<sup>65</sup> See ZURICH, FARMERS NEXT GENERATION HOMEOWNERS POLICY NEVADA (56-5544 1ST ED. 7-06), at 38 (2006) [hereinafter ZURICH HOMEOWNERS POLICY], available at [http://docs.nv.gov/doi/documents/home\\_policies/ZurichForms/56-5544-1st.pdf](http://docs.nv.gov/doi/documents/home_policies/ZurichForms/56-5544-1st.pdf) (listing such coverage exclusions as mistaken beliefs, intentional acts, and failure to act). Zurich has 6.22% of the market, largely through Farmers. NAT’L ASS’N OF INS. COMM’RS, *supra* note 45, at 2. The exclusion is so broad it is worth setting out:

We do not cover bodily injury, property damage or personal injury which is caused by, arises out of, or is the result of an intentional act by or at the direction of any insured. By way of example this includes but is not limited to any intentional act or intentional failure to act by any insured, whether a criminal act or otherwise, where resulting injury or damage would be objectively expected to a high degree of likelihood, even if not subjectively intended or expected. This exclusion applies even if:

- a. any insured mistakenly believes he or she has the right to engage in certain conduct;
- b. the injury or damage is sustained by persons or property not intended or expected by any insured;
- c. the injury or damage is different or greater or of a different quality than that intended or expected;
- d. any insured did not understand that injury or damage may result; or
- e. any insured knew the intentional act or failure to act was a violation of any penal law, whether or not an insured is actually charged with or convicted of a crime.

ZURICH HOMEOWNERS POLICY, *supra*, at 38.

harm (often even if the harm that occurred was “of a different kind, quality or degree” than the harm initially expected, if any); and (2) are likely to exclude derivative negligence claims against other insureds whose policies otherwise might provide a legal defense to the policyholder and a source of compensation to the victims. Based on 2012 market data compiled by the National Association of Insurance Commissioners (“NAIC”), the eight insurers mentioned above write approximately 56% of the nation’s homeowners insurance market.<sup>66</sup> State Farm, the largest personal lines insurer in the country, possesses 20.7% of the homeowners insurance market.<sup>67</sup>

## 2. *The Uncertainty of Self-Defense Provisions*

The self-defense exception to the intentional harm exclusion is one of the few current areas where liability insurance could fulfill its hoped-for role in financially protecting policyholders and compensating victims shot in alleged acts of self-defense.<sup>68</sup> This coverage is limited, though, for several reasons.<sup>69</sup>

First, the exception is not found in all homeowners policies. Five of the ten policies discussed in the previous section contain a self-defense

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<sup>66</sup> NAT’L ASS’N OF INS. COMM’RS, *supra* note 45, at 2. Presumably, many of the insurers who write the rest of the homeowners market also utilize ISO’s intentional harm exclusion, or a similarly broad one.

<sup>67</sup> *Id.*

<sup>68</sup> An “exception” to an exclusion brings back some of the coverage the exclusion would otherwise eliminate. For example, an insured who intentionally caused harm in a legitimate act of self-defense would not be excluded from coverage due to the intentional harm exclusion. ISO’s action states: “However this Exclusion E.1 [Intentional Harm] does not apply to ‘bodily injury’ or ‘property damage’ resulting from the use of reasonable force by an ‘insured’ to protect persons or property.” ISO HOMEOWNERS 3 FORM, *supra* note 45, at 19.

<sup>69</sup> The existence of statutory or common law self-defense laws as a defense to criminal prosecution does not dictate insurance coverage, which is governed (in part) by the language of the policy and the applicability of its contractual intentional harm exclusion. *See* State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504, 505 (Fla. 1989) (“The intent underlying an act of self-defense where the defender intends to harm the attacker is identical to that underlying an assault. In each, the actor intends to inflict harm on the other. . . . The difference between the two lies in the motive or purpose governing the act; the motive for one is worthy, that for the other is not. Nevertheless, such acts of self-defense are undeniably intentional and have been held to be embraced within intentional act exclusions by a majority of courts.”); *see also* Coop. Fire Ins. Ass’n of Vt. v. Bizon, 693 A.2d 722, 728 (Vt. 1997) (holding that “intent” is a complex term and does not necessarily include harmful acts). Some courts have disagreed with this analysis and ruled that intentional harm caused by a lawful use of self-defense can constitute an “accident” and not trigger the intentional injury exclusion despite the absence of a self-defense exception in the policy. *See, e.g.,* Vt. Mut. Ins. Co. v. Walukiewicz, 966 A.2d 672, 682 (Conn. 2009) (“Accordingly we conclude that the intentional injury exclusion does not preclude coverage for injuries resulting from legitimate acts of self-defense because those injuries were not expected or intended by the insured.”). For a discussion of how courts interpret self-defense claims in the face of intentional harm exclusions, *see generally* John Dwight Ingram, *The Expected or Intended Exclusion in Liability Insurance: What About Self-Defense?*, 42 CREIGHTON L. REV. 123 (2009).

exception.<sup>70</sup> Second, standard homeowners policies do not cover any costs associated with defending against criminal charges.<sup>71</sup> Third, even when present in the policy, the exception's applicability will often be uncertain as it will depend upon the policy language, the facts of the shooting, and state law on the use of self-defense in criminal cases, as well as the claim adjuster's assessment of how these issues apply.<sup>72</sup> As with varying judicial definitions of "accident,"<sup>73</sup> these ambiguities will often leave the policyholder, insurer, and victim uncertain about the scope of insurance coverage.

Perhaps because of these limitations, several insurers offer specialized liability products for gun owners. This market has attracted increased attention from gun owners and the media.<sup>74</sup> The NRA endorses an insurance program through broker Lockton Affinity, which administers a number of gun-related insurance products, including self-defense coverage, excess personal liability insurance, and coverage for gun shops and gun shows.<sup>75</sup> The self-defense endorsement to Lockton's excess personal liability insurance provides coverage for "'bodily injury' or 'property damage' caused by the use of a 'legally possessed firearm' by the Individual Insured Member while engaged in an 'act of self-defense.'"<sup>76</sup> Self-defense is defined as actions authorized by state law.<sup>77</sup> There are two

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<sup>70</sup> The ISO, AAIS, Travelers, USAA, and Liberty Mutual policy forms contain self-defense exceptions. ISO HOMEOWNERS 3 FORM, *supra* note 45, at 19; AAIS, *supra* note 61; TRAVELERS HOMEOWNERS POLICY, *supra* note 62, at 19; USAA HOMEOWNERS POLICY, *supra* note 64, at 24; LIBERTY MUTUAL HOMEOWNERS POLICY, *supra* note 64, at 14. The State Farm, Nationwide, The Hartford, Allstate, and Zurich, policy forms do not.

<sup>71</sup> *E.g.*, USAA HOMEOWNERS POLICY, *supra* note 64, at 24.

<sup>72</sup> *See, e.g.*, Allstate Ins. Co. v. Justice, 493 S.E.2d 532, 535–36 (Ga. Ct. App. 1997) (holding that the facts of the underlying case were sufficient for a jury to find that the insured triggered his policy's self-defense exception, despite the insurer's argument that the facts actually supported a finding of "mutual combat").

<sup>73</sup> *See supra* notes 46–50 and accompanying text.

<sup>74</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> (discussing the increased availability of personal gun liability insurance); Jay MacDonald, *Gun Owners Seek Out Self Defense Insurance*, BANKRATE (Feb. 1, 2013), <http://www.bankrate.com/finance/insurance/gun-owners-look-for-self-defense-insurance.aspx> (discussing advocates' increased calls for gun liability insurance).

<sup>75</sup> *Insurance for NRA Members*, LOCKTON AFFINITY, <http://www.locktonrisk.com/nra/members.htm> (last visited Apr. 15, 2014). A Lloyd's syndicate underwrites the coverage and provides the actual insurance. LLOYD'S, PERSONAL FIREARMS LIABILITY INSURANCE: POLICY FORM (2013), [hereinafter LLOYD'S LIABILITY INSURANCE FORM], available at [http://www.locktonrisk.com/nra/forms/Self-Defense\\_Certificate\\_of\\_Insurance.pdf](http://www.locktonrisk.com/nra/forms/Self-Defense_Certificate_of_Insurance.pdf). The policy states it is excess to any other liability policy providing coverage. *Id.* § I.A.

<sup>76</sup> LLOYD'S LIABILITY INSURANCE FORM, *supra* note 75, amend. § VII.A.

<sup>77</sup> *See id.* amend. § X.P ("Act of self-defense' shall mean the act of defending one's person, or other persons who may be threatened, or one's property by the actual or threatened use of a 'legally possessed firearm' as may be authorized by an applicable local, state or federal laws of the state or jurisdiction within which the 'bodily injury' or 'property damage' occurs. 'Act of self-defense'

separate aspects of coverage: (1) the standard insuring agreement for civil actions, which includes a duty to defend; and (2) *reimbursement* for criminal defense costs up to the policy limits, but only if either the charges are dropped or the insured is acquitted “due to an ‘act of self-defense.’”<sup>78</sup> The insurance application allows the policyholder to select policy limits from \$100,000 to \$1,000,000.<sup>79</sup>

### III. INSURING INTENTIONAL HARM AND CRIMINAL ACTS

If standard liability policies would only rarely respond to wrongful deaths and injuries caused by firearms, where does this leave us? States could either encourage or require liability insurers to cover what they currently exclude under their standard policies: bodily injury intentionally caused by firearms. This approach suggests four scenarios: (1) insurers voluntarily offer coverage and gun owners are required to obtain it; (2) insurers are required to offer this coverage in specific policies (e.g., homeowners policies) and gun owners are required to obtain it; (3) insurers are required to offer coverage, but purchase is optional for gun owners; (4) insurers voluntarily offer coverage and purchase is optional for gun owners. Each scenario presents problems; options (3) and (4), in which gun owners are not required to obtain insurance, are functionally comparable due to moral hazard and adverse selection issues discussed below.

#### A. *Insurers Voluntarily Covering Intentional Harm*

Market-based solutions are usually preferable to mandating insurance coverage, particularly if many insurers and potential policyholders would be hostile to such coverage requirements. However, there appears to be little interest among insurers to expand liability coverage for gun-related injuries outside of certain specialty insurance products offered to gun owners and gun clubs, such as enhanced self-defense coverage.<sup>80</sup> This is not surprising. As noted above, homeowners policies already cover some negligence claims involving the use of firearms, though it is increasingly unlikely that a policy would cover a negligence claim if another insured under the policy intentionally harmed the claimant (as determined by state insurance coverage law, not tort law). Many policies, though certainly not

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includes the rendering of emergency assistance solely at the request of a uniformed law enforcement officer.”).

<sup>78</sup> *Id.* amend. §§ VII.A–B, XIII.

<sup>79</sup> The yearly premiums range from \$165.00 (\$100,000 limit) to \$600.00 (\$1,000,000 limit). Reimbursement for “Criminal Defense Expenses” require limits of \$500,000 or \$1,000,000. *NRA Self-Defense Insurance*, LOCKTON AFFINITY, <http://www.locktonrisk.com/nra/defense.htm> (last visited Apr. 15, 2014).

<sup>80</sup> *See supra* text accompanying notes 75–79.

all, also contain a self-defense exception to the intentional harm exclusion.<sup>81</sup> Insurance coverage for criminal prosecutions is rare, at least for personal lines policies.<sup>82</sup> If there is an increase in coverage demands for gun-related injuries, especially if accompanied by court decisions favorable to policyholders, we are more likely to see explicit exclusions for gun related injuries rather than increased coverage.<sup>83</sup>

Financial or actuarial risk is another obstacle for insurers in underwriting coverage for firearm-related claims arising out of willful acts. Insurers need sufficient data to estimate claim frequency and a range of damage awards to establish adequate rates.<sup>84</sup> This type of coverage would be new and insurers would not have the quantity and quality of information they typically rely on in underwriting liability policies. Further, insurers' actuarial ability to underwrite this coverage accurately using risk-based rate structures does not guarantee that they would be allowed to charge the premiums desired. Rate regulation remains an essential component of insurance regulation in many states, particularly in personal lines.<sup>85</sup> There is a sufficient history of regulatory rate suppression to create legitimate concerns that insurers would not be allowed to charge sufficient premiums to cover losses,<sup>86</sup> especially when access to firearms involves both constitutional rights and fervent advocacy by gun-rights organizations. Though regulatory rate suppression for firearm liability insurance may make it cheaper and therefore more palatable for gun owners, it would reduce or defeat insurers' ability to price for risk, one of the primary objectives of mandating liability insurance.

While these concerns are real, they need not be significant obstacles.

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<sup>81</sup> See *supra* note 70 and accompanying text.

<sup>82</sup> See Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 66, 70 (David M. Engel & Michael McCann eds., 2009) (“[A]lthough liability insurance contracts provide broad defense and indemnity coverage for tort proceedings and tort damages, they typically do not provide defense coverage for criminal proceedings, and, to my knowledge, they never provide any coverage for criminal fines or penalties.”).

<sup>83</sup> See *Missing the Target, Gun Insurance Proposals Overlook Important Realities of the Risks*, *VIEWPOINT*, Winter 2013, at 3, 7 (“In any event, if liability insurers reconsider their exposure to gun violence in any fundamental sense, they are more likely to reduce that exposure, not expand it.”).

<sup>84</sup> See Baker & Farrish, *supra* note 14, at 298 (“The core analytical task of an insurance enterprise is identifying future losses, . . . estimating their frequency and magnitude, . . . and then deciding how much to charge to which classes of people in return for this protection.”).

<sup>85</sup> See, e.g., FED. INS. OFFICE, U.S. DEP’T OF THE TREASURY, *HOW TO MODERNIZE AND IMPROVE THE SYSTEM OF INSURANCE REGULATION IN THE UNITED STATES* 54–55 (2013).

<sup>86</sup> See ABRAHAM, *supra* note 19, at 129 (“[I]nsurers are always concerned about the prospect that their rates will be regulated in a manner that denies them what they regard as a fair profit.”); Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 *TEX. L. REV.* 1681, 1700 (1994) (“[Insurance] affordability concerns have led to rate suppression in many states and, as a consequence, have led to availability problems.”); see also *State Farm Mut. Auto. Ins. Co. v. New Jersey*, 590 A.2d 191 (N.J. 1991) (noting that a provision of the Fair Automobile Insurance Reform Act that prohibited insurers from directly passing surcharges and assessments on to policyholders was not an unconstitutional taking).

First, insurers would have access to a large amount of public information collected by public safety agencies and other groups concerning incidents of firearm use, the type of firearms used, whether criminal charges were filed, and some approximation of the injuries caused.<sup>87</sup> And while insurers may have little experience in adjusting liability claims arising out of intentional shootings, the causes of action and types of damages available to claimants would be very familiar (e.g., medical treatment, lost income, pain and suffering, loss of consortium). Second, insurers could use standard risk mitigation practices to limit their liability, for example, through the use of a sublimit, capping insurer liability at a lower limit than available in the policy as a whole, or by narrowing the scope of liability itself through additional exclusions.<sup>88</sup> Third, insurers often do write new products in the absence of significant underwriting data, *if* they perceive there is an economic incentive to do so.<sup>89</sup>

Unfortunately, there seems to be little profit in the enterprise, even if insurers do surmount these hurdles. Given that Second Amendment and gun rights issues are volatile areas for many individuals and organizations, providing insurance coverage for the product could interject these insurers into a political and social debate they likely would want to avoid—costing them policyholders in otherwise profitable areas, such as standard homeowners and automobile insurance. Finally, even if these issues were successfully addressed (or willing to be risked), the likely underwriting profit would be small<sup>90</sup> and arguably not worth the time to develop the product, obtain regulatory approval,<sup>91</sup> educate insurance producers, litigate the inevitable challenges, and face the reputational risks it could entail.

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<sup>87</sup> This assumption can be tested through a much more thorough review of the information available and an evaluation of what underwriting assumptions could be accurately drawn from this data. At present, critics argue that firearms injury data is not comprehensive or is otherwise flawed. *See supra* note 25. Moreover, there are likely political and perhaps legal problems with expanding research in this area and allowing private insurers access to some of the data.

<sup>88</sup> *See* 12 COUCH ON INSURANCE § 180:15 (3d ed. 2005) (“Insurers frequently specify a maximum amount that is reasonable under the policy . . .”).

<sup>89</sup> Tom Baker, *The Shifting Terrain of Risk and Uncertainty on the Liability Insurance Field*, 60 DEPAUL L. REV. 521, 529–31 (2011).

<sup>90</sup> Commentators have offered premium estimates falling within the range of \$20 to \$57. *See* Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits*, 14 ENGAGE 18, 23 (2013) (estimating a baseline premium of \$20 per year for the average firearm owner); Tom Harvey, *Gun Insurance Would Not Be Expensive*, GUN INS. BLOG (Jan. 23, 2013), <http://www.guninsuranceblog.com/gun-insurance-would-not-be-expensive/> (estimating an average premium of \$57.15 per year, per gun).

<sup>91</sup> Depending on the state, insurers may need to obtain regulatory approval from the state insurance department when introducing a new coverage. *State Insurance Regulation: History, Purpose and Structure*, NAIC, [http://www.naic.org/documents/consumer\\_state\\_reg\\_brief.pdf](http://www.naic.org/documents/consumer_state_reg_brief.pdf) (last visited Apr. 15, 2014).

### B. *Optional Purchase of Insurance Coverage*

Giving gun owners the option to purchase liability insurance that would cover intentional harm could reduce the furor that compulsory coverage would provoke, but it creates severe adverse selection problems. Few gun owners would likely purchase an endorsement that would cover future acts that, under criminal law, could be classified as homicides or assaults with a deadly weapon—or perhaps more important, insurers would not want to sell to those individuals who selectively believed they might need this coverage during the policy period. This problem would exist regardless of whether the insurer was required to offer the product or just authorized and encouraged to do so.<sup>92</sup> Insurers could also face another traditional adverse selection issue,<sup>93</sup> where the riskiest homeowners/gun owners could constitute a growing majority in an underwriting pool. Their (likely) greater claim frequency would drive the premiums upwards and further discourage its purchase by low-risk insureds, which could cause a higher loss ratio, creating even higher premiums and driving even more low-risk insureds out of the market.

### C. *Mandatory Offer and Purchase*

Compulsory coverage for injuries caused by illegal use of firearms addresses some of these problems. Insurers would presumably not be a significant focus of gun owner anger if the law required them to offer the coverage—or at least not after public furor died down. The moral hazard and adverse selection issues associated with optional purchase of this coverage would be significantly lessened since all gun owners would be required to purchase this coverage.<sup>94</sup>

What if a state required liability insurers to cover intentional shootings? Leaving aside for a moment the wisdom of such legislation (and Second Amendment issues), states would likely have the legal authority to mandate this coverage, at least absent express federal legislation preempting such laws. States have broad powers to regulate insurance, an area of traditional state concern.<sup>95</sup> The McCarran-Ferguson

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<sup>92</sup> There is an argument for gun owners to purchase enhanced liability insurance to cover self-defense claims, since not every insurer provides a self-defense exception in intentional harm exclusions and even for those that do, insurers may still dispute coverage on the facts of specific cases. See Gilles & Lund, *supra* note 90, at 19 (“Given the vagaries of self-defense law and the uncertainty over how a jury will evaluate a colorable claim of self-defense, some gun owners could benefit from enhanced self-defense liability coverage . . .”); *supra* notes 70–73 and accompanying text.

<sup>93</sup> See 1 COUCH ON INSURANCE, *supra* note 88, § 1:3 (defining adverse selections as “the statistical phenomenon of people with higher than average risk seeking insurance more often than people of average or below average risk”).

<sup>94</sup> For a discussion of some specific concerns relating to moral hazard, see *infra* Part III.C.1.

<sup>95</sup> *Id.* § 2:2.

Act<sup>96</sup> reaffirms this right, and establishes that state laws related to the “business of insurance” will not be preempted by implication.<sup>97</sup> Some states would also need to amend or repeal statutory prohibitions against insurance coverage for intentional acts or harm, which would not be an obstacle to state legislatures who wish to mandate this coverage for gun owners.<sup>98</sup>

Opponents have raised many objections to requiring this coverage. I do not believe most of them are sustainable and addressed some of the various problems above. The following two subsections focus on two major objections: (1) insurance cannot cover intentional harm; and (2) insurers would not offer insurance covering intentional gun violence.

### 1. *Insurance Does Not Cover Illegal Acts*

As expected, insurers oppose providing coverage for intentional harm caused by a firearm.<sup>99</sup> Dr. Robert Hartwig, President of the Insurance Information Institute, stated: “Insurers don’t cover illegal acts, ever, period.”<sup>100</sup>

Yet, insurers often do. A prime example is coverage for driving while intoxicated. Personal lines automobile policies do not exclude bodily injury or property damage when the policyholder is driving under the influence of alcohol or drugs in violation of law.<sup>101</sup> These policies do exclude intentional harm, but there is no exclusion for criminal acts as there are in several of the homeowners policies mentioned earlier.<sup>102</sup> The

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<sup>96</sup> 15 U.S.C. §§ 1012–1015 (2012).

<sup>97</sup> *Id.* § 1012(a)–(b); *see* *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427–28 (2003) (“[T]he business of insurance shall be recognized as a subject of state regulation, which will be good against preemption by federal legislation unless that legislation specifically relates to the business of insurance.” (citation omitted) (internal quotation marks omitted)); *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 380 (4th Cir. 2012) (observing that the McCarran-Ferguson Act authorizes “‘reverse preemption’ of generally applicable federal statutes by state laws enacted for the purpose of regulating the business of insurance”); *Life Partners, Inc. v. Morrison*, 484 F.3d 284, 291–95 (4th Cir. 2007) (describing Congress’s purpose in enacting the McCarran-Ferguson Act).

<sup>98</sup> *See, e.g.*, CAL. INS. CODE § 533 (West 2013) (“An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.”); MASS. GEN. LAWS ANN. ch. 175, § 47 (West 2013) (“[N]o company may insure any person against legal liability for causing injury . . . by his deliberate or intentional crime or wrongdoing . . .”).

<sup>99</sup> *See* Cavanaugh, *supra* note 4 (“[T]he industry knows one thing: illegal acts cannot be insured.”).

<sup>100</sup> Jones, *supra* note 74 (internal quotation marks omitted).

<sup>101</sup> *See, e.g.*, Baker, *supra* note 82, at 74 n.10 (“[T]he overwhelmingly compensatory purpose of compulsory automobile liability insurance has prevented automobile insurance companies from putting drunk driving exclusions in their policies.”); Avi Perry, *Restructuring Insurance Coverage for Drunk Drivers*, 4 HARV. L. & POL’Y REV. 427, 431 (2010) (“[N]o Connecticut automobile insurance policy reviewed . . . contained an exclusion for injuries or damages arising as a result of drunk driving.”).

<sup>102</sup> Perry, *supra* note 101, at 431; *see supra* notes 63–65 and accompanying text. The intentional harm exclusion in ISO auto policies is limited. *See* ISO, PERSONAL AUTO POLICY FORM

likely reason for this coverage is that legislators and regulators would not allow insurers to add a driving while intoxicated (DWI) or criminal act exclusion because of the numerous deaths and injuries that occur each year by impaired drivers.<sup>103</sup> Exclusions for intoxicated driving would eliminate a major source of financial contribution to victims harmed by this behavior, thus defeating a primary purpose of liability insurance.<sup>104</sup> We also know that the minimum liability limits required under state motor vehicle financial responsibility laws are not sufficient to compensate for serious bodily injuries.<sup>105</sup>

Professional liability policies, such as Errors & Omissions and Directors & Officers coverages, exclude intentionally dishonest, criminal, and similar acts, but typically the insurer may only deny coverage on this ground if the fraud is actually proven.<sup>106</sup> Until then, the policy requires the insurer to defend the policyholder or reimburse defense costs.<sup>107</sup> For example, a typical Directors & Officers policy excludes:

[A]ny Claim . . . alleging, based upon, arising out of, or attributable to any deliberately fraudulent or deliberately criminal act, error or omission. However, this exclusion shall not apply unless and until there is a final adjudication against

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(PP 00 01 01 05), at 3 (2003), available at <http://www.sba.muohio.edu/adelmasw/classes/Policies/01-09%20PersonalAutoPolicyPP00010105.pdf> (“We do not provide Liability Coverage for any ‘insured’ . . . [w]ho intentionally causes ‘bodily injury’ or ‘property damage.’”).

<sup>103</sup> See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., ALCOHOL IMPAIRED DRIVING 1 (2012), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811606.pdf> (noting that in 2010 over 10,000 people were killed in alcohol-impaired motor vehicle accidents, accounting for approximately one-third of the total motor vehicle traffic death toll).

<sup>104</sup> See Baker, *supra* note 82, at 74 n.10 (“[T]he overwhelmingly compensatory purpose of compulsory automobile liability insurance has prevented automobile insurance companies from putting drunk driving exclusion in their policies.”); Perry, *supra* note 101, at 432 (“If a drunk driving exclusion were permitted, many tort victims would be either undercompensated or wholly uncompensated for their injuries since drivers typically have shallower pockets than do insurers.”). Critics of this regime that allows for DWI-related coverage may argue “that the gap between the criminal and civil consequences of illegal conduct should be narrow, if not nonexistent.” *Id.* at 427. Professor Gary Schwartz notes a potential shared theoretical justification in tort law and liability insurance: “[T]he many scholars who unqualifiedly assert that liability insurance is inconsistent with fairness theories of tort law are guilty of ignoring . . . the possibility that compensatory justice is the theory that tort law has in mind—a theory that renders liability insurance not only acceptable but commendable.” Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 335 (1990).

<sup>105</sup> Most states require auto liability insurance in the \$20,000 to \$25,000 range (per person, which doubles the total amount), though some states go as high as \$50,000 in minimum liability limits. *State-by-State Minimum Coverage Requirements*, *supra* note 20.

<sup>106</sup> 9A COUCH ON INSURANCE, *supra* note 88, § 131:16; 14 *id.* § 201:59.

<sup>107</sup> 14 *id.* § 201:59.

any Insured as to such conduct.<sup>108</sup>

On a practical level, this requirement is often tantamount to coverage, since these cases are rarely tried to conclusion and judicial resolution of any fraud allegations is unlikely.<sup>109</sup> Further, insurance coverage for defense costs can bring in substantial financial resources to a case and serve as one source of compensation for reaching settlement.<sup>110</sup> These exclusions are underwritten and priced with the knowledge that intentional fraud allegations alone will not defeat insurance coverage.<sup>111</sup>

Similar coverage is available even for allegations of criminal acts causing significant physical and emotional injury, such as physical and sexual abuse. As an illustration, Hanover Insurance offers professional liability insurance for human service agencies that includes optional endorsements covering civil liability for “Physical and Sexual Abuse Coverage” (to protect the agency) and “Innocent Party Defense Coverage” (to protect agency employees).<sup>112</sup> A separate endorsement reimburses the agency for defense costs it pays to employees charged with criminal acts, but only if the charges are dismissed or the employee acquitted.<sup>113</sup>

First party property insurance typically provides coverage to individuals and entities who are “innocent co-insureds.” For example, mortgage lenders do not lose their coverage (often as an “additional insured”) on properties in which they have maintained a security interest even when a borrower/insured intentionally damages or destroys the

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<sup>108</sup> ACE ADVANTAGE, MANAGEMENT PROTECTION POLICY (PF-18880), at 5 (2005), available at <http://www.acegroup.com/us-en/assets/ace-advantage-management-protection-policy-for-public-companies.pdf>.

<sup>109</sup> Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 776–77 (2009).

<sup>110</sup> *See id.* at 760–61, n.19 (noting that Directors and Officers liability policies “typically cover amounts paid in settlements as well as defense costs”).

<sup>111</sup> Errors & Omissions policies contain similar provisions. *See, e.g.*, BEAZLEY INS. CO., LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY (F00020), at 5 (2008), available at [https://www.beazley.com/forms\\_and\\_resources\\_search\\_page.html?business=164&type=1565](https://www.beazley.com/forms_and_resources_search_page.html?business=164&type=1565) (select “Lawyers” from the first drop-down menu, “Wordings/policies” from the second drop-down menu, then follow “Lawyers\_PL\_Ins\_Policy.pdf”) (“The coverage under this Policy does not apply to Damages or Claims Expenses in connection with or resulting from any Claim . . . arising out of or resulting from any criminal, dishonest, fraudulent or malicious act, error or omission of any Insured; however, this Policy shall apply to Claims Expenses incurred in defending any such Claim alleging the foregoing until such time as there is a final adjudication, judgment, binding arbitration decision or conviction against the Insured, or admission by the Insured, establishing such criminal, dishonest, fraudulent or malicious conduct, or a plea of *nolo contendere* or no contest regarding such alleged conduct, at which time the Insured shall reimburse the Underwriter for all Claims Expenses incurred defending the Claim and the Underwriter shall have no further liability for Claims Expenses.”).

<sup>112</sup> HANOVER INS. GRP., PROFESSIONAL LIABILITY, GENERAL LIABILITY, AND ABUSE & MOLESTATION COVERAGE 6 (2008), available at <http://www.hanover.com/linec/docs/115-1066.pdf>.

<sup>113</sup> *See id.* at 4 (stating that reimbursement for criminal defense fees is limited to \$25,000).

property (e.g., through arson).<sup>114</sup>

Numerous courts have held that innocent insureds, such as spouses, are entitled to coverage even if their co-insured intentionally set fire to a home or other property, regardless of whether the insurance policy itself excludes intentional acts caused by “any” or “an” insured.<sup>115</sup> These cases are often based on policy language that is inconsistent with statutory requirements for standard fire policies, which apply to first party property coverages in both homeowner and commercial policies.<sup>116</sup> The existence and enforcement of these requirements protects individuals, especially victims of domestic abuse, whose co-insured (e.g., a spouse or partner) intentionally commits arson, perhaps as retaliation for acrimonious divorce or separation proceedings.<sup>117</sup>

So insurers, either by public policy or by choice and market demands, often insure illegal and intentional acts, despite the moral hazards inherent in doing so. This is not surprising given the multiple roles that liability insurance plays, such as protecting policyholder assets, compensating injured parties, and promoting safer practices—whether in driving a vehicle, designing and manufacturing products, or providing services.

While moral hazard concerns for insuring intentionally caused harm are legitimate,<sup>118</sup> in practice it is unlikely that insurance coverage for intentional shootings would encourage additional gun violence even by reducing the financial costs of such actions. First, policyholders already face substantial criminal penalties far more severe than any exacted through civil litigation. Second, there are significant normative, personal, and psychological barriers to intentionally shooting someone (particularly a family member) that are presumably a far greater deterrent for most

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<sup>114</sup> See ISO HOMEOWNERS 3 FORM, *supra* note 45, at 15 (“If we deny your claim, that denial will not apply to a valid claim of the mortgagee . . .”).

<sup>115</sup> See, e.g., *Nangle v. Farmers Ins. Co.*, 73 P.3d 1252, 1257–58 (Ariz. Ct. App. 2003) (discussing the possible recovery of an innocent co-insured if she did not know that her husband had set the fire); *Trinity Universal Ins. Co. v. Kirsling*, 73 P.3d 102, 106–07 (Idaho 2003) (holding that a fire insurance policy could not provide less coverage to an innocent co-insured than that which would have been afforded under her standard policy); *Sager v. Farm Bureau Mut. Ins. Co.*, 680 N.W.2d 8, 14 (Iowa 2004) (discussing the unenforceability of intentional loss provision in fire insurance policy).

<sup>116</sup> See *Century-Nat’l Ins. Co. v. Garcia*, 246 P.3d 621, 625–27 (Cal. 2011) (surveying cases holding that fire policies excluding coverage for an innocent co-insured were unenforceable because they undermined statutorily mandated coverage).

<sup>117</sup> VAUGHAN & VAUGHAN, *supra* note 41, at 466; Melody S. Mosley, *Arson and Innocent Co-Insureds: Homeowners Coverage Analysis*, PROP. CASUALTY 360 (Nov. 6, 2012), <http://www.propertycasualty360.com/2012/11/06/arson-and-innocent-co-insureds-homeowners-coverage>.

<sup>118</sup> “Somewhat loosely speaking, moral hazard is the tendency of insurance to diminish an insured’s incentives to take care that would reduce the risk being insured against.” Tom Baker & Peter Siegelman, *The Law and Economics of Liability Insurance: A Theoretical and Empirical Review*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 169, 169 n.3 (Jennifer Arlen ed., 2013); see also Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721, 762–66 (2012) (discussing moral hazard).

people than the risk of being sued.<sup>119</sup> These deterrents would remain and when they are not sufficient to prevent an intentional shooting, it is difficult to imagine that civil liability for harm caused by an intentional shooting provides any real additional deterrence to an individual's decision to shoot another person.<sup>120</sup> Further, an important goal of mandating this coverage is to leverage insurers' loss prevention abilities and, through risk-based pricing, encourage gun owners to store firearms in a safer manner—thus reducing the use of guns in suicides, domestic violence, and other situations where such use was not premeditated.

Insurers have long addressed moral hazard concerns through “contract design,” which provides policyholders financial incentives (or penalties) to minimize insured losses, and also thereby reducing the financial consequences of insuring these risks for insurers.<sup>121</sup> These tools include deductibles, policy limits, and experience ratings, as well as providing sub-limits on particular risks and narrowly drawing specific coverages or exclusions. These practices are designed to give policyholders a financial stake in managing their insured risks and would play a similar role here.

## 2. *Insurers Might Refuse to Write the Coverage*

If insurers would have minimal economic incentive to voluntarily offer this coverage even assuming sufficient rate flexibility, then mandatory coverage is the alternative. However, while states likely could require insurers to offer coverage for intentional harm caused by a gun as a condition of writing a specific coverage line in their state, they cannot require an insurer to write in that line. For example, an auto insurer cannot be required to also write homeowners insurance, or a commercial lines insurer to write personal lines policies.

For states, the most logical solution is tying this coverage to homeowners (and renters) insurance, a business line that insurers would be very reluctant to exit because of a new coverage requirement.<sup>122</sup> While this

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<sup>119</sup> Of course, an individual who intends to kill or intentionally risks killing someone as part of a criminal endeavor has already bypassed these deterrents.

<sup>120</sup> Commentators and courts have expressed similar skepticism that insurance coverage for intentional torts would measurably increase the likelihood of occurrence. See, e.g., Christopher C. French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 71 (2012) (discussing a Wyoming Supreme Court decision that expressed an inability to locate any studies showing that insurance for punitive damages would make misconduct more probable); Erik S. Knutsen, *Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct*, 37 QUEEN'S L.J. 73, 109 (2011) (“Most insureds do not consider loss of insurance coverage while acting in a manner that could be deemed to be intentional or criminal”); Swedloff, *supra* note 118, at 763–64 (noting that the fear of moral hazard is likely exaggerated).

<sup>121</sup> Baker & Siegelman, *supra* note 118, at 177–79; Swedloff, *supra* note 118, at 765.

<sup>122</sup> This assumes that insurers can charge adequate rates and contain losses through policy limits so that a coverage mandate does not significantly alter existing profitability (or in some cases, loss)

would be unpopular with insurers, coverage mandates are both a historic and contemporary feature of insurance regulation. For example, starting in 1887, New York and many other states mandated a specific insurance contract for fire coverage in property policies;<sup>123</sup> these provisions still remain in force today and their coverage requirements consistently upheld.<sup>124</sup> States generally require auto insurers to offer uninsured and underinsured motorists coverage with specified limits<sup>125</sup> and provide minimum coverage requirements in general.<sup>126</sup> Workers' compensation policies must cover all benefits authorized by state law (without policy limits), and disability and life insurance policies must comply with state nonforfeiture laws.<sup>127</sup>

Conceptually, then, mandating that a homeowners policy include coverage for intentional harm caused by a firearm is consistent with a state's traditional regulatory prerogatives. Exiting a state's homeowners market in the face of such a mandate would be a drastic step for personal lines insurers and likely an excessive response to this type of mandate, particularly if the allowed rates are adequate, the risks are controllable (i.e.,

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margins. For brevity, I include renters insurance within the ambit of homeowners insurance, though the take-up rate for renters insurance is much lower than for homeowners insurance, in part because mortgage lenders require homeowners coverage. Sarah Coffey, *Renters Insurance for Former Homeowners*, BANKRATE (July 10, 2012), <http://www.bankrate.com/finance/insurance/renters-insurance-former-homeowners.aspx> ("Not everyone is convinced that renters insurance is affordable or worth the investment. About 97 percent of homeowners have insurance coverage, but only about 47 percent of renters are insured . . .").

<sup>123</sup> See Scott G. Johnson, *The Suit Limitation Provision and the Equitable Tolling Doctrine*, 30 TORT & INS. L.J. 1015, 1016 n.4 (1995) ("The standard fire policy was first enacted into a statute in New York in 1887 and is often called the New York Standard Fire Insurance Policy.").

<sup>124</sup> N.Y. INS. LAW § 3404 (McKinney 2013); *Quaker Hills, LLC v. Pac. Indem. Co.*, 728 F.3d 171, 180, 184 (2d Cir. 2013) (upholding the enforceability of the mandatory New York Standard Form fire insurance unless an insurer deviates for terms that are more favorable).

<sup>125</sup> *E.g.*, CONN. GEN. STAT. § 38a-336(a)(1)–(2) (2013). States could also require personal lines auto insurers to cover wrongful acts committed with firearms. While auto policies cover far fewer acts of gun violence than a homeowners policy, auto liability insurance is already mandated and has an extensive enforcement regime in place. If coverage could be expanded beyond the traditional limits of auto liability insurance (i.e., bodily injury and property damage arising out of the use of an auto), then requiring both home and auto policies to cover intentional gun violence would expand the overall insurance pool, reduce premiums, and provide more compensation to victims.

<sup>126</sup> *E.g.*, *id.* § 38a-335(a).

<sup>127</sup> See *id.* § 31-345(a), (b)(2) (requiring workers' compensation policies to be approved by the Insurance Commissioner and requiring the Workers' Compensation Commission to annually determine a sufficient amount to meet expenses incurred); *id.* § 17b-611(a) (allowing the Commissioner of Social Services to provide a subsidized nongroup health insurance coverage for disabled persons); *id.* § 38a-439(a) ("[N]o policy of life insurance, except as stated in subsection (i) of this section, shall be delivered or issued for delivery in this state unless it contains in substance the following provisions, or corresponding provisions which in the opinion of the commissioner are at least as favorable to the defaulting or surrendering policyholder as are the minimum requirements hereinafter specified and are substantially in compliance with subsection (h) of this section . . .").

appropriate limits exist),<sup>128</sup> and other states enact similar laws that would make state market withdrawals increasingly difficult.

Nor is drafting the language especially difficult. This coverage could be provided by current homeowners policies or through a separate endorsement. For instance, the most current ISO form discussed above, the HO 00 03 05 11, could be adapted through a modification of the basic insuring agreement to expand the concept of “occurrence” (accident) and an additional exception to the intentional harm exclusion. For example, this policy could be amended by defining “firearm” and adding the following underlined language:

*Section II – Liability Coverages*

*A. Coverage E – Personal Liability*

If a claim is made or a suit is brought against an “insured” for damages because of “bodily injury” or “property damage” caused by an “occurrence” or because of “bodily injury” caused by a “firearm”, to which this coverage applies, we will: . . . .

*Personal Liability* . . . does not apply to the following:

*1. Expected or Intended Injury*

“Bodily injury” or “property damage” which is expected or intended by an “insured”, even if the resulting “bodily injury” or “property damage”:

- a. Is of a different kind, quality or degree than initially expected or intended; or
- b. Is sustained by a different person, entity or property than initially expected or intended.

However this Exclusion does not apply to:

- (1) “bodily injury” or “property damage” resulting from the use of reasonable force by an “insured” to protect persons or property, or
- (2) “bodily injury” resulting from an insured’s use of a “firearm.”

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<sup>128</sup> In addition to limiting the maximum amount of indemnity an insurer might owe, a state could restrict—or authorize insurers to limit—the definition of allowable intentional harm (e.g., no coverage for insureds hired to harm the victim, or a premeditated assault with the intention to murder). The type and number of coverage limitations also depends on the desired balance between various public goals. For example, the more victim compensation and leveraging of the insurance industry’s risk mitigation features that occur, then the more restrictions a state would put on insurers’ use of sub-limits, self-insured retentions, and limitations on what type of “intentional” harm could still be excluded.

#### IV. WHO WOULD BUY THIS INSURANCE?

Assume that the following are true: (1) insurers are required to offer, and gun owners must purchase, some form of liability insurance for intentional harm through the use of a gun; (2) the rates charged by insurers are actuarially valid and not suppressed (or raised) through regulation; (3) the proposal captures the three primary objectives of liability insurance—protecting policyholder assets, compensating victims, and encouraging risk mitigation strategies through underwriting; (4) the required coverage and associated limitations (e.g., sub-limits) adequately reduce the moral hazard of insuring wrongful acts; and (5) the public benefits of mandating coverage for illegal or wrongful acts of gun violence are sufficient to justify its use as an appropriate regulatory tool.

Even if all these conditions exist and there is sufficient political support to enact these coverage mandates, one major obstacle remains. Those most likely to shoot and injure others are not likely to be insured or otherwise have homeowners or renters insurance; nor would civil or criminal sanctions associated with violating a statutory requirement to purchase liability insurance deter individuals who already face far more severe penalties if convicted of an illegal shooting. The level of gun violence in our country is appalling, but unless we can address this issue, mandating liability insurance will not noticeably reduce it.

These problems should give pause to advocates and state legislators who wish to reduce gun violence through leveraging the traditional advantages of liability insurance. However, liability insurance offers too many potential advantages to be discarded without much greater consideration. These benefits include compensating victims, financially protecting policyholders, and insurers' ability to analyze, underwrite, and mitigate loss. The private insurance market has limitations, but it can also be innovative and ready to take (reasonably) measurable risks. Insurers have developed insurance products for many perils previously thought uninsurable because of traditional moral hazard concerns,<sup>129</sup> significant exposure issues,<sup>130</sup> or simply because the risk was historically ignored for

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<sup>129</sup> For example, some professional liability insurance policies cover sexual abuse claims. See *supra* note 112 and accompanying text.

<sup>130</sup> Insurance coverage for acts of terrorism is widely available, though only after the 9/11 attacks when the federal government created a reinsurance backstop covering a portion of loss associated with an announced act of terrorism. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322. This program is supported by most insurers, reinsurers, agents and brokers, and commercial policyholders, and demonstrates that public and private participation in some insurance programs can be successful. While acts of terrorism strike locally, they are directed against the nation as a whole and a national response seems appropriate. This Article focuses almost solely on state regulatory solutions; additional thought and research should be given to whether the federal government has a role in encouraging a private insurance market for mandatory firearm liability insurance covering wrongful acts.

coverage purposes.<sup>131</sup>

Further, the use of a private regulatory tool such as insurance might not only be more effective and less costly than a government program or mandate, but it might significantly temper the philosophical or political concerns many gun owners have about (further) governmental intrusion on Second Amendment rights.<sup>132</sup> A coverage mandate could financially motivate insurers to conduct or support additional research on reducing gun violence, as there would be a better alignment between their policy coverage obligations and the harm caused through firearms. These private market economic incentives could also avoid the current limitations on government-funded research in this area and the divisive political debates surrounding them.<sup>133</sup>

There are other ways to think about gun violence, insurance, and government policy. Two are briefly discussed here, simply as a starting point, to illustrate several alternatives in conceptualizing how insurance, or similar compensation/protection programs, could be used to address and reduce gun violence in our country.

#### A. *Creating Compensation Funds Through Surcharges*

States that mandate liability insurance for gun owners could require a portion of the insurance premium to go to a compensation fund for victims shot by an uninsured person. While there are precedents for this type of subsidization,<sup>134</sup> there are fairness issues in requiring individuals (as

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<sup>131</sup> For example, while the “absolute pollution exclusion” is utilized in most commercial general liability (“CGL”) policies, companies can obtain a variety of specialized liability policies and endorsements covering environmental risks. See ANN WAGNER, AM. L. INST., *THE IMPACT OF ENVIRONMENTAL LAW ON REAL ESTATE AND BUSINESS TRANSACTIONS: BROWNFIELDS AND BEYOND, CURRENT INSURANCE POLICIES FOR INSURING AGAINST ENVIRONMENTAL RISK* (2013), available at SU035 ALI-CLE 1685 (Westlaw). Damage to a company’s reputation and the retention of a public relations firm to “restore” the reputation is often included in professional liability policies, particularly those covering emerging cyber and social media risks. See Baker & Swedloff, *supra* note 8, at 1422 (“[I]nsurers provide loss prevention services for other reasons as well (such as marketing, public relations, and buyer demand) . . .”).

<sup>132</sup> A private regulatory tool may reduce, but it certainly will not eliminate, gun owners’ concerns. Mandating insurance means there must be an enforcement mechanism and accessible records, whether under public or private control, correlating gun ownership with the required insurance. See Mocsary, *supra* note 9, at 1258 (noting that “[a]n effect of mandatory insurance would be to provide insurance companies with a substantial amount of information about insureds” and that the vast amount of data insurers would have raises the question by gun owners about “whether, and to what extent, the firearm-specific information will be protected”).

<sup>133</sup> See *supra* note 25.

<sup>134</sup> Insurers are required to contribute to state guaranty funds that are activated when an insurer becomes insolvent and has insufficient assets to pay claims, and many licensed professionals, such as lawyers and brokers, may be required to contribute to funds that compensate individuals harmed by other professionals in that field. See generally Kent M. Forney, *Insurer Insolvencies and Guaranty Associations*, 43 *DRAKE L. REV.* 813 (1995) (providing a discussion of the insurance insolvency problem, a history of state liquidation acts, and developments in state guaranty associations). The

opposed to commercial enterprises) who are fully compliant with a law to pay for the consequences of those who are not. In addition, unlike other compensation schemes, the percentage of those purchasing firearm liability insurance and paying into the fund is likely to be less than the number of uninsured tortfeasors responsible for the majority of shootings. The cost of this insurance would increase significantly, with the majority of the claims paid likely going to victims of shooters who did not obtain the mandatory insurance.<sup>135</sup>

### B. *Play or Pay*

A more promising alternative would be to mandate liability insurance but allow gun purchasers the option to either purchase the insurance or to pay a surcharge (perhaps more expensive than the cost of the insurance), with the proceeds of the surcharge going to a compensation fund for gun violence victims. This option could allow the three major roles of liability insurance to operate by: (1) providing compensation for victims of gun violence; (2) creating incentives for liability insurers to further develop and utilize loss prevention mechanisms that could reduce gun violence; and (3) protecting gun owners who purchased insurance instead of paying the surcharge. Creating this option may also diminish the opposition to an insurance mandate, though the political furor surrounding the Affordable Care Act's individual mandate<sup>136</sup> suggests otherwise. However, it only partially addresses the compensation function of insurance, as it does not guarantee that the funds collected through the surcharge would be sufficient to compensate the victims of gun violence.

We can also review the assumption, noted here and more definitively stated elsewhere,<sup>137</sup> that a liability insurance mandate would be both

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National Conference of Insurance Guaranty Funds (property casualty) and the National Organization of Life and Health Insurance Guaranty Associations provide extensive information on state guaranty laws. NAT'L CONF. INS. GUARANTY FUNDS, <http://ncigf.org>; <http://www.nolhga.com> (last visited Apr. 15, 2014); NAT'L ORG. LIFE & HEALTH INS. GUARANTY ASS'NS, <https://www.nolhga.com> (last visited Apr. 15, 2014).

<sup>135</sup> A more direct approach would be to tax all gun sales at the federal or national level, rather than surcharging liability policies or mandating insurance coverage with or without coverage for intentional harm. While this plan could provide more funds for victim compensation, research, and public health strategies aimed at reducing gun violence, it would not utilize the insurance industry's ability to rate, price risk, and enhance gun safety and ownership. Nor would it provide specific insurance coverage for gun owners. This proposal is not new and brings a separate set of legal and public policy concerns that will not be addressed in this Article.

<sup>136</sup> The mandate establishes a "shared responsibility payment" whereby a taxpayer who "fails to meet the requirement [to "maintain minimum essential coverage"] must pay a "penalty with respect to such failures." 26 U.S.C. § 5000A(a)(b)(1) (2012).

<sup>137</sup> See Mocsary, *supra* note 9, at 1258 ("[T]here is little doubt that criminals will not insure . . ."); *id.* at 1260 ("Rightly or wrongly, Americans have more ingrained reasons to defy insurance mandates that they believe may lead to confiscation [of firearms]. . . . In other words, there

widely ignored by individuals who legally own guns and irrelevant to the majority of tortfeasors who are responsible for much of the gun violence. However, some gun owners *would* purchase mandatory insurance because it was the law, regardless of personal objections. Some gun right advocates, such as the NRA, and gun owners do perceive (correctly) the gaps in existing insurance coverage since there is a market for enhanced liability coverage for accidental and self-defense shootings.<sup>138</sup> Thus, there is a subset of people that *would* obey an insurance mandate, we just do not know the size of that subset and whether it would constitute a sufficiently large risk pool to truly engage the private insurance market and trigger its ability to actuarially assess the causes and consequences of gun violence, underwrite liability coverage for wrongful acts committed with a firearm, and reduce at least some of the potential for gun violence through risk-based premiums.

## V. CONCLUSION

Advocates for mandatory liability insurance rightly point out its potential advantages. These include not only policyholder protection and victim compensation, but also leveraging risk mitigation functions that insurance schemes can provide. Importantly, these benefits would also extend beyond the traditional recipients (i.e., policyholders and victims) to include individuals typically not part of a liability scheme, such as domestic partners and family members. Delaying access to firearms and restricting their use to particular individuals could diminish the use of firearms in suicide attempts and domestic disputes. In particular, since suicides account for over sixty percent of gun violence, measures that could reduce gun access to those contemplating this act could be a significant public policy achievement.

Homeowners policies may now cover the relatively small number of accidental firearm injuries and deaths, but insurers are reducing even this coverage through expanded intentional harm exclusions. Requiring insurance coverage for wrongful acts committed with a firearm would significantly expand the insurance benefits available to reduce and compensate for gun violence. There is sufficient regulatory authority and insurance precedent for regulators to mandate such coverage, which would better align insurers' risk mitigation strategies with actual losses under their policies. The more difficult issue is the presumed disconnect between gun violence and the users' willingness to purchase liability insurance even if required. This conundrum should not end the debate.

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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.”).

<sup>138</sup> See *supra* text accompanying notes 75–77.

We do not have enough information either to reject or champion the use of insurance as a tool to significantly reduce gun violence. We do know, however, that the potential benefits of liability insurance could be considerable and that the industry can, when motivated, assess and underwrite risks that previously were considered uninsurable. For now, analysis and debate should be supported, rather than shutting—or shouting—down advocates on any side of these issues.