



MANDATORY LIABILITY INSURANCE FOR FIREARM OWNERS: DESIGN CHOICES AND SECOND AMENDMENT LIMITS

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Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits

Stephen G. Gilles and Nelson Lund

Some twenty-five years ago, one of us sketched out a rationale for using mandatory liability insurance rules as an alternative to common forms of direct government regulation of firearms.¹ Until recently, this possibility attracted almost no attention, but it is now being considered as a response to the massacre at Sandy Hook Elementary School in Newtown, Connecticut.² The time thus seems right to explore the subject in somewhat more depth, with an eye especially to design features that would be needed to minimize interference with the constitutional right to keep and bear arms.

The Second Amendment protects the right of the people to keep and bear arms. In *District of Columbia v. Heller*, the Supreme Court held that while this right is not unqualified, its core is the individual's interest in self defense.³ Regulatory measures that may decrease the misuse of guns frequently also compromise the ability of individuals to defend their lives. Thus, gun control laws make tradeoffs between the legitimate interests of the individual and of the government, and the Supreme Court's emerging Second Amendment jurisprudence will largely be concerned with policing these tradeoffs.

The most important advantage of using an insurance requirement as an alternative to direct government regulation arises from the incentives that insurance companies face in a competitive market. Competitive pressures would lead insurance carriers to keep the premiums for low-risk gun owners low, while charging higher premiums to those who are more likely to cause injuries to other people. At the margin, such a system can be expected to reduce the possession and use of firearms by high-risk individuals, and the threat of increased premiums might induce greater care in using and storing firearms by those who were previously uninsured. Mandatory insurance would also increase the likelihood that victims of firearms-related injuries would be able to recover damages through the tort system. Insurance companies have better incentives than the government to acquire and use the information needed for distinguishing high-risk from low-risk individuals. For that reason, a mandatory insurance system is likely to make more reasonable trade-offs between public safety and individual rights than a system in which legislatures make politically driven decisions about who may possess what kinds of firearms.

Although a mandatory insurance regime may have the potential to allocate the costs of firearms possession in a more constitutionally efficient or appropriate way than direct regulation, we do not claim it can do so perfectly or that it would be an adequate substitute for

all other forms of regulation. More importantly, a mandatory insurance regime could easily be designed (either deliberately or inadvertently) in a way that would unnecessarily compromise the Second Amendment rights of individuals.

This article provides an analysis that could contribute to designing mandatory liability insurance laws that deserve to be upheld by the courts charged with protecting the Second Amendment rights of American citizens.

The Second Amendment Framework

The Supreme Court's seminal decision in *Heller* established that the Second Amendment protects an individual right of law-abiding citizens to keep a handgun in the home for the purpose of self defense. *McDonald v. Chicago* held that the Fourteenth Amendment protects the same right against state and local governments.⁴ These cases involving flat bans on handguns left unanswered a great many questions about the scope of government's authority to regulate the possession and use of firearms. Although the *Heller* opinion contains dicta giving a kind of provisional approval to some common forms of gun control, the Court has not yet offered an analytical framework for evaluating the constitutionality of other forms of gun control.⁵

The lower federal courts have coalesced, quickly and fairly uniformly, around an interpretation of *Heller* that provides such a framework. The emerging consensus can be roughly summarized as follows: Some regulations, primarily those that are "longstanding," are presumed not to infringe the right protected by the Second Amendment.⁶ Regulations that severely restrict the core right of self defense are subject to strict scrutiny,⁷ while regulations imposing lesser burdens are subject to intermediate scrutiny.⁸

For purposes of this article, we will assume the validity of this general approach.⁹ We believe that a mandatory insurance statute that does not severely restrict the core right can probably be drafted so as to survive intermediate scrutiny, which requires the government to show "a substantial relationship or reasonable 'fit'" between the regulation and the government's important interests in preventing the injuries that can result from the misuse of firearms.¹⁰ Conversely, if the government does not demonstrate such a relationship, or if the regulation is subject to strict scrutiny because it severely restricts the core right, the Second Amendment would likely be violated.

What Should a Mandatory Liability Insurance Regulation Cover?

For our purposes here, firearms-related injuries fall into the following categories: (1) the gun owner intentionally shot the plaintiff with no colorable justification; (2) the gun owner intentionally shot the plaintiff with a colorable self-defense justification; (3) the gun owner

accidentally shot the plaintiff; and (4) the gun owner did not shoot the plaintiff, but the plaintiff was injured by the owner's firearm under circumstances in which the owner might be liable in tort for the plaintiff's injuries.

Category One (Malicious Shootings)

Mandatory liability insurance cannot be expected to have much effect in reducing or redressing criminal homicides or aggravated batteries committed by gun owners. The vast majority of these crimes are committed by habitual lawbreakers who would be unlikely to comply with such a regulation.¹¹ There will be the occasional "crime of passion" committed by an individual who has previously been a law-abiding citizen, but such incidents appear to be uncommon.

An insurance mandate would face serious legal obstacles even as to the small percentage of deliberate wrongful shootings that are committed by persons who would purchase the insurance. Statutory or decisional law in most states provides that liability insurance for intentional wrongs is against public policy because it undermines deterrence by enabling wrongdoers to shield their personal assets.¹² Of course, a state legislature could decide to override this public policy. But why do so? The risk that insurance coverage for deliberate shootings would undermine deterrence is a real one. Granted, the criminal sanctions for homicide are severe enough that the deterrent impact of tort liability for wrongful death may be distinctly secondary. Yet that backstop still matters, particularly for potential killers with substantial assets who can afford top-shelf criminal defense counsel. Criminal cases against them may fail in the face of the beyond-a-reasonable-doubt standard, yet succeed under tort law's less demanding preponderance-of-the-evidence standard. Insurance coverage would give plaintiffs an incentive to settle within the policy limits rather than pursue the personal assets of these wrongdoers.

Even if a state legislature elected to permit or require insurance coverage for deliberate shootings, it is doubtful that liability insurers would agree to sell these policies. Insurers generally exclude intentional wrongs from liability insurance coverage for reasons closely related to those that underlie the public-policy objection to insurance for intentional torts.¹³ Insurers fear the "moral hazard" that liability insurance for intentional wrongs would create: knowing that he is indemnified for the damages flowing from an intentional tort – and that the insurer will have to defend him if he is sued¹⁴ — the insured is more likely to commit the intentional wrong. To avoid this perverse effect, standard homeowners policies generally exclude losses "expected or intended from the standpoint of the insured."¹⁵ In recent years, many insurers have also added a "criminal acts" exclusion.¹⁶

Legislation demanding that gun owners purchase a kind of liability insurance that the law generally forbids in other contexts, and which insurers might not even be willing to offer, would probably violate the Second Amendment. In the not unlikely event that such insurance proved to be unavailable, strict scrutiny should apply because the insurance mandate would constitute a de facto ban on gun ownership. If insurance were available, it would likely be at exorbitant rates that reflected insurers' aversion to moral hazard and their ability to exploit the compulsory-purchase requirement. Here again, strict scrutiny should apply because the insurance mandate would amount in practice to a confiscatory tax on gun ownership, rather than a reasonable effort to internalize the expected accident costs of firearms. Speculative claims that such a regulation would have a meaningful impact on the small number of impetuous crimes by generally law-abiding people could hardly qualify as a compelling governmental interest, even if one could imagine that the regulation was the least restrictive means of pursuing that goal.¹⁷

Category Two (Colorable Self-Defense)

Mandatory insurance coverage makes more sense in cases in which the gun owner intentionally shot the tort plaintiff, but has a colorable self-defense justification. Currently, courts facing coverage disputes in homeowners' liability insurance cases falling within this category are divided. Some hold that intentional-act exclusions bar coverage, while others resist that conclusion, reasoning that the insured acted in order to prevent injury to himself rather than to injure another.¹⁸ Given the vagaries of self-defense law and the uncertainty over how a jury will evaluate a colorable claim of self-defense, many gun owners would benefit from this liability coverage and the correlative expansion of the insurer's duty to defend against civil suits.¹⁹ An insured who is found by a jury to have acted in unreasonable self-defense, or to have used excessive force, has in many cases made a mistake while acting "intentionally" in trying and unintended circumstances – as has many a negligent driver or physician. Insurers would probably be willing to sell this coverage, which would provide greater assurance of some compensation for the victims of unreasonable but arguably legitimate conduct (along with substantial benefits to many gun owners). If insurers proved willing to offer policies at a price that did not substantially exceed their costs, a regulation requiring such coverage should probably survive intermediate scrutiny.

Category Three (Accidental Shootings)

Our next category of cases consists of those in which the firearm owner accidentally shoots an innocent person. Here the mandated coverage would essentially duplicate the personal liability coverage provided by a standard homeowners policy – although, depending on the minimum dollar amount mandated, it might increase that coverage. A statute that allowed homeowners liability insurance to satisfy its requirements would be inconsequential as

applied to homeowners. Gun owners who are not homeowners, however, rarely have personal liability insurance. Renters insurance is widely available but (in contrast to homeowners coverage) is purchased by only a minority of potential insureds.²⁰ Mandatory insurance coverage would thus impose a new liability insurance cost on firearms owners who do not own their own homes. Some might purchase general rental coverage, while others would elect firearm-specific policies. Assuming that the premiums are set in an actuarially fair way, this aspect of the regulation would increase the assets available to satisfy plaintiffs' judgments in accidental shooting cases while giving insurance companies incentives to police the behavior of gun owners through the price mechanism.

A statute that excluded firearms accidents from homeowners or renters liability coverage and required *separate* firearms liability insurance, on the other hand, should receive skeptical judicial scrutiny. Why tamper with an existing homeowners liability market that appears to be functioning well? And why deny renters the option of purchasing umbrella liability coverage that would indemnify them for firearms-related accidents? We cannot think of any good answer to either question. On the other hand, illegitimate reasons are not hard to imagine: to create an aura of stigma around owning a firearm, or to create a special category of liability insurance for which state regulators might encourage insurers to overcharge. Unless the government could demonstrate that such a new regulation provides a better fit with its legitimate goals than the existing alternative, it should not survive even intermediate scrutiny.

That said, firearms liability insurance mandates *should* require that homeowners policies include separate riders for firearms coverage that specify the additional premium the insured is being charged and the reasons for any upward or downward adjustments. In addition to making it more difficult for insurers to overcharge gun owners, transparent firearms premiums will enhance insurers' ability to convey information about risks and safety to insureds through the price mechanism. Premium reductions for those who take specific precautions known to insurers to be cost-effective — and premium increases for those with poor safety records — are more likely to influence the behavior of insureds if they are itemized and highlighted in this way.

Category Four (Negligent Entrustment and Storage)

There is nothing novel about tort liability for a gun owner who provides a weapon to someone he should know is likely to misuse it, or who negligently allows such a person to acquire a weapon he owns.²¹ Requiring insurance against such behavior is in principle no more problematic than the parallel automobile liability coverage requirement.

On the other hand, gun control advocates have long chafed at tort law's limits when it comes to victims who have been injured by criminals using stolen firearms. They have tried and

largely failed to use product liability suits against gun manufacturers to shift these costs to those who legally purchase handguns.²² They have also argued for relaxing traditional duty, foreseeability, and proximate-cause limits on the gun owner's liability for failing to take adequate precautions to prevent thieves from stealing (and subsequently misusing) guns.²³ Mandatory insurance legislation could be deployed in the service of a similar agenda. The idea is simple: create mandatory liability coverage, and the ensuing tort suits will invite courts to entertain expansive theories of tort liability. In our view, the Second Amendment requires, at a minimum, that gun owners not be required to insure against more than their own negligent behavior, and that generally applicable standards of negligence be applied in tort suits covered by the policy. The risk that courts will succumb to the expansionary temptation, and respond to mandatory insurance statutes by adopting constitutionally invalid tort theories for gun owners, provides yet another reason for extreme care in drafting this type of legislation.

Regulatory Pathologies

Disguised Taxes

Mandatory liability insurance can be converted into a disguised tax. Instead of using regulation to ensure that individual gun owners bear more of the costs of injuries resulting from their own negligence, one could structure it to force law-abiding gun owners to bear the costs of firearms injuries inflicted by criminals who are outside the mandatory insurance risk pool. In its extreme form, this version of the mandate would give every person injured by a firearm (or their survivors, in wrongful death cases) a statutory right to recover from a fund created from premiums paid by gun owners who complied with the insurance requirements. To ensure adequate resources for the fund, of course, premiums would be very high – and would overwhelmingly be attributable to the costs of injuries caused by persons other than the premium-payers.

In substance, this would be a tax on lawfully-owned firearms earmarked for payment to the victims of illegal firearm violence. As such, it would egregiously violate the Second Amendment. No one would think that a similarly structured “libel tax” could be imposed on every newspaper, magazine, broadcaster, blogger, and soapbox orator, even if the tax turned out to be trivial. The same conclusion follows in the firearms area, though even more obviously since the tax would almost certainly be quite substantial. The use of a government regulation to force law-abiding firearms owners to bear the costs of wrongs committed by those who own and use firearms *illegally* would violate the Second Amendment whether the coerced transfer occurred on a large scale, as in the foregoing hypothetical, or was introduced in camel's-nose fashion.

This reasoning is not limited to attempts to make premium-payers responsible for injuries inflicted by gun owners who have not purchased the required insurance. It applies to any legislation that attempts to distort the market by charging one class of gun owners premiums that are fairly attributable to risks created by another class of gun owners.²⁴ For example, imagine a statute that sets a maximum premium rate for urban gun owners that is well below the actuarial costs of their liability coverage. In order to continue offering policies, insurers will have to overcharge rural and suburban gun owners. The premium ceiling violates the Second Amendment because it operates as a discriminatory tax on rural and suburban gun owners. The fact that the premiums are used to cross-subsidize urban gun owners is no defense. A tax on the speech of rural and suburban residents would violate the First Amendment even if the revenues were used to subsidize speech by city dwellers. The same logic applies to the Second Amendment.

Disguised Gun Registration Requirements

Another difficulty with an insurance mandate is the potential for abuse of its recordkeeping requirements. Gun registration laws are controversial for good reason,²⁵ and it is easy to imagine how they could be designed or used in a way that violates the Second Amendment.²⁶ But it is not obvious that such laws are necessarily or inherently unconstitutional. Recordkeeping requirements in a mandatory insurance regulation should be analyzed in the same way that general registration laws should be analyzed. That analysis is likely to be highly fact-intensive, and we do not undertake to explore the issue further in this article.²⁷

Enforcement of the Mandate

Enforcing compliance with mandatory liability insurance laws has proven difficult in the automobile setting,²⁸ and is likely to pose even greater problems for firearms liability insurance regulations. The least intrusive technique is ex post penalties: if an insurable event such as an accidental shooting occurs, the uninsured gun owner would be subject to a fine. Provided the penalties for non-compliance do not exceed those to which uninsured drivers are liable, this strategy is unlikely to threaten Second Amendment rights.²⁹

A second strategy, employed by many states for automobile liability insurance, is to require proof of insurance as a condition of vehicle registration and licensing. Imposing a universal licensing requirement on owning a firearm would raise serious constitutional questions, just as a licensing requirement on speech would raise such questions under the First Amendment. A less troubling alternative would be a requirement that anyone purchasing a firearm provide proof of liability insurance at the time of sale. As applied to ordinary commercial transactions, this requirement would be minimally burdensome and is unlikely to

pose constitutional problems.³⁰ Just as with universal registration requirements, however, imposing a proof-of-insurance requirement on every sale or transfer of a firearm would present substantial Second Amendment questions.

Excessive Minimum Coverage Requirements

How high may a state set the minimum coverage under the mandated policies without running afoul of the Second Amendment? For guidance, we propose looking to the most analogous type of regulation – mandatory automobile liability insurance. The cost of injuries from automobile accidents exceeds that from firearms accidents by orders of magnitude. The state's burden of justification should be a heavy one when it places greater burdens on the exercise of a constitutional right than on the exercise of a non-constitutional right that involves very similar trade-offs between individual and social interests. Consequently, we think the Second Amendment presumptively requires states to tailor minimum coverage limits so they do not exceed the analogous auto liability limits.

In the overwhelming majority of states, the statutory minimums for auto liability insurance are relatively low: forty-four states require coverage of \$25,000 per person/\$50,000 per occurrence or less, and only two states (Alaska and Maine) require as much as \$50,000 per person/\$100,000 per occurrence.³¹ The risks that the average driver will accidentally cause serious injuries to a third party in amounts exceeding these limits are significant, yet no state mandates minimum coverage of even \$100,000 per injured person.³²

With such minimums in place, premiums for firearms liability insurance would presumably be quite reasonable.³³ It is true that states might raise the minimums for both automobile and firearms insurance, but a presumption that the latter not exceed the former would prevent discriminatory treatment of the constitutional right and would pretty effectively discourage the kind of political grandstanding that many legislators seem to find irresistible. To overcome that presumption, a state would need to make a convincing showing that its higher minimum for firearms insurance would not make gun ownership unaffordable for law-abiding citizens of modest means, either because insurers charged steep premiums, or because they refused to issue large liability policies to insureds without significant assets of their own.³⁴

Premium-Setting Practices and Regulations

Auto liability insurers price their policies in part on the basis of indirect indicia of risk, such as the riskiness of the insured's neighborhood, the insured's creditworthiness, and so on. As a policy matter, this could be a serious problem in the firearms context because insurance companies might be inclined to charge higher rates in high-crime neighborhoods, where law-abiding people are likely to have the most need for a gun, but also to have trouble affording insurance.

It is nevertheless difficult to argue that the Second Amendment flatly forbids such practices. It is true, as we have stressed, that driving an automobile is not a constitutional right, whereas owning a firearm is. There is, however, no general constitutional rule that citizens must be exempted from the obligation to internalize the costs of exercising their constitutional rights. High-quality firearms are expensive, but that does not imply that government must subsidize their purchase by impecunious individuals. Access to shooting ranges is protected by the Second Amendment,³⁵ but this does not imply that range owners have a constitutional right to operate without liability insurance. To the extent that a liability policy prevents gun owners from externalizing the risk of their own negligence onto innocent victims or society at large, it is analogous to a government regulation that requires newspaper companies to carry workers' compensation insurance. That said, any mandatory insurance statute should be closely scrutinized for features that would encourage insurers to overcharge the very people to whom Second Amendment rights are most valuable.

Burdensome Private Regulation by Insurers

One of the benefits of mandatory liability insurance is that it facilitates the flow of information to insureds about how to reduce the risks associated with their activities. If insurers learn that firearms owners who keep their guns in safes or use safety locks typically have lower accident rates, they can offer discounts to insureds who take these precautions. But while this type of private "regulation" could yield safety benefits, insurers might also impose onerous conditions on the issuance of liability insurance. Imagine, for example, that insurers (perhaps in response to pressure from state insurance regulators) all decide that they will not issue liability insurance coverage if the insured owns so-called assault weapons. If liability coverage is mandatory, this requirement is tantamount to a ban on that category of firearms, and the state's enforcement of the mandate should be analyzed as such. Because "assault weapon" bans invariably impact a subcategory of semi-automatic weapons that are defined almost entirely in cosmetic terms, this form of state action should fail intermediate scrutiny.³⁶

Selective Regulation of Firearms but Not Other Means of Self-Defense

The regulatory pathologies we have surveyed provide ample reason to be skeptical when politicians propose mandatory liability insurance for gun owners. Nevertheless, we disagree with those who might regard such compulsory insurance as inherently unconstitutional because it singles out firearms for discriminatory treatment. Granted, even with the restrictions and safeguards we have proposed, such regulations would require liability insurance only for the risks associated with owning guns for self-defense, thereby excluding the parallel risks of owning other instrumentalities that can be used in self-defense (e.g., knives and pepper sprays).³⁷ But these substitutes for firearms are both less lethal and less likely to result in serious accidental injuries to others, and consequently the state's decision to regulate only

the former is not facially unreasonable. Given the good fit between mandatory liability insurance for firearms and the state's legitimate interests in deterrence and victim compensation, a well-designed statute should survive intermediate scrutiny.

Conclusion

Statutes requiring gun owners to carry liability insurance could be written in a way that would not violate the Second Amendment, but there are many constitutional pitfalls in such an undertaking. These kinds of regulations could easily be used to impose disguised taxes, penalties, and prohibitions on gun ownership, to discriminate in favor of some law-abiding gun owners at the expense of others, or to promote overcharging by insurers supervised by state regulators eager to score political points with gun control advocates.

Nevertheless, a properly drafted regulation would do more good than some of the other measures that have recently been proposed, such as bans on so-called assault weapons and limits on the capacity of magazines for semi-automatic firearms. Such efforts to ban limited categories of politically unpopular devices are unlikely to have any significant effect on criminal violence or negligent behavior. A mandatory insurance regulation might at least have some effect in deterring negligence, though it would probably not be very great.³⁸ Such regulations therefore hardly deserve to be among the highest of legislative priorities. Nevertheless, they would increase the chances that those who suffer accidental injuries at the hands of negligent gun-owners would receive some compensation. If legislators who feel driven to “do something” about guns could be persuaded to adopt properly drafted mandatory liability insurance laws instead of other measures that are useless or unconstitutional (or both), that would be a happy outcome.

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¹ Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 122-30 (1987).

² See, e.g., Rick Green, *Time is Right to Consider Liability Insurance for Gun Owners*, Hartford Courant (Jan. 21, 2013); Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, New York Times (Feb. 21, 2013).

³ *Heller*, 554 U.S. 570 (2008) The Court has suggested that other interests, such as hunting, may also be protected by the Second Amendment, but has not clearly so held. See *id.* at 599, 604.

⁴ 130 S. Ct. 3020 (2010).

⁵ The regulations approved in *Heller* include bans on the possession of firearms by felons and the mentally ill; bans on carrying firearms “in sensitive places such as schools and government buildings”; laws imposing conditions and qualifications on the commercial sale of arms; bans on carrying concealed weapons; and bans on “those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns” and apparently machineguns. *Id.* at 625-27. For a detailed critique of these obiter dicta, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1356-68 (2009).

⁶ Many of the cases resting on this rationale involve regulations that are at least arguably comprehended within the *Heller* dicta summarized in note 5, *supra*. See, e.g., *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) (upholding “longstanding” statute criminalizing possession of a firearm by unlawful drug users); *United States v. Dorosan*, 350 Fed. Appx. 874, 875-76 (5th Cir. 2009) (unpublished) (parking lot at a post office is a “sensitive place” from which guns may be banned); *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (upholding “long-standing prohibition” against shipping and receiving firearms through interstate commerce while using a controlled substance); *United States v. Davis*, 304 Fed. Appx. 473, 474 (9th Cir. 2008) (unpublished) (upholding statute prohibiting the carrying of a concealed weapon on an aircraft); *United States v. Hatfield*, 376 Fed. Appx. 706, 707 (9th Cir. 2010) (unpublished) (upholding statute prohibiting the possession of an unregistered short-barreled shotgun). Contrary to what some judges have thought, the Supreme Court has not said that *all* longstanding regulations are constitutional.

⁷ See, e.g., *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (strict scrutiny inapplicable to a regulation that does not impose “a substantial burden upon the core right of self-defense”); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (strict scrutiny inapplicable because “[t]he burden imposed by the law [at issue] does not severely limit the possession of firearms”).

⁸ See, e.g., *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (upholding, under intermediate scrutiny, statute prohibiting possession of a handgun with an obliterated serial number).

⁹ For a more detailed analysis, see Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 Fordham Urb. L.J. 1617 (2012).

¹⁰ *Heller II*, 670 F.3d at 1262.

¹¹ See, e.g., Delbert S. Elliott, *Life-Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. Colo. L. Rev. 1081 (1998) (“[P]ersons engaging in life-threatening violent behavior are heavily embedded in a general pattern of criminal behavior; crime is a part of their general lifestyle.”); Jo Craven Meginty, *New York Killers, and Those Killed, by Numbers*, New York Times (April 28, 2006) (of the 1,662 murders committed in New York City from 2003 through 2005, “[m]ore than 90 percent of the killers had criminal records; and of those who wound up killed, more than half had them”).

¹² Robert H. Jerry & Douglas R. Richmond, *Understanding Insurance Law* 459 (4th ed. 2007).

¹³ *Id.* at 460.

¹⁴ Liability insurance policies invariably confer on the insurer the duty to defend the insured in any suit arguably covered by the policy. *Id.* at 825-26.

¹⁵ *Id.* at 460.

¹⁶ See Daniel C. Eidsmore & Pamela K. Edwards, *Home Liability Insurance: Does the Criminal Acts Exclusion Work Where the “Expected or Intended” Exclusion Failed?*, 5 Conn. Ins. L.J. 707 (1999).

¹⁷ A few state courts have held that mandatory automobile liability insurance must cover intentional wrongs committed by the insured using the automobile. See *Wheeler v. O’Connell*, 297 Mass. 549, 553-54 (1937) (reasoning that mandatory automobile insurance is intended to protect injured parties even if the injuries were caused intentionally); *Hartford Accident & Indemnity Co. v. Wolbarst*, 95 N.H. 40, 43-44 (1948) (same). A parallel requirement for gun owners’ liability insurance would be more defensible in these specific jurisdictions, but might still run afoul of the exorbitant-premium problem. See the discussion of excessive minimum coverage requirements *infra*.

¹⁸ Jerry & Richmond, *supra* note 12, at 470.

¹⁹ At least one organization now sells a form of such insurance. See Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, New York Times (Feb. 21, 2013) (reporting that the United States Concealed Carry Association recently began selling a form of insurance that reimburses insureds who justifiably use their guns in self-defense for their legal defense costs if they are acquitted).

²⁰ See Ray A. Smith, *Landlords Push Liability Insurance*, Wall Street Journal (May 26, 2004) (consumer surveys suggest that nearly two-thirds of renters do not have renters insurance). Only recently have landlords begun demanding that their tenants carry renters liability insurance, which is typically bundled together with coverage for the renter’s personal property. *Id.* By contrast, mortgage lenders have long required homeowners to carry homeowners insurance, and since 1955 the insurance industry has insisted that property and casualty coverage be bundled with personal liability coverage. See Stephen G. Gilles, *The Judgment-Proof Society*, 63 Wash. & Lee L. Rev. 603, 664 (2006).

²¹ See Mark S. Cohen, *Proof of Negligent Sale, Entrustment, or Storage of Firearms*, 37 Am. Jur. Proof of Facts 3d §§ 18-23 (1996) (collecting cases).

²² The only major victory won by gun control advocates was the Maryland Court of Appeals decision in *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1159 (Md. 1985), which imposed strict liability on manufacturers and sellers of so-called Saturday Night Specials. Even that success was short-lived, because the Maryland legislature abolished strict liability for handguns in 1988. See David Kopel, *The Great Gun Control War of the Twentieth Century – and Its Lessons for Gun Laws Today*, 39 Fordham Urb. L. J. 1527, 1577 (2012).

²³ See, e.g., Andrew McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 Conn. L. Rev. 1189, 1225-1242 (2000) (arguing that courts should expand tort liability for negligent storage of firearms to include subsequent criminal misuse of stolen firearms).

²⁴ In other insurance settings, including health insurance and automobile insurance, legislatures frequently mandate a variety of cross-subsidizing coverages. In most contexts, however, the disguised tax does not burden a constitutional right, and consequently is subject to highly deferential rational-basis review.

²⁵ See, e.g., David B. Kopel, *The Great Gun Control War of the 20th Century—and Its Lessons for Gun Laws Today*, 39 Fordham Urb. L.J. 1527 (2012).

²⁶ Amid the breakdown of civil order after Hurricane Katrina, for example, the police systematically confiscated firearms from law-abiding citizens in blatant violation of the Second Amendment. See Stephen P. Halbrook, *“Only Law Enforcement Will Be Allowed to Have Guns”: Hurricane Katrina and the New Orleans Firearms Confiscations*,

18 Geo. Mason U. C.R. L.J. 339 (2008). If the New Orleans police had had access to gun registration lists, it would have facilitated this unconstitutional government program.

²⁷ For a brief discussion, see Lund, *supra* note 9, at 1629-30.

²⁸ See Gilles, *supra* note 20, at 701.

²⁹ Without this safeguard, a state might enact disproportionate penalties – for example, substantial prison time – for failure to purchase mandatory firearms liability insurance. In the auto-insurance context, prison terms are normally reserved for repeat offenders. See, e.g., Ark. Code Ann. 27-22-103 (authorizing a sentence of up to one year of jail for third and subsequent offenses).

³⁰ Firearms dealers would presumably respond to such a requirement by offering liability insurance coverage as an option for persons who do not have homeowners or renters insurance.

³¹ <http://www.insure.com/car-insurance/minimum-coverage-levels.html> (visited March 3, 2013).

³² We leave aside the question whether the federal government has the constitutional authority to impose mandatory liability insurance requirements on gun owners. We think it is doubtful that the original meaning of the Constitution would permit this, but it is also doubtful that the Supreme Court would be inclined to follow the Constitution's original meaning. If a federal statute were deemed constitutional, courts should presume that the coverage minimums may not exceed the highest coverage minimum imposed by a state on automobile liability coverage.

³³ Provided that the mandatory minimum coverage is capped at levels comparable to the ones used in the automobile context, it seems clear that actuarially fair premiums would be small. Such premiums would be based on the expected costs of indemnity and litigation-defense for (1) accidental firearms injuries and deaths and, if a state elected to include them, (2) injuries and deaths caused by persons using a firearm in colorable self-defense. According to statistics collected by the federal government, there were 14,161 unintentional firearms injuries (including 606 fatal firearms accidents) in the United States in 2010. Nat'l Ctr. for Injury Prevention & Control, U.S. Centers for Disease Control and Prevention, *Web-Based Injury Statistics Query & Reporting System (WISQARS) Injury Mortality Reports, 1999-2010, for National, Regional, and States* (Dec. 2012), http://webappa.cdc.gov/sasweb/ncipc/dataRestriction_inj.html (hereinafter *WISQARS Injury Mortality Reports, 1999-2010*). Even on the unrealistic assumption that all of these injuries are attributable to negligence on the part of the firearm owner, the maximum possible liability cost, given mandatory minimum coverage of \$25,000 per injured person, would be only about \$354 million (14,161 x \$25,000). Following the rule of thumb that litigation-defense is roughly as costly as indemnity expense, the total cost would be double, or \$708 million. Estimates of the number of Americans who own at least one firearm range from 50 million to 100 million. See Carl Bialek, *Gun Counts Can Be Hit-or-Miss*, Wall Street Journal (March 23, 2013). Using the lower figure, the expected liability-insurance costs are a mere \$14 per year for the core category of accidental firearms injuries. Estimating the costs of insuring colorable self-defense is more difficult. For 2010, the FBI reports 232 justifiable homicides by private citizens using a firearm against a felon during the commission of a felony. See <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl15.xls>. We have not found reliable data on the number of injuries inflicted by persons using firearms in self-defense. If we assume that the ratio of deaths to injuries is the same for self-defense shootings as for accidental ones, the result would be an estimated 5,457 (14,161/602 x 232) annual reportable injuries from self-defense shootings. After adjusting for litigation-defense costs, this would yield \$273 million in additional expected coverage costs. Dividing by 50 million insureds would yield roughly another \$6 per year for self-defense coverage of \$25,000 per person. The result is a baseline premium estimate of about \$20 per year for the average firearm owner. (We have not attempted separately to estimate the incidence of negligent storage and entrustment cases, most of which are already included in the category of accidental firearms injuries).

³⁴ We anticipate the objection from gun control advocates that a higher mandatory minimum would do nothing more than require gun owners to pay for a greater share (but still not all of) the externalities associated with non-malicious misuse of firearms. The first problem with this objection is its failure to consider the extent to which persons who engage in other, riskier activities – particularly driving – are not subjected to any such requirement. Singling out firearms for disfavored treatment presumptively violates the Second Amendment. In addition, insurers might reasonably take the position that issuing large amounts of liability insurance to persons without significant assets or income could create a variety of moral hazard and monitoring problems. *See Gilles, supra* note 20, at 701. If states compelled unwilling insurers to issue policies to persons of modest means, insurers would presumably respond by raising premiums even more, either for those persons or (if forbidden to do that) for all gun owners.

³⁵ *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

³⁶ *See Lund, supra* note 9, at 1631; Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 70-71 (1996).

³⁷ A state could avoid this difference in treatment by requiring that all adults carry 'dangerous instrumentality' insurance. While this broader coverage might be desirable as a policy matter, we think it is not constitutionally required.

³⁸ If the mandatory minimums for firearms liability insurance are set at levels comparable to those required for automobile liability insurance, the actuarially fair premiums needed to fund such coverage should be very modest. *See supra* note 33 (roughly estimating a basic premium of about \$20/year for the average firearm owner). Premiums of this order of magnitude are unlikely to have large incentive effects. For example, if an insurer offered a 50% discount from the baseline premium for an accident-free record, the insured would gain a meager \$10/year. Conversely, if an insurer doubled the baseline premium for insureds who did not own safes in which to store their firearms, the \$20/year surcharge might prompt some insureds to buy a safe, but others would not because the surcharge would be less than the cost of a safe. If the mandatory minimums were set much higher, premiums would increase substantially (though not proportionately, because most covered firearms injuries would involve damages smaller than the higher limits). As we've argued, however, larger mandatory minimums for firearms than for automobiles would likely contravene the Second Amendment.