

# A Cost Analysis Approach to Determining the Reasonableness of Using Domestic Violence as an Insurance Classification

## I. Introduction

Domestic violence is the leading cause of injury to American women.<sup>1</sup> Every year approximately four million women are attacked by a domestic partner.<sup>2</sup> These victims face many obstacles that prevent them from successfully escaping their batterers.<sup>3</sup> These obstacles include: economic concerns, lack of affordable housing and temporary shelters, fear of retaliation, harassment, instability, and lack of financial support.<sup>4</sup> Due to these obstacles and according to the research that indicates that children who live in these abusive environments are more likely to become future batterers or victims of domestic violence, a continuous cycle of abuse is likely to persist.<sup>5</sup> Despite these obstacles, however, fifty to ninety percent of victims of domestic violence report that they have attempted, although often unsuccessfully, to escape.<sup>6</sup>

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1. See *Don't Let Insurers Cancel - Some Companies Compound Abuse*, DAYTON DAILY NEWS, May 31, 1997, at 10A (suggesting that approximately 1,400 women die each year because of domestic violence); see also DIANE CRAVEN, PH.D., U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIMES (1996) (stating that in 1994 women were about two-thirds more likely to be victims of violence than men).

2. See 143 CONG. REC. E509-02 (daily ed. Mar. 18, 1997) [hereinafter Sanders] (statement of Rep. Sanders) (noting that it is difficult to obtain an annual estimate of the exact number of domestic violence victims because the abuse is significantly underreported); U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES (1994) (reporting in one study that about one in five females who were victimized by their spouse or ex-spouse stated that they had been a victim of a series of three or more assaults in the last six months that were so similar that they could not distinguish between one of the assaults and another); CRAVEN, *supra* note 1 (stating that female homicide victims are more than twice as likely to be killed by intimate partners than are male victims); Anne Stein, *Will Health Care Reform Protect Victims of Abuse? Treating Domestic Violence as a Public Health Issue*, 21 HUM. RTS. Q. 16, 17 (1994) (suggesting that 42% of all homicide victims are victims of domestic violence); Margo L. Ely, *Abuse Victims Face New Battle: Insurance*, CHICAGO DAILY L. BULL., May 12, 1997, at 6 (recognizing that domestic violence is a public health issue).

3. See Ellen J. Morrison, Note, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259, 261-62 (1996) (identifying the obstacles that discourage victims from attempting escape).

4. See *id.* at 261-63.

5. See *Insurance for Victims of Domestic Violence: Testimony of the Discriminatory Practices Working Group of the Nat'l Assoc. of Ins. Commissioners Before the Comm. on Labor & Human Resources of the U.S. Senate*, 1995 WL 449181 (1995) [hereinafter Senn] (statement of the Honorable Deborah Senn, Insurance Commissioner of Washington) (noting that discriminatory insurance practices undermine the social policy goal of eliminating the social costs of domestic violence); *Domestic Violence: Testimony Before the U.S. House of Representatives Comm. on Gov't Operations*, 1994 WL 541271 (1994) [hereinafter Campbell] (Statement of Jacquelyn C. Campbell, Ph.D., RN, FAAN Chair) (describing the potential mental health consequences of children who live in abusive environments).

6. See Morrison, *supra* note 3, at 262; see also VIOLENCE BETWEEN INTIMATES, *supra* note 2, at 4 (noting that data shows that 80% of female victims also took some form of self-protective action during the attack); L.H. Otis, *Domestic Abuse Law Hearings Sought (Congressional Hearings Into Alleged Insurance Co. Discrimination Against Domestic-Violence Victims)*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFIT MGMT., Sept. 29, 1997, at 3 (describing the experience of one woman who was denied homeowner's insurance even after she left her abusive husband); Sera L. Tank, *Domestic Violence Victims Experience Difficulty Securing Insurance Coverage* (last modified Sept. 18,

The costs associated with domestic violence are shocking. Abuse-related medical treatment in the United States is estimated to be thirty-one billion dollars.<sup>7</sup> Domestic violence is estimated to cost employers approximately three to five billion dollars annually.<sup>8</sup> Law enforcement costs are also substantial because domestic violence is responsible for generating the largest number of calls made to police every year.<sup>9</sup> The total annual cost of domestic violence in the United States is estimated to be sixty-seven billion dollars.<sup>10</sup>

During the past thirty years, as individuals began to realize the prevalence of and the costs associated with domestic violence in the United States, victims' advocates started a movement to educate society about this widespread danger.<sup>11</sup> As a result, legislators, medical professionals, and law enforcement officials joined victims' advocates in encouraging victims to report and document abuse incidents, to obtain restraining orders, and to leave their abusive environments.<sup>12</sup> In addition, the medical community and legislatures began to encourage medical professionals to report suspicious injuries in medical records to establish a record of abuse that may be used later as evidence in criminal and civil proceedings.<sup>13</sup>

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1995) <<http://www.spub.ksu.edu/issues/v100/fa/n020/city-gov-domestic-violence.html>> (noting that women who leave their abusers may be viewed by insurance companies as a higher risk).

7. See Morrison, *supra* note 3, at 264 (stating that this annual medical cost is the equivalent of \$124 per year for every person living in the United States). *But see* Campbell, *supra* note 5 (stating that the annual national health care costs are estimated to total \$857.3 million). Additional health-related costs that may not be included in traditional estimates due to problems of identification and underreporting, include the costs of long-term mental health services and birth defects. *See id.* (stating that victims of domestic violence are more likely to suffer serious mental health problems, seek late prenatal care, and that abuse during pregnancy significantly increases the risk of lower birth weight, low material weight gain, infections, anemia, and alcohol and other drug abuse); 143 CONG. REC. S1659-03, S1678 (daily ed. Feb. 25, 1997) [hereinafter Wellstone] (statement of Sen. Wellstone) (stating that the total annual medical cost is approximately forty-four million dollars resulting from 21,000 hospitalizations and 28,700 emergency room visits); 141 CONG. REC. S1790-01 (1995) (article written by Sen. Wellstone) (noting that other health consequences of domestic violence include birth defects and miscarriages).

8. See Wellstone, *supra* note 7 (explaining that the costs to an employer results from decreased productivity, increased absenteeism, and increased health costs); *see also* Morrison, *supra* note 3, at 264-65 (estimating the cost to employers to be thirteen billion dollars a year).

9. See Morrison, *supra* note 3, at 264 (stating that New York City spent forty-one million dollars in 1989 on domestic violence arrests).

10. See Wellstone, *supra* note 7; *see also* 141 CONG. REC. H10720-01, H10723 (daily ed. Oct. 24, 1995) (statement of Rep. Jackson-Lee) (noting that children who witness abuse at home are likely to become abusers or victims when they become adults); Morrison, *supra* note 3, at 265 (describing additional costs for the provision of emergency shelters, unreported injuries, and incidents of abuse).

11. See *Insurance for Victims of Domestic Violence, Testimony in Support of Senate Bill 524, Before the Labor & Human Resources Comm. of the U.S. Senate*, 1995 WL 449183 (1995) [hereinafter Durborow] (statement of Nancy Durborow, Health Projects Coordinator of the Pennsylvania Coalition Against Domestic Violence) (discussing the efforts of the Pennsylvania Coalition Against Domestic Violence which was founded in 1976); Morrison, *supra* note 3, at 259 (noting that advocacy efforts have resulted in some legal reforms).

12. See Senn, *supra* note 5. Legislators and state representatives have taken several steps to encourage prevention and to provide further protection for victims of domestic violence. *See* Violence Against Women Act, 42 U.S.C. § 13981 (1997); S.367, 105th Cong. (1997) (proposing the Battered Women's Employment Protection Act designed to ensure eligibility for unemployment benefits to victims of domestic violence who are forced to leave their jobs due to domestic violence); Timothy J. Connolly, *Cellucci Targets Domestic Abuse*, TELEGRAM & GAZETTE, Aug. 2, 1997, at A1 (discussing an executive order issued by Massachusetts Governor Paul Cellucci, that gives automatic eligibility for unemployment benefits to victims who are forced to leave their jobs due to domestic violence).

13. See *Domestic Violence: Oral Testimony of the American College of Emergency Physicians, Before the House Gov't Operations Comm., Subcomm. On Human Resources & Intergovernmental Rela-*

Ironically, while domestic violence advocates developed strategies designed to elicit support from legislators, law enforcement officials, and medical and other professionals in assisting victims of domestic violence, the insurance industry also took notice of the problem and began to alter its practice of insuring victims of domestic violence.<sup>14</sup> The insurance industry began using domestic violence as an insurance classification that is used to decide whether to offer insurance to an applicant, what rates to charge, and whether to cancel coverage for existing customers.<sup>15</sup>

Domestic violence is currently used as an insurance classification in all lines of insurance<sup>16</sup> including health,<sup>17</sup> life,<sup>18</sup> disability,<sup>19</sup> property,<sup>20</sup> homeowners,<sup>21</sup>

*tions*, 1994 WL 541275 (F.D.C.H.) (1994) (statement of Patricia R. Salber, MD, FACEP) (describing the unique role emergency room personnel can play in identifying, interrupting, and preventing the cycle of domestic abuse); Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?*, 273 JAMA 1781, 1781-82 (1995); Caroline W. Jacobus, *Legislative Responses to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 WOMEN'S RTS. L. REP. 153, 214 (1995) (describing the Division on Women's protocol which requires medical staff to document any evidence of domestic violence or statements made by possible victims); Morrison, *supra* note 3, at 259-60 (explaining that this reporting requirement was designed to develop evidence that could be used to obtain restraining orders or other legal restraints); Family Violence Prevention Fund, 4 *Health Alert: Routine Screening for Domestic Violence* 1 (Spring 1996); Health Resource Center on Domestic Violence, *Mandatory Reporting of Domestic Violence by Health Care Providers: An Information Packet on the California Mandatory Reporting Law* (unpublished information packet, on file with the *Journal of Legislation*); Health Resource Center on Domestic Violence, *General Information on the Health Care Response to Domestic Violence: An Information Packet for Health Care Providers* (unpublished information packet, on file with the *Journal of Legislation*); Health Resource Center on Domestic Violence, *Screening Patients for Domestic Violence: An Information Packet for Health Care Providers* (unpublished information packet, on file with the *Journal of Legislation*).

14. See Sanders, *supra* note 2 (stating that insurers have used domestic violence as a criterion in deciding whether to, and at what price to, provide health, life, disability, homeowners, and auto insurance coverage); Katharine Q. Seelye, *Battered Women Put Insurers on Spot*, N.Y. TIMES, May 12, 1994, at A7 (describing the case of one woman who was denied life, health, mortgage, and disability insurance after the insurance company learned that the woman had a history of domestic disputes from her medical reports).

15. See Bill Sloat, *Insurers Hit Abuse Victims Again When Claims are Denied*, PLAIN DEALER (Cleveland), May 12, 1997, at A1 (noting that domestic violence classifications not only involve spousal abuse but also include parental abuse as exemplified by Blue Cross's rejection of health care coverage for three children who were subjects of parental abuse).

16. See 141 CONG. REC. E2199-02 (daily ed. Nov. 16, 1995) [hereinafter Sanders II] (statement of Rep. Sanders) (noting that health, life, disability, homeowners, and automobile insurers utilize domestic violence in deciding who to insure and how much to charge for insurance); Nancy Durborow & Terry Fromson, *Insurance Discrimination Against Victims of Domestic Violence 2* (July 1997) (unpublished manuscript, on file with the *Journal of Legislation*) (describing specific cases of women and children who were denied payment or coverage for either health, life, disability, or property and casualty insurance).

17. See Elliot Zaret, *Bill Would Ban Insurance Company Bias: Abuse Victims Denied Coverage*, DENVER POST, May 23, 1998, at A25 (discussing the case of one woman, whose husband broke her nose, that was denied health insurance because she had "chosen to live a dangerous lifestyle"); Fern Shen, *For the Battered Spouse, Insurers' Bias Worsens Pain*, WASH. POST, Mar. 9, 1995, at A1 (describing the case of one woman who was denied life and health insurance after State Farm obtained information from a doctor's report which indicated that the woman came from an "unstable family environment").

18. See Monica C. Fountain, *Insurance Companies Hit Battered Women Too*, CHI. TRIB., June 4, 1995, at 1. For example, one woman was denied life insurance coverage when the insurance company examined her medical records that indicated the applicant had been treated for injuries resulting from domestic violence. See *id.*

19. See Sanders II, *supra* note 16 (noting that insurers consider a history of domestic violence in providing disability, health, life, homeowners, and automobile insurance); Editorial, *Cover Domestic Victims*, DENVER POST, May 28, 1998, at B10 (noting that one woman from Iowa, who was sexually assaulted as a child, was denied disability insurance even though she had an adult record of good

automobile,<sup>22</sup> and casualty insurance.<sup>23</sup> In 1994, a House Judiciary Subcommittee on Crime and Criminal Justice informal survey indicated that eight out of the sixteen largest insurance companies in the United States used domestic violence as a factor in deciding who to insure, what coverage to offer, and what rates to charge.<sup>24</sup> The Insurance Commissioner of Pennsylvania reported the results of a 1994 formal survey that indicated that twenty-four percent of the insurance companies that responded reported considering domestic violence in making insurance decisions and the results of a similar study, reported by the Insurance Commissioner of Kansas in December 1995, showed that twenty-four percent of the responding companies used domestic violence as a criterion in insurance decisions.<sup>25</sup>

Insurance companies use several methods to identify possible victims of domestic violence.<sup>26</sup> First, insurers require applicants to sign a release form permitting inspection of their medical records.<sup>27</sup> These medical records often reveal information about

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20. See Durborow & Fromson, *supra* note 16, at 5. For example, one woman's property claim was denied because her former, abusive boyfriend broke into her home and stole her personal property. See *id.*

21. See *Dateline* (NBC television broadcast, Sept. 21, 1998) (highlighting the case of a woman from Seattle who was denied coverage after her husband blew up her home); Durborow and Fromson, *supra* note 16, (describing the case of a woman who was denied payment under her homeowner's policy for a bodily injury claim resulting from injuries sustained when her husband set her on fire, because of Prudential's policy provisions which exclude coverage for intentional and criminal acts).

22. See Editorial: *Cover Domestic Victims*, *supra* note 19, at B10 (noting that one woman from Georgia was denied automobile and homeowner insurance because her estranged husband might run her off the road or set her house on fire); Durborow and Fromson, *supra* note 16, at 5 (describing the case of a community advocacy group that was denied automobile insurance because the group planned to use the vehicle to transport victims of domestic violence who may be chased by their abusers).

23. See Sanders II, *supra* note 16. For example, Allstate denied one woman's claim for payment under her fire insurance policy because her history of spousal abuse was discovered by the insurance company in court and by police records and because the fire investigator suspected arson. See Sloat, *supra* note 15, at A1 (describing Allstate's response to the federal lawsuit the insureds filed).

24. See Morrison, *supra* note 3, at 266-67 (acknowledging that since the survey, two of those companies, Nationwide and State Farm, report that they no longer use domestic violence as a classification criterion). Victims' advocates and legislators, however, question the motivation of State Farm's allegedly altruistic acts. See L.H. Otis, *State Farm Challenged on P-C Domestic Abuse Efforts*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., May 19, 1997, at 1. It is difficult, however, to determine how widespread the use of domestic violence as a classification is because insurance companies are not required to disclose their reasons for their insurance decisions, regulatory agencies do not require insurance companies to report the criteria used in making insurance decisions, and victims are reluctant to report alleged insurance discrimination for fear of retaliation and economic concerns. See Morrison, *supra* note 3, at 267; Judi Hasson, *Firms That Don't Insure Battered Women Examined*, USA TODAY, June 2, 1994, at A6 (quoting Rep. Charles Schumer, chairman of a subcommittee studying domestic violence issues, who estimated that insurance companies deny coverage to thousands of women).

25. See Durborow & Fromson, *supra* note 16, at 2 (noting that of those insurance companies that responded to the 1994 formal survey, 74% of life insurers, 65% of health insurers, and 47% of accident insurers used domestic violence as a criterion in deciding whether to accept new applications, and stating that of those insurance companies that responded to the similar Kansas study, 65% of the life insurers, 56% of the health insurers, and 45% of the accident insurers reported using domestic violence as a criterion in deciding whether to accept new applications).

26. See *id.* at 1; see also *Life Ins. Assoc. of Mass. v. Commissioner of Ins.*, 530 N.E.2d 168, 171 (Mass. 1988) (acknowledging that insurance companies are permitted to solicit information from applicants to make insurance coverage decisions).

27. See Morrison, *supra* note 3, at 267 (noting that the accuracy and reliability of these medical records are increasing due to the recent training provided to medical personnel and the detailed protocols regarding documentation issued); Kathy Showalter, *Insurers Can Get Info on Victims of Abuse, New Law Protects Victims From Loss of Benefits*, 14 CINCINNATI BUS. COURIER, Sept. 26, 1997, at

past incidents of abuse that medical professionals documented for later evidentiary use.<sup>28</sup> Second, insurance companies may obtain information on risk factors from computer databases such as the Medical Information Bureau (MIB) and Equifax.<sup>29</sup> Finally, insurance companies also examine court documents and credit reports that often contain information about protection orders.<sup>30</sup> As a result, victims of domestic violence are discouraged from disclosing their history of abuse and from seeking necessary medical treatment and protection, because the primary source of information utilized by insurance companies to support their decisions to deny or cancel insurance or charge higher rates are medical and court records.<sup>31</sup>

This article considers the reasonableness of using domestic violence as an insurance classification. This article will also analyze current and proposed legislative efforts to restrict the use of domestic violence as a classification used in making insurance decisions. Part II of this article provides an overview of the insurance industry. It describes the original goals of private insurance and the methods insurance companies use, including classifications, to achieve their ultimate goal, to make a profit. It also describes the two dominant perspectives on the use of insurance classifications. Part III discusses legal constraints on the insurance industry's use of classifications. Part IV asserts that the use of domestic violence as an insurance classification violates the traditional requirement that there be a statistical correlation between the classification and the risk of loss, because insurers have failed to present any statistical support for their use of domestic violence as a classification. Part V compares other prohibited classifications to the use of domestic violence as a classification and concludes that reasonableness is the test that should govern the use of insurance classifications. Part VI examines the reasonableness of the use of domestic violence as an insurance classification by weighing the costs to the insurance industry of not using the classification versus the cost to society of using the classification. Part VII concludes that the economic, psychological, and social costs to society of using domestic violence as an insurance classification justifies prohibiting the use of domestic violence as a classification, despite the economic costs to the insurance industry.

## II. Overview of the Insurance Industry

The insurance industry first introduced the concept of insurance as a method of distributing the risk of loss.<sup>32</sup> An insurer assumes an individual's risk of loss in ex-

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28. See Morrison, *supra* note 3, at 267 (discussing the sources insurers rely on in determining whether an applicant is at risk due to domestic violence); Showalter, *supra* note 44 (noting that advocates did not foresee this use of medical records when they fought for laws requiring medical professionals to document information concerning a patient's injuries from domestic violence).

29. See Morrison, *supra* note 3, at 268 (noting that the MIB is funded by the insurance industry and that it is used by more than 600 insurance companies to share information about applicants); Durborow & Fromson, *supra* note 16, at 1 (noting that insurance companies that subscribe to these databases must also report client risk factors so that the database may be updated).

30. See Showalter, *supra* note 27, at 44 (noting that insurers often maintain their own databases identifying an individual's risk factors); Durborow & Fromson, *supra* note 16, at 1 (stating that these sources "are becoming popular underwriting tools").

31. See Senn, *supra* note 5 (stating that victims of domestic violence are discouraged because they fear they will not be able to obtain, or will lose, insurance coverage).

32. See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 412 (1914) (stating that the fundamental goal of insurance is to distribute widely the risk of loss so that many individuals will bear the risk, thereby decreasing the risk of great catastrophes); *Insurance Fed'n of Pa., Inc. v. Foster*, 587 A.2d 865, 870 (Pa. Commw. Ct. 1991) (quoting the testimony of Robbert Dobbins, Vice President of

change for the payment of a premium equal to the individual's expected loss.<sup>33</sup> The insurer's goal is to make a profit, which, insurers argue, will be accomplished through accurate calculations of an individual's risk of loss, wise investments of money received from premiums, and through accurate grouping of insureds posing similar risks.<sup>34</sup> Insurance companies use an individual's risk of loss to determine whether to offer or deny the individual coverage and to determine the terms and cost of the insurance.<sup>35</sup>

Traditionally, insurance companies have used a statistical analysis to calculate the

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Guardian Life Insurance Company of America, in which he stated that the risk of loss is decreased by pooling the claims of many individuals); Jill Gaulding, Note, *Race, Sex and Genetic Discrimination in Insurance: What's Fair?*, 80 CORNELL L. REV. 1646, 1651 (1995) (analyzing the economic constraints of insurance classification choices).

33. See Gaulding, *supra* note 32, at 1651 (describing the calculation of a premium). An individual's expected loss is calculated by the probability of the loss multiplied by the size of the possible loss. See *id.* In addition, the insurer charges a small fee to cover its overhead costs. See *id.* Thus, the individual benefits by exchanging an unlimited risk of loss for the certainty of paying only a limited loss. See *id.*

34. See *Massachusetts Auto. Rating & Accident Prevention Bureau v. Commissioner of Ins.*, 424 N.E.2d 1127, 1135 (Mass. 1981) (recognizing that insurers earn most of their profits through investing and not through underwriting); *Katt v. Commissioner of Ins.*, 505 N.W.2d 37, 40 (Mich. Ct. App. 1993) (reasoning that profit is necessary to ensure the availability of adequate resources to cover assumed risks and to satisfy claims); *In re N.J.A.C. 11:1-20*, 505 A.2d 177, 180 (N.J. Super. Ct. App. Div. 1986) (suggesting that the financial status of the entire insurance industry is favorable due to wise investments and allowable tax burdens); Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OHIO ST. L. J. 835, 861 (1986) (critiquing the insurance industry's argument that economic reasoning justifies the use of insurance classifications); Morrison, *supra* note 3, at 286-87 (analyzing the incompatibility of the private goal of insurance companies to make a profit and the public goal of ensuring the affordability and availability of insurance). The Supreme Judicial Court of Massachusetts also recognized the authority of the commissioner of insurance to make equitable adjustments in rate making to achieve the legislative policy of ensuring the availability and affordability of automobile insurance to all eligible individuals. See *Massachusetts Auto. Rating*, 424 N.E.2d at 1134. The following sources provide examples of the interpretation of regulations concerning underwriting and insurance profits. See *id.* at 1131-35; *Insurance Dep't. v. Philadelphia*, 173 A.2d 811, 824-827 (Pa. Super. Ct. 1961) (recognizing the need to consider an insurer's ability to earn a fair and reasonable profit in approvals of rate making).

35. See *Wilson v. Fair Employment & Housing Comm'n*, 54 Cal. Rptr. 2d 419, 427 (Ct. App. 1996) (describing the fundamental importance of these decisions to the insurance industry in order to spread risk of loss in an "economically feasible way" and the court's evaluation of the reasonableness of these practices); *Telles v. Commissioner of Ins.*, 574 N.E.2d 359, 360 (Mass. 1991) (considering the use of sex-based mortality differences in life insurance coverage decisions). Insurance companies refer to the decision regarding whether to offer insurance to an individual as underwriting. See *id.* In addition, the decision on the terms of the insurance is called coverage and the cost of the premium is called rating. See Gaulding, *supra* note 32, at 1652; see also Leah Wortham, *Insurance Classification: Too Important to be Left to the Actuaries*, 19 U. MICH. J.L. REFORM 349, 354 (1986) (suggesting other definitions of underwriting that are used by insurance companies). For the purposes of this article, I will refer to all insurance coverage, rating, and underwriting decisions as underwriting.

risk of loss.<sup>36</sup> The statistical analysis results in classifications that insurance companies use to assign individuals to different groups based on risk of loss.<sup>37</sup> Theoretically, coverage decisions and insurance rates are then based on this classification.<sup>38</sup>

There are two dominant perspectives on the use of classifications in the insurance industry: the fair discrimination and the antidiscrimination perspectives.<sup>39</sup> Insurance companies are the predominant advocates of the fair discrimination perspective.<sup>40</sup> According to this perspective insurance companies argue, and courts have historically agreed, that the use of classifications that are based on a statistically significant relationship to risk of loss ensures fairness.<sup>41</sup> For example, individuals who are at higher risk for injury, and therefore are more likely to utilize their insurance coverage, will pay more than individuals who are at lower risk.<sup>42</sup> Thus, theoretically everyone pays for what they receive and there is no subsidization by individuals of different risk groups.<sup>43</sup> Examples of classifications that insurers who rely on the fair discrimination

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36. See *Brest v. Commissioner of Ins.*, 169 N.E. 657, 660-61 (Mass. 1930) (stating that risk of loss must be based on statistics, experience, and data, and that classifications based on statistical risk of loss should be upheld despite theory or logic). *But see* *Capital Blue Cross v. Commonwealth Ins. Dept.*, 383 A.2d 1306, 1309 (Pa. Commw. Ct. 1978) (noting that underwriting decisions are not based on "an exact science"); KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 15 (1986) (stating that insurers will only attempt to refine risk classifications until the cost of obtaining data exceeds the benefit realized by the refinement); Wortham, *supra* note 35, at 354 (describing informal methods insurance companies may also use in making insurance decisions, such as lists of unacceptable risks that are informally passed amongst underwriters); Gaulding, *supra* note 32, at 1652 (suggesting that insurance decisions are more likely to be made on the basis of subjective beliefs); Morrison, *supra* note 3, at 269 (noting, however, numerous reasons why in actuality, insurance decisions are rarely based on sound statistical methodology).

37. See *Century Cab, Inc. v. Commissioner of Ins.*, 100 N.E.2d 481, 488-89 (Mass. 1951) (describing the process of using statistically significant risk of loss based on reliable evidence of experience to develop a formula utilized to form classes of individuals who pose similar risks); Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517 (1983).

38. See *Century Cab*, 100 N.E.2d at 488 (describing the formula used to fix rates); *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542, 552 (Pa. 1984) (stating that insurance rates must be actuarially sound, which requires a reasonable relationship between the risk of loss and the rate to be paid by a certain class). *But see* Wortham, *supra* note 35, at 354 (describing informal methods insurance companies may use in making insurance decisions).

39. See Wortham, *supra* note 35, at 350; *see also* ABRAHAM, *supra* note 36, at 5 (utilizing the terms libertarianism and egalitarianism to characterize the two approaches to the permissibility of insurance classifications, instead of the fair discrimination or antidiscrimination perspectives). *But see* Wortham, *supra* note 35, at 350 (adding two overlooked perspectives including an appreciation that insurance is a necessity and that selective competition in the insurance industry possesses limited utility under the free market and public policy viewpoints); Gaulding, *supra* note 32, at 1647-50 (suggesting that current unfair discrimination laws do not entirely reflect either of these two perspectives because they prohibit the use of race and genetic discrimination while allowing sex discrimination; therefore, Gaulding proposes an alternative view that widely shared beliefs about fairness should govern the use of classifications); .

40. See Gaulding, *supra* note 32, at 1647.

41. See *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1100 n.6 (1983) (Powell, J., dissenting) (stating that most states prohibiting unfair discrimination merely prohibit discrimination within the same class and allow classifications that are statistically sound); Telles v. Commissioner of Ins., 574 N.E.2d 359, 360-61 (Mass. 1991) (acknowledging that fair discrimination allows insurers to group individuals posing the same risk together for determination of premiums to ensure that individuals posing a lower risk do not subsidize those who present a higher risk of loss; therefore, unfair discrimination only occurs when individuals who pose the same risk are treated differently); *Health Ins. Ass'n of Am. v. Corcoran*, 551 N.Y.S.2d 615, 618-19 (App. Div. 1990) (stating that a goal of insurance regulation is to ensure that underwriting practices are fair to policyholders by not requiring cross-subsidization of differing risk categories); Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair? A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355, 358-59 (1997).

42. See Morrison, *supra* note 3, at 269.

43. See *Life Ins. Ass'n of Mass. v. Commissioner of Ins.*, 530 N.E.2d 168, 171 (Mass. 1988)

perspective have used include race,<sup>44</sup> sex,<sup>45</sup> domestic violence,<sup>46</sup> age,<sup>47</sup> human immunodeficiency virus (HIV) test results,<sup>48</sup> and physical or mental impairments.<sup>49</sup>

The second dominant view is the antidiscrimination perspective.<sup>50</sup> Proponents of this perspective argue that individuals have a right not to be classified for insurance purposes on the basis of unacceptable classifications, especially those classifications restricted by civil rights laws that govern other industries or activities.<sup>51</sup> Proponents of the antidiscrimination perspective consider unacceptable classifications to include those that are not causally related to the risk of loss, are not controllable, are associated with historical or invidious discrimination, or are socially unacceptable.<sup>52</sup> Therefore, advo-

(acknowledging that the basic principle underlying unfair discrimination statutes is that insurance companies must treat individuals of the same risk class the same); *Health Ins. Ass'n of Am.*, 551 N.Y.S.2d at 618-19 (stating that insurance regulations also attempt to ensure that policyholders are not required to subsidize the solvency of the insurer); *see also Insurance Dept. v. Philadelphia*, 173 A.2d 811, 820 (Pa. Super. Ct. 1961) (discussing the tendency of insurance companies, when left unregulated, to undercharge insureds in order to compete, thus resulting in an inability to pay losses).

44. *See, e.g., Equitable Assurance Soc'y of U.S. v. State Comm'n on Human Relations*, 430 A.2d 60 (Md. 1981) (considering the use of race in underwriting practices for life insurance providers); *Lange v. Rancher*, 56 N.W.2d 542, 543 (Wis. 1953) (describing the use of race and other classifications including "the applicant's physical condition, occupation, age, habits, morals, medical history, and the medical history of parents" as classifications used in underwriting decisions for the provision of life insurance).

45. *See, e.g., In re Binghamton GHS Employees Fed. Credit Union v. State Div. of Human Rights*, 564 N.E.2d 1051 (N.Y. 1990) (holding that the exclusion of coverage for normal pregnancies in a health and disability insurance policy is sex discrimination). *Accord. Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo. 1988); *Bully v. General Motors Corp.*, 328 N.W.2d 24, 28 (Mich. Ct. App. 1983); *Bankers Life & Cas. Co. v. Peterson*, 866 P.2d 241, 244 (Mont. 1993). *See also Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542 (Pa. 1984) (holding that the use of sex in automobile insurance underwriting practices, though actuarially sound, violates the state's Equal Rights Amendment and is against public policy).

46. *See Jacobus, supra* note 13, at 165 (describing the case of a battered woman who was denied health, life, and mortgage insurance because her previous history of abuse was considered in categorizing her as a high risk); Stein, *supra* note 2 (describing the justifications insurance companies give for refusing to insure victims of domestic violence); Ely, *supra* note 2, at 6 (stating that insurance companies are using medical and police records of domestic abuse to deny insurance coverage).

47. *See Insurance Servs. Office v. Commissioner of Ins.*, 381 So. 2d 515 (La. Ct. App. 1979) (reviewing the use of age as a reasonable classification in automobile insurance underwriting practices).

48. *See Life Ins. Ass'n. of Mass. v. Commissioner of Ins.*, 530 N.E.2d 168 (Mass. 1988) (considering the argument of insurance companies, who had utilized HIV testing to make underwriting decisions, that the insurance commissioner lacked authority to promulgate a regulation prohibiting this testing); *Health Ins. Ass'n. of Am. v. Corcoran*, 551 N.Y.S.2d 615 (App. Div. 1990) (holding that the consideration of HIV in insurance underwriting is permissible).

49. *See Austin, supra* note 37, at 517 (acknowledging the use of sex, age, marital status, place of residence, and occupation); Hellman, *supra* note 41, at 355 (noting that a 1988 survey revealed that about one-half of the largest insurance companies in the United States denied disability insurance to victims of domestic violence); Wortham, *supra* note 35, at 354-55 (identifying use of territorial rating as a disguised form of racial discrimination, and the use of age, gender, physical and mental disabilities, and socio-economic status in various types of insurance).

50. *See ABRAHAM, supra* note 36, at 5 (utilizing the term egalitarianism to refer to the antidiscrimination perspective); Gauding, *supra* note 32, at 1647, 1657-58 (using the term collectivists to refer to advocates of the antidiscrimination perspective).

51. *See Kirsh v. State Farm Mutual Auto. Ins. Co.*, Cal. Rptr. 260, 262, 264 (Ct. App. 1991) (opinion withdrawn from publishing, 1992 Cal. Lexis 1262) (holding that sex-based classifications are discriminatory under the state's Civil Rights Act because these classifications perpetuate harmful stereotypes that are not made permissible merely because they ensure the profitability of insurance companies); Wortham, *supra* note 35, at 360 (indicating that this perspective is grounded in civil rights law concepts).

52. *See Hartford Accident & Indem. Co. v. Insurance Comm'r of Commonwealth*, 482 A.2d 542, 547-48 (Pa. 1984) (stating that although rates may be actuarially sound, rates may still be unfair when public policy considerations make it necessary to base rates on other factors including reliability, social



cates of the antidiscrimination perspective argue that when social costs of using a classification outweigh industry costs of not using a classification, social welfare should govern insurers' decisions.<sup>53</sup> Thus, subsidization by individuals of lower risk should occur in order to make insurance available and affordable to higher risk individuals.<sup>54</sup>

### III. Legislative and Regulatory Constraints on the Insurance Industry's Use of Classifications

Insurance companies generally possess considerable discretion to develop and use classifications.<sup>55</sup> Constitutional provisions, federal and state legislation, and state regulations, however, have limited the insurance industry's discretion to use certain classifications.<sup>56</sup> The primary restriction on an insurance company's discretion has been through state legislative and regulatory actions; the role of courts has largely been limited to reviewing these legislative and regulatory actions.<sup>57</sup>

The United States Supreme Court has recognized that the insurance industry is "affected with a public interest" and thus it is subject to governmental regulation despite its operation through private contracts.<sup>58</sup> The public has an interest in the regulation of the insurance industry because a large portion of the public's wealth is protected by insurance policies and because insurance may be regarded as a necessity in the United States.<sup>59</sup> Therefore, to protect the public welfare, the government may exercise its police powers to ensure that the insurance industry is operated in the public's

acceptability, reasonableness, and causality which the court defined as "the actual or implied behavioral relationship between a particular rating factor and loss potential"); *Capital Blue Cross v. Commonwealth Ins. Dep't*, 383 A.2d 1306, 1309 (Pa. Commw. Ct. 1979) (recognizing the importance that underwriting decisions be supported by accurate statistical data, but that it is also in the best interest of the public to examine the assumptions upon which the statistical projections are based).

53. See *Hartford Accident & Indem.*, 482 A.2d at 584-85 (stating that when classifications, such as sex and marital status, lack serious justification and there are serious public policy considerations involved, the use of this classification should be prohibited); see also ABRAHAM, *supra* note 36, at 6 (stating that the government's solution to many important social problems is achieved through regulation of the insurance industry).

54. See Austin, *supra* note 37, at 549 (describing arguments made by individualists, which is another term used for advocates of the antidiscrimination perspective); see also Benjamin Schatz, Commentary, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782 (1987) (advocating a public policy approach to assess whether HIV antibody test results should be used by insurers making underwriting decisions).

55. See Wortham, *supra* note 35, at 353-54 (describing the extent of the insurer's discretion in making insurance decisions).

56. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000a(1)-(17) to 2000e (1988) (prohibiting employers from providing different benefits on the basis of race, color, religion, sex, and national origin); ARIZ. REV. STAT. § 20-448(G) (1998) (prohibiting the use of domestic violence as a classification for purposes of making life or disability insurance underwriting decisions); *Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo. 1988) (holding that the use of sex as an insurance classification violates the state's equal rights amendment).

57. See Austin, *supra* note 37, at 518 (describing the limited role courts have played); Gaubling, *supra* note 32, at 1656 (stating that federal constraints are fairly limited but that state statutes and regulations are fairly extensive).

58. See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 408-416 (1914) (stating that when private property becomes "affected with a public interest," such as fire insurance, it may be regulated by the public).

59. See *id.* at 413-14 (stating that these factors, in addition to the desire to lessen the burden of catastrophes through distribution of risk of loss and the unequal bargaining powers of the parties involved, differentiate insurance policy contracts from ordinary commercial contracts); see also Wortham, *supra* note 35, at 351-52, 394-400 (describing the necessity of insurance).

interest.<sup>60</sup>

### A. Constitutional Provisions

Generally, insureds have not been successful in using the U.S. Constitution's Equal Protection Clause and similar state constitutional provisions including Equal Rights Amendments (ERAs), to restrict the use of insurance classifications.<sup>61</sup> For these provisions to be used successfully to restrict the use of any classification, there must be federal or state action.<sup>62</sup> Generally, courts have refused to classify heavily regulated industries, including the insurance industry, as a form of federal or state action.<sup>63</sup>

On the other hand, the insurance industry has attempted to rely on constitutional provisions, like the Due Process Clause of federal and state constitutions, to attack the constitutionality of insurance regulations; however, generally, this attempt has been unsuccessful.<sup>64</sup> For example, in *Katt v. Insurance Bureau*,<sup>65</sup> the Court of Appeals of Michigan held that regulatory statutes prohibiting the rebating of insurance commissions did not violate the state's due process clause.<sup>66</sup> Although insurers argued that

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60. See *German Alliance Ins.*, 233 U.S. at 413-14; see also *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (holding that insurance is commerce and thus subject to federal regulation under the Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3); Gauiding, *supra* note 32, at 1654-55 (acknowledging the power of Congress to regulate the insurance industry).

61. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that the exclusion of disability insurance coverage for normal pregnancies did not violate the Fourteenth Amendment); *Murphy v. Harleysville Mutual Ins. Co.*, 422 A.2d 1097 (Pa. Super. Ct. 1980) (holding that the use of age, sex, and marital status in setting insurance rates did not violate the U.S. Constitution's Equal Protection Clause or the state's ERA); *Austin*, *supra* note 37, at 530. But see, e.g., *Insurance Comm'r of Md. v. Equitable Life Assurance Soc'y of U.S.*, 664 A.2d 862 (Md. 1995) (holding that a state insurance code provision that authorized gender discrimination in insurance rates, even if it was statistically associated to risk of loss, violated the state's ERA); *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542 (Pa. 1984) (holding that the state's ERA and public policy prohibit the use of classifications based on sex in automobile insurance underwriting decisions, even if the use of sex as a classification is statistically sound); *Welsch v. Aetna Ins. Co.*, 494 A.2d 409 (Pa. Super. Ct. 1985) (dismissing a claim alleging that the use of sex as a classification in automobile insurance underwriting decisions violates the Fourteenth Amendment's Equal Protection Clause, but recognizing that a claim may be brought under the state's ERA).

62. See, e.g., *Hartford Accident & Indem.*, 482 A.2d at 586 (stating that the state's ERA requires the presence of state action); *Welsch*, 494 A.2d at 411-12 (holding that a determination of the presence of state action is irrelevant under the state's ERA and that the use of sex in determining automobile insurance rates does not constitute state action even though the state requires automobile insurance to lawfully operate an automobile); *Murphy*, 422 A.2d 1097 (holding that a sex discrimination suit under the state's ERA failed for lack of state action).

63. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974) (rejecting the argument that heavily regulated industries are a form of state action); see also *supra* note 62 and accompanying text. But see, e.g., *Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo. 1988) (finding a violation of the state's ERA when a private employer discriminated on the basis of sex by providing a group health insurance policy that excluded coverage of expenses associated with a normal pregnancy). For a definition of state action, see *Jackson*, 419 U.S. at 351, 360 (stating that no single fact or relationship is dispositive in determining the existence of state action and that a "sufficiently close nexus" must exist between the state and the contested action so that the action may be considered as that of the state itself).

64. See, e.g., *Katt v. Insurance Bureau*, 505 N.W.2d 37 (Mich. Ct. App. 1993) (holding that the insurer also failed to state a valid equal protection claim because he did not show that the regulations affected his insurance company differently than other insurance companies).

65. 505 N.W. 2d 37 (Mich. Ct. App. 1993).

66. See *id.* at 40 (stating that the rebating of commissions may result in unfair discrimination because insureds within the same risk group may receive differing rebates).

the regulations unnecessarily restricted their liberty and property rights, the court found that the legislature's goal of preventing unfair discrimination and promoting insurer solvency and public convenience were legitimate and rational reasons for prohibiting the use of rebates.<sup>67</sup> Therefore, the enactment of regulations to prevent unfair discrimination were held to be a legitimate exercise of police powers to protect the public health, safety, and welfare.<sup>68</sup>

## B. Federal Statutes

Proponents of the antidiscrimination perspective have relied on numerous federal statutes to prohibit the use of insurance classifications that have a discriminatory effect. One statute that has proven successful in restricting the use of classifications is Title VII of the Civil Rights Act of 1964,<sup>69</sup> which prohibits employers from treating employees differently in the payment of salary and benefits on the basis of "race, color, religion, sex, and national origin."<sup>70</sup> In two cases, the United States Supreme Court relied on Title VII in refusing to support the fair discrimination perspective.<sup>71</sup> In *City of Los Angeles Department of Water & Power v. Manhart*<sup>72</sup> and *Arizona Governing Committee v. Norris*,<sup>73</sup> the Supreme Court held that under Title VII, employers may not require different contributions to pension plans or provide different benefits because of an employee's sex.<sup>74</sup> Thus, Title VII limits the insurance industry's use of classifications based on race, religion, sex, and national origin; however, this limitation applies only to employer-sponsored insurance plans.<sup>75</sup>

Generally, however, Congress has entrusted the states with the primary regulatory authority over the insurance industry.<sup>76</sup> The lack of federal regulation of the insurance industry indicates a congressional preference for state regulation.<sup>77</sup> This prefer-

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67. See *id.* (stating that the public convenience was promoted by ensuring easier comparison of insurance policies).

68. See *id.*

69. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a(1)-(17) to 2000e (1988).

70. See *id.*; see also NOW Legal Defense and Education Fund, Insurance Discrimination Fact Sheet (1995) (unpublished Legal Resource Kit on Insurance Discrimination, on file with the *Journal of Legislation*) (contrasting Title VII restraints imposed on employers who provide group insurance to providers of individual insurance).

71. See *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1084 (1983) (stating that accurate generalizations about a class are not sufficient to justify class-based treatment); *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 709 n.24 (1978) (holding that Title VII focuses on "fairness to individuals rather than fairness to classes" and that although employers incur higher costs in providing retirement benefits to females, the use of sex in developing retirement plans is not justified).

72. 435 U.S. 702 (1978).

73. 463 U.S. 1073 (1983).

74. See *Arizona Governing Comm.*, 463 U.S. at 1079-86 and n.14 (stating that "the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based retirement plan"); *City of Los Angeles Dept. of Water & Power*, 435 U.S. at 707-711 (prohibiting "treatment of individuals as simply components of a racial, religious, sexual, or national class").

75. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a(1)-(17) to 2000e (1988) (stating that it is unlawful for employers "to discriminate against any individuals with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"). This legislation does have a considerable impact on annuity, health, disability, and life insurance which is largely provided by employers through group insurance. See Wortham, *supra* note 35, at 362 (noting that eighty-five percent of private hospital/medical insurance of individuals under the age of sixty-five is issued on a group basis).

76. See *infra* notes 77-81 and accompanying text.

77. See *Arizona Governing Comm.*, 463 U.S. at 1100 n.6 (Powell, J. dissenting) (stating that Congress has chosen to leave the regulation of the insurance industry to the states); *Insurance Dep't. v.*

ence is evidenced by the McCarran-Ferguson Act,<sup>78</sup> which established a presumption of state regulatory authority over the insurance industry unless Congress explicitly states an intent to regulate the insurance industry.<sup>79</sup> Proponents of the antidiscrimination perspective have proposed federal legislation to prohibit differentiation based on race, sex, color, religion, domestic violence, or national origin in insurance decisions; however, none of these proposals have been enacted.<sup>80</sup> Thus, to date, Congress has not passed any legislation designed to overcome the presumption of state control.<sup>81</sup>

### C. State Statutes and Regulatory Actions

#### 1. Development of State Unfair Discrimination Statutes

All states have enacted legislation prohibiting unfair discrimination by the insurance industry.<sup>82</sup> Many states enacted this legislation in the late nineteenth and early twentieth centuries to prohibit life and fire insurance companies from treating individuals in the same class and with similar life expectancies differently.<sup>83</sup> In addition, a few states enacted statutes banning the use of racial classifications shortly after the Civil War.<sup>84</sup> It was not until the late 1940s, however, that the remainder of the states passed unfair discrimination legislation.<sup>85</sup>

Unfair discrimination statutes serve a variety of purposes aimed at prohibiting unfair methods of competition and deceptive practices including the use of certain

Philadelphia, 173 A.2d 811, 813 (Pa. Super. Ct. 1961) (stating that the insurance industry has historically been regulated by the states and not the federal government).

78. McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1994)).

79. See *id.*

80. See, e.g., S. 467, 105th Cong. (1997); H.R. 1117, 105th Cong. (1997); H.R. 3145, 104th Cong. (1996); H.R. 1201, 104th Cong. (1995); H.R. 1793, 99th Cong. (1985); S. 372, 98th Cong. (1983); S. 2204, 97th Cong. (1982); S. 2477, 96th Cong. (1980), 126 CONG. REC. 6536-39 (1980); H.R. 100, 98th Cong. (1983); H.R. 100, 97th Cong. (1981); H.R. 100, 96th Cong. (1979); Wortham, *supra* note 35, at 364 (discussing specific legislation that antidiscrimination proponents have proposed). Insurance companies argue that because the McCarran-Ferguson Act indicates a congressional preference for state regulation, the federal government should leave the issue of the use of insurance classifications, including domestic violence, to the states. See *Insurance for Victims of Domestic Violence: Testimony Regarding Health Insurance and Domestic Violence, Before the Comm. on Labor & Human Resources*, 1995 WL 449184 (1995) [hereinafter Echols] (statement of Peg Echols, Assistant Counsel/Federal Affairs, State Farm Insurance Companies).

81. See Gaulding, *supra* note 32, at 1654. Therefore, if federal legislation prohibiting the use of domestic violence as a classifier is passed, it may be the first federal legislation specifically designed to preempt state regulations.

82. See *Insurance Dep't v. Philadelphia*, 173 A.2d 811, 813-14 (Pa. Super. Ct. 1961) (stating that prior to 1945 only a few state insurance rate regulations existed, but that by 1948 all states had enacted similar legislation which sought to protect the public welfare by prohibiting inadequate, excessive, or unfairly discriminatory rates).

83. See Wortham, *supra* note 35, at 384 (describing the once common practice of rebating where insurance agents offered a portion of their commission to potential customers, or offered other valuable incentives, to encourage a sale); Gaulding, *supra* note 32, at 1656 (same).

84. See, e.g., MASS. GEN. LAWS ch. 175, § 122 (1998) (first enacted in 1884); MICH. COMP. LAWS § 500.2082 (1998) (first enacted in 1869).

85. See *Insurance Dep't*, 173 A.2d at 813-14 (stating that by 1948 all states had enacted unfair discrimination statutes); Wortham, *supra* note 35, at 386 (noting that the passage of the 1945 McCarran-Ferguson Act caused insurance companies to lobby for state regulation in order to avoid federal antitrust laws).

insurance classifications.<sup>86</sup> These statutes seek to ensure the solvency of insurance companies, require insurers to communicate terms and rates clearly to insureds, and prohibit the use of fraud in sales tactics.<sup>87</sup> These statutes also limit the use of classifications to those that are "fair"; however, because no definition of "fair" is included in these statutes, insurance commissioners, legislators, and courts usually interpret the meaning of this term through application of either the fair discrimination or antidiscrimination perspective.<sup>88</sup>

## 2. *Types of State Legislation Prohibiting Use of Discriminatory Classifications*

### a. *State Unfair Discrimination Statutes*

State legislation prohibiting the use of particular classifications takes numerous forms.<sup>89</sup> Some statutes prohibit only the use of classifications that are not actuarially justified.<sup>90</sup> Other statutes prohibit differential treatment that is based "solely" on a specific classification.<sup>91</sup> Still others impose a heightened scrutiny standard that requires more than a mere statistical association with loss, but does not completely ban the use of classifications.<sup>92</sup> Finally, legislation based on the antidiscrimination perspective completely prohibits the use of classifiers such as race,<sup>93</sup> sex,<sup>94</sup> marital sta-

86. See, e.g., ARK. CODE ANN. § 23-66-206 (Michie 1997) (defining unfair methods of competition and deceptive practices).

87. See *Insurance Dep't*, 173 A.2d at 814, 820 (stating regulations require insurance companies to charge adequate rates, instead of decreasing rates, in response to the demands of competition to ensure the availability of funds to pay policy claims); Gaulding, *supra* note 32, at 1656.

88. See *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1100 n.1 (1983) (Powell, J., dissenting) (stating that most states prohibiting unfair discrimination merely prohibit discrimination within the same class and allow classifications that are statistically sound); *Telles v. Commissioner of Ins.*, 574 N.E.2d 359, 360-61 (Mass. 1991) (acknowledging that fair discrimination allows insurers to utilize actuarially sound classifications but suggesting that had the court been presented with an argument based on the state's ERA, the result may have been different); *Health Ins. Ass'n of Am. v. Corcoran*, 551 N.Y.S.2d 615, 618-19 (App. Div. 1990) (arguing that cross-subsidization among differing risk groups is not fair).

89. See, e.g., COLO. REV. STAT. § 10-3-1104(1)(f)(III) (1998) (permitting the use of classifications that are statistically sound); DEL. CODE ANN. tit. 18 § 4124 (1998) (prohibiting underwriting decisions made "solely" on the basis of certain classifications).

90. See, e.g., COLO. REV. STAT. § 10-3-1104(1)(f)(III) (prohibiting the consideration of marital status or sex unless it is statistically sound); KAN. STAT. ANN. § 40-2, 109 (1997) (permitting the use of mental or physical handicaps as a classification if it is supported by sound statistical evidence).

91. See, e.g., ARK. CODE ANN. § 23-66-206(7)(F)-(G) (prohibiting the termination or modification of insurance policies "solely" on the basis of mental or physical impairments, race, sex, or religion); DEL. CODE ANN. tit. 18 § 4124 (prohibiting the termination or denial of property insurance "solely" on the basis of occupation); FLA. STAT. ch. 626.9541(1)(g)(3) (1998) (prohibiting the cancellation or denial of insurance, in addition to other underwriting decisions, "solely" because of a history of domestic violence). See also Wortham, *supra* note 35, at 367 (stating that the meaning of these statutes is somewhat unclear, but that this type of statute may restrict the use of a certain classification more than those statutes that require only actuarial justification).

92. See, e.g., 215 ILL. COMP. STAT. 5/236(b) (West 1998) (prohibiting insurers from considering the presence of handicaps or disabilities unless it is based on sound actuarial principles, is a reasonable classification, and is directly related to actual or reasonable anticipated experience); MINN. STAT. § 72A.20(8) (1998) (prohibiting the consideration of the presence of a disability unless supported by claims experience, statistically sound conclusions, and other data that show substantial and significant differences in risk because of the disability).

93. See, e.g., ARIZ. REV. STAT. § 20-1631 (1998); ARK. CODE ANN. § 23-66-206(7)(G); CAL. INS. CODE §§ 10140-10141 (1998); CONN. GEN. STAT. § 38a-816 (1997). See also Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583 (1996).

94. See, e.g., HAW. REV. STAT. § 431:10C-111 (1998) (applying only to automobile insurance);

tus,<sup>95</sup> national origin,<sup>96</sup> religion,<sup>97</sup> and genetics<sup>98</sup> due to the societal view that these classifiers are unacceptable.<sup>99</sup>

*b. State Human and Civil Rights Statutes*

State human and civil rights statutes may also prohibit the use of classifications by the insurance industry.<sup>100</sup> For example, in *Kirsch v. State Farm Mutual Automobile Insurance Co.*,<sup>101</sup> the California Court of Appeals held that an automobile insurer's practice of excluding coverage for normal pregnancy and childbirth violated the Unruh Civil Rights Act (Unruh Act) which reflects the state's public policy that men and women be treated equally.<sup>102</sup> The Unruh Act was enacted to declare the state's public policy that sex-based differential pricing is harmful because it reinforces harmful stereotypes and that differential pricing is not permissible "merely because it is profitable."<sup>103</sup> The court held, however, that the practice of charging women more than men for medical insurance was permissible because an insurance code provision that specifically permitted differential pricing superseded the Unruh Act.<sup>104</sup> But the court held that the Unruh Act's limitations on arbitrary sex discrimination still prohibited insurers from selling policies that excluded coverage for normal pregnancy and childbirth because the insurance code was silent on whether insurers could offer policies containing different terms and coverage.<sup>105</sup>

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MASS. GEN. LAWS ANN. ch. 175, §§ 22E, 24A (applying only to automobile insurance); MICH. COMP. LAWS § 500.2027 (1998) (applying only to automobile insurance); N.C. GEN. STAT. § 58-3-25 (1998) (applying only to automobile insurance). Only one state, Montana, completely bans the use of sex discrimination in all types of personal insurance. MONT. CODE ANN. § 49-2-309 (1997). Therefore, under the majority of states' unfair discrimination statutes, most insurance companies may use sex as a classifier. See Gauling, *supra* note 32, at 1662. But see CAL. INS. CODE § 790.03(f) (West 1998) (requiring the use of sex-specific actuarial tables for life insurance and annuities).

95. See, e.g., ARK. CODE ANN. § 23-66-206.

96. See, e.g., CAL. INS. CODE § 11628.

97. See, e.g., ARK. CODE ANN. § 23-66-206; CAL. INS. CODE § 11628.

98. See, e.g., ARIZ. REV. STAT. § 20-448(E); MONT. CODE ANN. § 33-18-206 (prohibiting the use of genetic discrimination only if there is no actuarial justification for the discrimination). See also Naomi Obinata, *Genetic Screening and Insurance: Too Valuable an Underwriting Tool to be Banned from the System*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 145 (1992) (examining the moral arguments advanced against the use of insurance classifications).

99. See Wortham, *supra* note 35, at 367-68 (stating that the use of these classifications is considered socially unacceptable because of their long history of abuse and the immutable and uncontrollable characteristics).

100. See, e.g., Unruh Civil Rights Act (Unruh Act), CAL. CIV. CODE § 51 (West 1998) (prohibiting arbitrary discrimination in "accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever").

101. 284 Cal. Rptr. 260 (Ct. App. 1991) (opinion withdrawn from publishing, 1992 Cal. Lexis 1262).

102. See *id.* at 262, 264; see also Binghampton GHS Employees Fed'l Credit Union v. State Div. of Human Rights, 564 N.E.2d 1051 (N.Y. 1990) (describing the state's human rights law which prohibited discrimination on the basis of sex in the rates, terms, and conditions of any form of credit).

103. See *Kirsch*, 284 Cal. Rptr. at 264.

104. See *id.* at 264-65 (stating that Insurance Code § 10140 does not prohibit "the issuance, cancellation or pricing of life or disability insurance" because of the insured's sex).

105. See *id.* at 264-66 (stating that the exclusion of coverage for normal pregnancy and childbirth constitutes sex discrimination because the only normal condition that is excluded from coverage under this comprehensive medical insurance is pregnancy-related treatment which is uniquely a woman's condition).

### 3. Interpretation of State Unfair Discrimination Statutes

State courts have sought to interpret unfair discrimination laws and their affect on the use of classifications by insurance companies.<sup>106</sup> Historically, courts have generally interpreted unfair discrimination statutes to prohibit only classifications that are not statistically associated with a risk of loss.<sup>107</sup> Within the last twenty years, however, courts have begun to consider other factors, in addition to the statistical relationship to risk of loss, to determine the validity of a classification.<sup>108</sup>

For example, Massachusetts and Pennsylvania courts have historically relied on the fair discrimination perspective to interpret unfair discrimination statutes.<sup>109</sup> In older cases, these courts held that actuarially sound insurance classifications were permissible under the state's unfair discrimination statutes.<sup>110</sup> In more recent cases, however, courts in these two states have suggested that other factors may be considered in determining the validity of a classification.<sup>111</sup> The Supreme Judicial Court of Massa-

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106. See, e.g., *Wilson v. Fair Employment & Housing Comm'n*, 54 Cal. Rptr. 2d 419 (Ct. App. 1996) (assessing whether the state's unfair discrimination law prohibits age-based underwriting decisions); *Fromberg v. Insurance Comm'r*, 589 A.2d 544, 548 (Md. Ct. Spec. App. 1991) (describing the standard of review for underwriting practices which requires that insurers produce facts that show the statistical basis for the classification, the validity of the statistical evidence, and any direct and substantial adverse effects on the insurer if the classification were not used); *Insurance Fed'n of Pa. v. Foster*, 587 A.2d 865 (Pa. Commw. Ct. 1991) (considering whether an insurer's underwriting criteria violates the states unfair discriminations laws).

107. See *Insurance Servs. Office v. Commissioner of Ins.*, 381 So.2d 515, 517 (La. Ct. App. 1979) (holding that the failure to use classifications based on sex or age, when the classification is statistically sound, constitutes unfair discrimination); *Government Employees Ins. Co. v. Insurance Comm'r*, 630 A.2d 713, 720-21 (Md. 1993) (interpreting the state's unfair discrimination statute to permit the use of age as a classification if it is statistically sound); see also *Wortham*, *supra* note 35, at 371 (stating that regulators, legislators, and the courts give deference to the fair discrimination perspective which may impede regulatory reform due to a heavy burden of justification for unfair discrimination statutes based on antidiscrimination perspective).

108. See, e.g., *Massachusetts Auto Rating & Accident Prevention Bureau v. Commissioner of Ins.*, 424 N.E.2d 1127, 1134-35 (Mass. 1981) (holding that underwriting decisions must be nondiscriminatory and reasonable as well as consistent with legislative and public policy); *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542, 581-82 (Pa. 1984) (holding that classifications must be supported by public policy); *Capital Blue Cross v. Commonwealth Ins. Dep't*, 383 A.2d 1306, 1310 (Pa. Commw. Ct. 1978) (holding that it is permissible to question the assumptions upon which classifications are based).

109. See, e.g., *Century Cab, Inc. v. Commissioner of Ins.*, 100 N.E.2d 481, 488 (Mass. 1951) (holding that risks must be equitably adjusted to ensure each individual pays his own way); *Schlabach v. Commissioner of Ins.*, 195 N.E. 887, 888 (Mass. 1935) (holding that classifications, such as territorial classifications, must be statistically associated with loss); *Brest v. Commissioner of Ins.*, 169 N.E. 657, 659-61 (Mass. 1930) (holding that classifications based on territorial districts are permissible under state and federal equal protection statutes); *Physicians' Mutual Ins. Co. v. Denenberg*, 327 A.2d 415, 420 (Pa. Commw. Ct. 1974) (holding that it is unfair discrimination to charge individuals living in different rating classifications the same rates); *Insurance Dep't. v. City of Philadelphia*, 173 A.2d 811 (Pa. Super. Ct. 1961).

110. See, e.g., *Century Cab*, 100 N.E.2d at 488; *Schlabach*, 195 N.E. 888; *Brest*, 169 N.E. at 659-61; *Physicians' Mutual Ins. Co.*, 327 A.2d at 420.

111. See *Massachusetts Auto Rating*, 424 N.E.2d at 1134-35 (holding that underwriting decisions must be nondiscriminatory and reasonable and that the reasonableness of an underwriting decision may also be affected by public and legislative policies); *Hartford Accident & Indem.*, 482 A.2d at 547-48 (holding that regulations barring the use of gender in automobile insurance decisions are required under unfair discrimination regulations and by public policy); *Capital Blue Cross*, 383 A.2d at 1310 (holding that other factors such as the financial needs of the elderly and the effects and practicability of a particular insurance classification should also be considered in determining the validity of a territorial classification).

chusetts and the Supreme Court of Pennsylvania have stated that other values, such as fairness and the public and legislative policy of ensuring the availability of insurance to all, may be considered in determining the reasonableness of rates.<sup>112</sup> The Pennsylvania Supreme Court has stated that public policy concerns require courts to consider several factors in determining the validity of a classification including the "causality, reliability, social acceptability, and incentive value in judging the reasonableness of a classification system."<sup>113</sup>

Thus, actuarial soundness may no longer be the sole test of the validity of an underwriting decision as the states are beginning to reexamine the traditional interpretation of unfair discrimination statutes.<sup>114</sup> Therefore, as courts are becoming increasingly more likely to judge the validity of insurance classifications by considering several other factors including legislative and public policy concerns and the fairness or reasonableness of the classification, reliance on the fair discrimination perspective to interpret existing statutes has decreased.<sup>115</sup>

Many courts continue to rely on the fair discrimination perspective, however, when faced with challenges to state unfair discrimination statutes.<sup>116</sup> For example, in 1990, the New York Appellate Division in *Health Insurance Association of America v. Corcoran*<sup>117</sup> addressed the use of human immunodeficiency virus (HIV) as a classification.<sup>118</sup> The court held that under the state's unfair discrimination statute, the denial of coverage or the imposition of different rates based on sound actuarial practices is permissible.<sup>119</sup> Therefore, due to the nature of HIV and its statistical association with risk of loss, the court determined that it may be used as a classifier.<sup>120</sup> These cases illustrate that depending on the viewpoint of the court and which perspective the court adopts, courts often interpret similarly worded unfair discrimination statutes differently.<sup>121</sup>

#### D. Specific Legal and Regulatory Restraints on the Use of Domestic Violence as a Classifier

Within the past few years, many federal and state representatives have responded to the news that insurance companies often use domestic violence as a classifier.<sup>122</sup>

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112. See *Massachusetts Auto Rating*, 424 N.E.2d at 1134 (stating that underwriting practices "must be 'reasonable' as well as 'nondiscriminatory'"); *Hartford Accident & Indem.*, 482 A.2d at 547-48 (holding that other values including fairness and public policy, which favors the restriction of excessive, inadequate, or unfair rates, may outweigh the statistical association with loss); *Capital Blue Cross*, 383 A.2d at 1310.

113. See *Hartford Accident & Indem.*, 482 A.2d at 584-85 (concluding that on the basis of these factors, the use of classifications based on sex and marital status were not justified).

114. See generally *Massachusetts Auto Rating*, 424 N.E.2d at 1134-35; *Hartford Accident & Indem.*, 482 A.2d at 547-48; *Capital Blue Cross*, 383 A.2d at 1310.

115. See generally *Massachusetts Auto Rating*, 424 N.E.2d at 1134-35; *Hartford Accident & Indem.*, 482 A.2d at 547-8; *Capital Blue Cross*, 383 A.2d 1306.

116. See *Health Ins. Ass'n of Am. v. Corcoran*, 551 N.Y.S.2d 615, 619 (App. Div. 1990).

117. 551 N.Y.S.2d 615 (App. Div. 1990).

118. See *id.* at 616-17.

119. See *id.* at 618. The New York Appellate Division stated that statistically sound underwriting practices are not unfair, misleading, or discriminatory. See *id.* at 619.

120. See *id.* at 619.

121. Compare *id.* (permitting the use of HIV as a classification because it is statistically sound), with *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542, 581-82 (Pa. 1984) (prohibiting the use of sex and marital status as a classification even though it is statistically sound).

122. See, e.g., *Sanders II*, supra note 16 (unveiling legislation titled "The Victims of Abuse Insurance Protection Act"); 141 CONG. REC. S3744-04 (daily ed. March 9, 1995) (statement of Sen.



Many federal and state legislators have proposed legislation that restricts the use of domestic violence as a classifier.<sup>123</sup> Many states have recently enacted this legislation.<sup>124</sup>

### 1. Federal Legislation

Federal legislators have introduced numerous bills in Congress that would restrict the use of domestic violence as a classifier.<sup>125</sup> Some of the proposed legislation prohibits insurance companies from engaging in any practice that has the effect of charging more, denying, or canceling insurance for applicants with a known or suspected history of domestic violence.<sup>126</sup> Other proposed legislation prohibits only the use of domestic violence as a classifier but does not prohibit the adverse treatment of those individuals insurers consider to be at high risk for victimization.<sup>127</sup> Therefore, insurance companies still may use other predictors that will affect victims of domestic violence.<sup>128</sup> For example, insurance companies could consider the presence of medical conditions that may have been caused by domestic violence to make underwriting decisions that will still negatively affect these victims.<sup>129</sup> Although to date, none of the proposed federal legislation specifically designed to prohibit the use of domestic violence as a classification have become law, the Health Insurance Portability and Accountability Act of 1996<sup>130</sup> specifically includes provisions that protect victims of

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Wellstone) (introducing the "Victims of Abuse Access to Health Insurance Act"); John Kerr, *Wilson Signs Domestic Violence Bills Dropping Diversion*, WEST'S LEGAL NEWS 2688 (October 9, 1995) (describing two bills that Governor Pete Wilson from California, signed into law to prevent insurers from denying or restricting coverage on the basis of domestic violence); Otis, *supra* note 6, at 3 (describing the action taken by Sen. Wellstone and Rep. Sanders in calling for Congressional hearings as part of a bi-partisan effort to enact legislation restricting the use of domestic violence as an insurance classification); Showalter, *supra* note 27, at 44 (describing a new Ohio law designed to protect victims of domestic violence from the loss of insurance benefits).

123. See, e.g., S. 467, 105th Cong. (1997); H.R. 1117 105th Cong. (1997); FLA. STAT. CH. 626.9541(g)(3)(e) (1998); N.H. REV. STAT. ANN. § 417:4(VII)(f) (1998); S. 5436, 54th Leg., 1st Sess. (Wash. 1996).

124. See, e.g., Act of May 22, 1997, 1997 Alaska Sess. Laws ch. 39 (codified at ALASKA STAT. §§ 21.36.430, 21.36.440, 26.36.450 (Michie 1998)); MD. CODE ANN. INS., § 27-504 (1998); Domestic Abuse Insurance Protection Act, ch. 141, 1997 N.M. Laws 1250 (effective July 1, 1997) (codified at N.M. STAT. ANN. §§ 59A-16B-1 to 59A-16B-10 (1998); TENN. CODE ANN. §§ 56-8-301 to 56-8-306 (1998) (enacting the "Domestic Violence Victims Health Insurance Protection Act").

125. See, e.g., S. 467, 105th Cong. (1997) (proposing the "Victims of Abuse Insurance Protection Act"); H.R. 1117 105th Cong. (1997) (same); H.R. 3145, 104th Cong. (1996) (proposing the "Insurance Protection for Victims of Domestic Violence Act"); H.R. 1201, 104th Cong. (1995) (proposing the "Domestic Violence Insurance Protection Act of 1995"); H.R. 3178, 104th Cong. (1996) (proposing the "Women's Health Equity Act of 1996"); S. 1799, 104th Cong. §§ 2251-2257 (1996) (same); H.R. 1920, 104th Cong. (1995) (proposing the "Domestic Violence Victims Insurance Protection Act of 1995"); S. 524, 104th Cong. (1995) (proposing the "Victims of Abuse Access to Health Insurance Act"); H.R. 1191, 104th Cong. (1995) (same).

126. See, e.g., S. 467, 105th Cong. (1997); S. 1799, 104th Cong. (1996); S. 524, 104th Cong. (1995); H.R. 3145, 104th Cong. (1996); H.R. 3178, 104th Cong. (1996); H.R. 1191, 104th Cong. (1995); H.R. 1201, 104th Cong. (1995); see also Hellman, *supra* note 41, at 406-07 (analyzing the strengths and weaknesses of proposed federal legislation).

127. See, e.g., H.R. 1920, 104th Cong. (1995) (stating that "[a]n insurer may not deny or cancel health insurance coverage for an individual *solely* on the basis that the individual is or has been the subject of an act of domestic violence") (emphasis added). As a result, insurance companies may still use other classifiers that will have an adverse effect on victims of domestic violence. See *id.*; see also Hellman, *supra* note 41, at 405.

128. See Echols, *supra* note 80 (stating that "medical conditions of ALL applicants (from whatever cause) must be considered in order to underwrite fairly and avoid improper subsidies").

129. See *id.*

130. See Pub. L. No. 104-191, 110 Stat. 1936 (1997) (codified in scattered sections of 29 U.S.C.

domestic violence from discrimination by prohibiting the use of domestic violence as a preexisting condition in underwriting decisions and by prohibiting companies from denying group health insurance to victims of domestic violence.<sup>131</sup>

## 2. State Legislation

Since 1994, forty-three states have enacted legislation restricting the use of domestic violence as a classifier for insurance purposes.<sup>132</sup> Three other states are currently considering similar legislation.<sup>133</sup>

Enacted and proposed state legislation is very similar to the different types of proposed federal legislation. Some legislation forbids the use of domestic violence only when it is not statistically correlated with risk of loss and other legislation permits the use of domestic violence as long as it is used with another predictive variable by stating that insurance companies may not make underwriting decisions "solely" or "only" because of a history of domestic violence.<sup>134</sup> Other legislation prohibits insurance companies from charging more for, denying coverage, or making underwriting decisions because the individual was, is, or may be a victim of domestic violence.<sup>135</sup> Many of the states with this type of legislation, however, still permit insurers to make

and 42 U.S.C.).

131. *See id.*

132. *See* ALASKA STAT. §§ 21.36.430, 21.54.100 (Michie 1998); ARIZ. REV. STAT. § 20-448(G) (1998); ARK. CODE ANN. § 23-86-306(a)(1)(G) (Michie 1997); CAL. HEALTH & SAFETY CODE § 1374.75 (West 1998); COLO. REV. STAT. § 10-3-1104.8 (1999); CONN. GEN. STAT. § 38a-816(18) (1998); DEL. CODE ANN. tit. 18, §§ 2302(5), 2304(24)-(25) (1998); FLA. STAT. ch. 626.9541(1)(g)(3) (1998); HAW. REV. STAT. § 431:10-217.5 (1998); 215 ILL. COMP. STAT. §§ 5/155.22a, 97/25(A)(1)(g) (West 1998); IND. CODE ANN. § 27-8-24.3 (1998); IOWA CODE §§ 507B.4(7)(c), 513B.9A(1)(g) (1998); KAN. STAT. ANN. § 40-2404(7)(d) (1997); H.B. 315 (Ky. 1998) (enacted); LA. REV. STAT. ANN. § 22.250.3(A)(1)(g) (West 1999); ME. REV. STAT. ANN. tit. 24-A, § 2159-B (West 1998); MD. CODE ANN. INS., § 27-504 (1998); MASS. GEN. LAWS ch. 175, §§ 95B, 108G, 120D; ch. 176A, § 3A; ch. 176B, § 5A; ch. 176G § 19 (1999); MINN. STAT. § 72A.20(8) (1998); MO. REV. STAT. § 375.1312 (1999); MONT. CODE ANN. §§ 33-18-216, 33-22-526 (1997); NEB. REV. STAT. §§ 44-7401 to 44-7410 (1998); NEV. REV. STAT. § 689A.413 (1997); N.H. REV. STAT. ANN. §§ 417:4(7)(f) (1998); N.J. STAT. ANN. § 17B:26-2.1q (West 1999); N.M. STAT. ANN. §§ 59A-16B-1 to 16B-10 (Michie 1998); N.Y. INS. LAW § 2612 (McKinney 1999); N.C. GEN. STAT. § 58-68-35 (1998); N.D. CENT. CODE § 26.1-36.3-01 (1999); OHIO REV. CODE ANN. § 3901.21 (Anderson 1998); OR. REV. STAT. § 746.015 (1998); PA. CONS. STAT. §§ 1171.3, 1171.5(a) (1998); R.I. GEN. LAWS § 27-60-4 (1998); S.C. CODE ANN. §§ 38-41-45, 38-71-860 (Law Co-op. 1998); S.D. CODIFIED LAWS § 58-188-27 (Michie 1998); TENN. CODE ANN. §§ 56-8-301 to 56-8-306 (1998); UTAH CODE ANN. §§ 31-A-21-501 to 31-A-21-506 (1998); VA. CODE ANN. § 38-2-3431 (Michie 1998); WASH. REV. CODE § 48.18.550 (1999); W. VA. CODE §§ 33-4-20, 33-15-2a, 33-16-1a (1998); WIS. STAT. § 632.748 (1998); WYO. STAT. ANN. § 26-19-107(g) (Michie 1998).

133. *See* S. 260, 145th Gen. Assembly, Reg. Sess. (Ga. 1999); S.2728, Reg. Sess. (Miss. 1999); 76th Legis. (Tex. 1999).

134. *See, e.g.,* ALASKA STAT. §§ 21.36.430, 21.54.00 (prohibiting insurers from making underwriting decisions "if the refusal, cancellation, denial, or increase results only from the fact that the person was a victim of domestic violence"); FLA. STAT. ch. 626.9541(1)(g)(3); KAN. STAT. ANN. § 40-2404(7)(d); ME. REV. STAT. ANN. tit. 24-A, § 2159-B; NEV. REV. STAT. § 689A.413; N.H. REV. STAT. ANN. § 417:4(7); N.Y. INS. LAW § 2612. For example, this type of legislation permits insurers to make underwriting decisions based on information about frequency of losses or medical conditions, even if the cause of the condition was domestic violence. *See, e.g.,* ALASKA STAT. §§ 21.36.430, 21.54.00; ME. REV. STAT. ANN. tit. 24-A, § 2159-B.

135. *See, e.g.,* ARIZ. REV. STAT. § 20-448; CAL. HEALTH & SAFETY CODE § 1374.75; CONN. GEN. STAT. § 38a-816; DEL. CODE ANN. tit. 18, §§ 2302(5), 2304(24-25); 215 ILL. COMP. STAT. 5/155.22a; MD. CODE ANN. INS., § 27-504; MINN. STAT. § 72A.20(8); OHIO REV. CODE ANN. § 3901.21; OR. REV. STAT. § 746.015; PA. CONS. STAT. § 1171.5(a); TENN. CODE ANN. §§ 56-8-301 to 56-8-306; W. VA. CODE §§ 33-4-20, 33-15-2a.

decisions based on medical conditions, even if the cause of the condition was domestic violence.<sup>136</sup> Remedies for violations of these regulations also differ; however, most regulations do not provide the victim with a private cause of action.<sup>137</sup>

As demonstrated by the legislation described above, most state and federal legislation contains loopholes that permit insurance companies to continue making underwriting decisions that adversely affect victims of domestic violence.<sup>138</sup> Legislation that merely forbids insurers from making underwriting decisions "solely" or "only" because of a history of domestic violence permits insurers to use other related factors, such as medical conditions that have been caused by domestic violence, which will adversely affect these victims.<sup>139</sup> For example, State Farm acknowledged that although it may be prohibited from making underwriting decisions "solely" on the basis of a history of domestic violence, it will still consider medical conditions, regardless of their cause, from which it can infer the patient's increased likelihood of filing future insurance claims.<sup>140</sup> Thus, State Farm will consider medical conditions that are indicative of a history of domestic violence in making its underwriting decisions.<sup>141</sup> In addition, another loophole is that many insurers are still able to use domestic violence as a classification because most of the enacted and proposed legislation only prevents insurance companies from using domestic violence as a classifier for certain types of insurance.<sup>142</sup>

Therefore, for these regulations to sufficiently protect victims of domestic violence, the regulations must prohibit the insurance industry from directly or indirectly using an individual's history of domestic violence in making any underwriting decision. In addition, to provide adequate enforcement of these regulations, legislation should expressly provide victims with a private cause of action against insurers who violate these regulations.<sup>143</sup>

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136. See, e.g., ARIZ. REV. STAT. § 20-448(G); 215 ILL. COMP. STAT. 5/155.22a; W. VA. CODE §§ 33-4-20, 33-15-2a.

137. See, e.g., ARIZ. REV. STAT. § 20-448 (providing only for an administrative remedy); DEL. CODE ANN. tit. 18, §§ 2302(5), 2304(24)-(25) (stating that insurers may not be held civilly or criminally liable for noncompliance); OR. REV. STAT. § 746.015 (providing for notification by the director of insurance when noncompliance is suspected, hearings to determine noncompliance, and the suspension or revocation of the insurer's certificate of authority to issue insurance for willful violations); UTAH CODE ANN. §§ 31A-21-501 to 31A-21-506 (denying a private cause of action).

138. See, e.g., ALASKA STAT. §§ 21.36.430, 21.54.100 (prohibiting underwriting decisions based "only" on a history of domestic violence); ARIZ. REV. STAT. § 20-448(G) (prohibiting the use of domestic violence as a classification only in life and disability insurance).

139. See Echols, *supra* note 80 (stating that "medical conditions of ALL applicants (from whatever cause) must be considered in order to underwrite fairly and avoid improper subsidies").

140. See *id.*

141. See *id.*

142. See, e.g., ARIZ. REV. STAT. § 20-448(G) (applying only to life and disability insurance); 215 ILL. COMP. STAT. 5/155.22a (applying only to life, health, and disability income insurance); UTAH CODE ANN. §§ 31A-21-501 to 31A-21-506 (applying only to life and disability insurance).

143. Cf. Wortham, *supra* note 35, at 371 (noting that insurance classifications are not generally reviewed by state insurance regulators); cf. also *supra* note 24 (discussing the reasons why it is difficult to determine how widespread this problem is). As a result, insurance regulators are unlikely to catch insurers using domestic violence as an insurance classification; therefore, for unfair discrimination statutes that prohibit the consideration of domestic violence to be effective, the state must provide the victim with a private cause of action. But see Megan O'Matz, *Some Pa. Insurers in Violation of Law: Their Manuals List Spouse Abuse as a Criteria to Assess Risk, Even Though No Discrimination Was Found*, ALLENTOWN MORNING CALL, at A14 (describing the results of an investigation done by Pennsylvania insurance regulators two years after the state made it illegal for insurers to make decisions based on a history of domestic violence) According to a recent investigation, twenty-five insur-

#### IV. Insurers Have Provided No Statistical Support that Domestic Violence is Associated with Higher Risk of Loss

The primary reason given by insurance companies in favor of using domestic violence, or other factors, as an insurance classification is that it is statistically associated with the insured's risk of loss.<sup>144</sup> Relying on the fair discrimination perspective, insurance companies assert that the use of classifications is fair because victims of domestic abuse are statistically more likely to be victimized again and thus, they are more likely to draw from insurance pools than individuals who are not victims of domestic violence.<sup>145</sup>

Generally, states require a classification to be statistically associated with a higher risk of loss.<sup>146</sup> As a result, despite the additional restrictions some states place on the use of particular classifications, insurance companies *must* be able to provide evidence that a certain classification is statistically associated with a higher risk of loss before use of the classification is permitted.<sup>147</sup>

Insurance companies, however, have failed to provide *any* evidence that victims of domestic violence are statistically more likely to draw from insurance pools than are non-victims.<sup>148</sup> Peg Echols, Assistant Counsel of Federal Affairs for State Farm Insurance Company, stated that "there is insufficient data available to measure costs associated with insuring victims of domestic violence."<sup>149</sup> In another interview, State Farm admitted that it had no statistical basis for using domestic violence in insurance decisions and justified the use of the classification as "just sort of a logical conclusion."<sup>150</sup> Deborah Senn, the Washington State Insurance Commissioner, has also stated that there is no "bona fide evidence that the victims of abuse are a greater risk" for drawing from insurance pools.<sup>151</sup> Therefore, because insurance companies have failed to produce *any* statistical support for the use of the domestic violence classification, the use of domestic violence as a classification should not be permitted under any current state unfair discrimination statute.<sup>152</sup>

ance companies possessed underwriting manuals listing domestic violence as a criteria for determining risk. *See id.*

144. *See* Deborah L. Shelton, *Adding Insult to Injury: Families Hurt by Domestic Violence Take Second Hit When Insurers Deny Them Coverage*, AM. MED. NEWS, Dec. 4, 1995 at 23; Hellman, *supra* note 41, at 356-58 (justifying the use of domestic violence as a classification on the basis of the principle known as "actuarial fairness").

145. *See* Hellman, *supra* note 41, at 356-57.

146. *See, e.g.*, COLO. REV. STAT. § 10-3-1104(1)(f)(111) (1998) (prohibiting the use of marital status or sex unless it is actuarially sound); 215 ILL. COMP. STAT. 5/236 (West 1998) (prohibiting insurers from using the presence of handicaps or disabilities unless it is based on sound actuarial principles, is a reasonable classification, and is directly related to actual or reasonable anticipated experience).

147. *See, e.g.*, KAN. STAT. ANN. § 40-2404(7)(c) (1997) (permitting the use of mental or physical handicaps as a classification if it is supported by sound actuarial evidence); MINN. STAT. ANN. § 72A.20(8) (West 1999) (prohibiting the use of the presence of a disability unless supported by claims experience, statistically sound conclusions, and other data that show substantial and significant differences in risk because of the disability).

148. *See* Echols, *supra* note 80 (stating that "there is insufficient data available to measure costs associated with insuring victims of domestic violence"); Fountain, *supra* note 18, at 1; Shen, *supra* note 17, at A1 (quoting K.C. Eynatten, a spokesperson for State Farm, who stated that State Farm used domestic violence as a classification despite the fact that there was no statistical evidence that it was associated with a higher risk of loss).

149. *See* Echols, *supra* note 80.

150. *See* Fountain, *supra* note 18, at 1.

151. *See* Shen, *supra* note 17, at A1.

152. *See* Echols, *supra* note 80; Wortham, *supra* note 35, at 370 (noting that state unfair discrimi-

### V. Comparison of Other Prohibited Classifications to the use of Domestic Violence as a Classification

Despite the lack of statistical evidence supporting the use of domestic violence as an insurance classification, for the purposes of Part V we will assume that there is evidence that domestic violence is statistically associated with a higher risk of loss. Thus, assuming that a history of domestic violence is statistically associated with a future risk of loss, the ultimate question arises, even if domestic violence is a strong predictor of loss, should society still permit insurance companies to make insurance decisions on the basis of domestic violence?

Originally the use of all classifiers, including race, that were statistically associated with a risk of loss was permissible.<sup>153</sup> After the Civil War, some states began to ban the use of race explicitly; however, the prohibition on the use of other insurance classifications began after states passed unfair discrimination statutes.<sup>154</sup> Most states merely interpret their unfair discrimination statutes to forbid the use of race according to an antidiscrimination perspective, while a few states explicitly ban the use of race as an insurance classification.<sup>155</sup>

There are numerous reasons why classifiers such as race have been interpreted as discriminatory under unfair discrimination statutes.<sup>156</sup> For example, some classifications such as race are immutable traits, uncontrollable, not "socially optional," or have been historically associated with invidious discrimination.<sup>157</sup> In addition, the Pennsylvania Supreme Court has stated that public policy concerns such as "causality, reliability, social acceptability, and incentive value" are important in determining whether a classification is consistent with public policy and thus reasonable.<sup>158</sup> Many of these

nation statutes are interpreted to permit the use of a classification if it is statistically sound). Insurance companies often use classifications that are not based on a statistical correlation, in violation of the state's unfair discrimination statute; however, because classifications are not generally reviewed by state insurance regulators. *See id.* at 371.

153. *See City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, 725-26 (1978) (recognizing that sex is a statistically valid consideration in determining risk of loss for life insurance, annuities, and pension plans); *Lange v. Rancher*, 56 N.W.2d 542, 543 (Wis. 1953) (stating that age, occupation, and past medical history are associated with longevity); Gaulding, *supra* note 32, at 1658 (noting that race is statistically related to a higher risk of loss in life insurance).

154. *See MASS. GEN. LAWS* ch. 175, § 122 (1998) (first enacted in 1884) (implementing a prohibition on the use of race after the Civil War); *MICH. COMP. LAWS* § 500.2082 (1998) (first enacted in 1869) (implementing a prohibition on the use of race after the Civil War); *Insurance Dept. v. Philadelphia*, 173 A.2d 811, 813-14 (Pa. Super. Ct. 1961) (stating that by 1948 all states had enacted unfair discrimination statutes).

155. *See, e.g., ARIZ. REV. STAT.* § 20-1548 (1998) (explicitly prohibiting the use of race as an insurance classification); *CONN. GEN. STAT.* § 38a-816 (1999) (explicitly prohibiting the use of race as an insurance classification); *MONT. CODE* § 33-18-210 (1997) (explicitly prohibiting the use of race as an insurance classification); *WIS. STAT.* § 625.12 (1998) (explicitly prohibiting the use of race as an insurance classification); Gaulding, *supra* note 32, at 1659-60 (stating that many states rely on unfair discrimination statutes to prohibit the use of race as an insurance classification).

156. *See Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542, 548-49 (Pa. 1984) (stating that public policy concerns should be considered in conjunction with any statistical basis supporting the use of an insurance classification).

157. *See ABRAHAM, supra* note 36, at 27-28 (stating that the egalitarian, otherwise known as the antidiscrimination, perspective requires that immutable traits, uncontrollable risks, socially unavoidable risks such as driving, but not boating, and socially unacceptable classifications should not be utilized in developing insurance classifications); Gaulding, *supra* note 32, at 1647 (stating that classifiers based on noncausal or immutable traits or classifiers that have been historically associated with invidious discrimination, would be forbidden under the antidiscrimination perspective).

158. *See Hartford Accident & Indem. Cf.*, 482 A.2d at 584-85 (concluding that on the basis of

factors that have contributed to a finding that classifications, such as race, should be prohibited are also relevant to determining the acceptability of using domestic violence as an insurance classification.<sup>159</sup>

Insurance companies assert that the use of domestic violence as an insurance classification is justified because it is controllable and voluntary because victims have a choice to remain in the abusive relationship.<sup>160</sup> The insurance industry argues that it should have the discretion to consider this dangerous or risky lifestyle choice in making insurance decisions.<sup>161</sup> Therefore, unlike race, which is unquestionably an immutable trait and thus clearly uncontrollable, it is possible to argue that domestic violence is controllable. This argument is generally based, however, on the mere stereotype that victims of domestic violence are responsible for their own abuse.<sup>162</sup>

Nevertheless, domestic violence is not truly a voluntary, controllable choice for several reasons. First, domestic violence is not controllable by victims because victims are subjected to the uncontrollable, criminal acts of a third person who often inflict abuse even after the victim attempts to, or does in fact, leave the abusive environment.<sup>163</sup> Victims of domestic violence are battered and criminally assaulted by another uncontrollable individual.<sup>164</sup> Just as victims of other crimes do not choose to be victimized, victims of domestic violence do not elect to be assaulted.<sup>165</sup> Therefore, because victims of other crimes are not held responsible for their injuries, insurance companies should not hold victims of domestic violence responsible for their injuries.<sup>166</sup>

In addition, although it is relatively easy for individuals who make dangerous

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these factors, the use of classifications based on sex and marital status were not justified).

159. See Hellman, *supra* note 41, at 382 n.69 (discussing the assertion that domestic violence causes a higher risk of loss); Shen, *supra* note 17, at A1 (describing the controllability of domestic violence victimization); See also Durborow, *supra* note 11 (describing the lack of control victims of domestic violence have over their victimization).

160. See Shen, *supra* note 17, at A1 (stating that insurance companies claim that women who choose to remain in these abusive relationships are similar to sky divers and travelers who enter war zones in that they choose to put themselves in dangerous situations); Durborow & Fromson, *supra* note 16, at 7 (describing how insurance companies compare victims of domestic violence to skydivers, motorcyclists, or window washers of skyscrapers because they make a voluntary lifestyle or career choice).

161. See Fountain, *supra* note 18, at A1.

162. See *id.* (stating that the use of domestic violence as an insurance classification perpetuates the stereotype that victims choose to remain in abusive relationships); *Activists Say Insurers Deny Coverage to Battered Women*, L.A. TIMES, May 13, 1994, at D2 (quoting Representative Charles Schumer, chairman of the House criminal justice subcommittee, who stated that the use of domestic violence as an insurance classification serves to perpetuate the myth that these victims are responsible for their injuries).

163. See Durborow, *supra* note 11 (stating that research indicates that victims of domestic violence face a risk of greater harm, or even death, if they attempt to leave their batterers); Durborow & Fromson, *supra* note 16, at 7.

164. See Durborow & Fromson, *supra* note 16, at 7 (stating "[d]omestic violence is a crime, not a career, a lifestyle or a choice").

165. See Durborow, *supra* note 11 (arguing that the comparison of victims of domestic violence to other voluntary career choices, like race car drivers, is an example of the myths associated with domestic violence and that this argument ignores the real issue concerning violence against women).

166. See Diana Griego Erwin, *Some Insurance Policies Add to Abuse of Women*, SACRAMENTO BEE, March 2, 1995, at A2 (quoting ABA President-elect Roberta Cooper Ramo, who stated that "[w]e don't hold victims of crime responsible for their injuries" because "[i]nsurance companies do not deny coverage for an individual who has been shot or stabbed by a stranger . . . they should not revoke coverage when the attacker is a spouse"); Howard Kline, *Insurers Shouldn't Hurt Victims Again*, PLAIN DEALER (Cleveland), May 23, 1997, at B10.

career and lifestyle choices, like skydivers and motorcyclists, to quit and avoid taking these risks, it is extremely difficult and dangerous for victims of domestic violence to attempt to leave their abusive environments.<sup>167</sup> More than one-half of all women who leave their batterers are pursued, harassed, or attacked.<sup>168</sup> As a result, victims of domestic violence must either remain in the abusive environment or attempt to leave, which often results in more severe abuse from their angry partners who pursue them.<sup>169</sup> Hence, because these victims continue to be victimized even after they attempt to leave, they do not really have any control over their abuse because they will continue to be abused whether they remain in the situation or not.<sup>170</sup> This continued high risk of loss, even when victims attempt to leave, is recognized by insurance companies because insurers who use domestic violence as a classification generally do not distinguish between victims who stay and victims who leave the abusive environment.<sup>171</sup> Thus, the insurance industry's argument, that the use of domestic violence classification is justified because victims voluntarily choose to stay in dangerous situations, is substantially weakened by the fact that insurance companies treat victims who stay in the abusive environment the same as those who leave.<sup>172</sup> Therefore, because domestic violence is a criminal act caused by an uncontrollable third person who often continues to inflict battering when victims attempt to, or do, leave the abusive environment, and because the argument that domestic violence is controllable is merely based on a stereotype, it can be said that domestic violence is uncontrollable.<sup>173</sup> The acknowledgement that domestic violence, like race, is uncontrollable, is one reason why domestic violence should not be used as an insurance classification.<sup>174</sup>

A second reason the use of race, and other traits, as an insurance classifier has been prohibited is because it is not the actual cause of the higher risk of loss.<sup>175</sup> For

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167. See Saunders, *supra* note 2 (stating that victims of domestic violence are often forced to remain with their batterers for safety and economic reasons); Morrison, *supra* note 3, at 272 (acknowledging that victims' fear of retaliation from their batterers, lack of financial resources, and lack of housing is justified).

168. See Durborow, *supra* note 11 (stating that according to research studies, victims of domestic violence face a risk of greater harm or even death if they attempt to leave their batterers); Hellman, *supra* note 41, at 374 (noting also that in one study, over one-half of the men who killed their spouses, committed the killing when they were separated).

169. See 141 CONG. REC. H10720-01, H10723 (daily ed. Oct. 24, 1995) (statement of Ms. Waters) [hereinafter Waters] (stating that separated and divorced women represent only seven percent of the U.S. population and account for seventy-five percent of all battered women, indicating that many battered women do escape their abusive environments; however, these women report being battered fourteen times more often than women who move in with their parents); Durborow, *supra* note 11.

170. See Waters, *supra* note 169.

171. See L.H. Otis, *Violence Victim Challenges State Farm*, 101 NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., May 19, 1997, at 67 (describing the case of a woman who was denied automobile and homeowner's insurance and told that her coverage may be reconsidered when her batterer was "out of the picture").

172. See generally *id.*; Stein, *supra* note 2, at 16 (stating that if medical records contain information concerning previous injuries due to battering, victims may be denied coverage even if they have divorced or left the batterer).

173. See generally *Activists Say Insurers Deny Coverage to Battered Women*, LOS ANGELES TIMES, May 13, 1994, at D2 (discussing the stereotype that victims choose to stay in abusive relationships); Durborow & Fromson, *supra* note 16, at 7 (stating that domestic violence is a crime caused by the uncontrollable acts of another person).

174. See generally ABRAHAM, *supra* note 36, at 27-28.

175. See *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953) (holding that race may not be used as a classification in life insurance because there is no causal explanation for the difference in mortality rates between blacks and whites).

example, the prevalence of sickle cell anemia is higher among African Americans; however, the cause of the disease is not due to an individual's race but rather the presence of the sickle cell gene.<sup>176</sup> On the other hand, in the case of domestic violence, insurance companies assert that the use of domestic violence as a classifier is justified because domestic violence causes a higher risk of loss.<sup>177</sup> However, the cause of the victim's higher risk of loss is not the victim—it is the batterer.<sup>178</sup> Insurance companies should not be permitted to further victimize the domestic violence victim who did not cause the criminal attack committed by another uncontrollable individual.<sup>179</sup> Therefore, like race, because the actual cause of a higher risk of loss is the uncontrollable, criminal act of a third person, and not the insured/victim, domestic violence should not be used as an insurance classification.

The final, and perhaps the most important, reason the use of certain classifications, including race, have been prohibited is because the classifications have been associated historically with invidious discrimination.<sup>180</sup> Unlike race, it may be argued that victims of domestic violence have not traditionally been victims of invidious discrimination in the insurance industry because the insurance industry does not generally make arbitrary insurance decisions, but rather, seeks to utilize factors that are statistically associated with a risk of loss.<sup>181</sup> The insurance industry has thus far failed, however, to provide any statistical support for the conclusion that domestic violence is associated with a higher risk of loss.<sup>182</sup> It has been shown that many underwriting decisions are based merely on informal methods, stereotypes, and subjective beliefs, thus underwriting decisions and insurance classifications, such as domestic violence, may be arbitrary and irrational.<sup>183</sup> Therefore, because the insurance industry's conclusion that domestic violence is associated with a risk of loss is not based on statistical evidence, which is required by unfair discrimination statutes, the use of domestic vio-

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176. See Hellman, *supra* note 41, at 381 (acknowledging, however, that several states even prohibit insurance companies from using the presence of a sickle cell anemia gene as a classifier in insurance decisions).

177. See *id.* at 384-87 (describing arguments victims' advocates advance in opposition to the insurance industry's position that a risk of higher loss is caused by domestic violence).

178. See Durborow & Fromson, *supra* note 16, at 7 (describing criminal assault as the cause of domestic violence).

179. See generally Fountain, *supra* note 18, at 1 (stating that victims of domestic violence should not be punished for reporting or seeking treatment for domestic violence); Shelton, *supra* note 144, at 23 (arguing that victims should not be victimized again by being denied insurance coverage).

180. See generally Gaulding, *supra* note 32, at 1659-60.

181. *Brest v. Commissioner of Ins.*, 169 N.E. 657, 660-61 (Mass. 1930) (stating that risk of loss must be based on statistical experience).

182. See *Insurance for Victims of Domestic Violence: Testimony Regarding Health Insurance and Domestic Violence, Before the Committee on Labor & Human Resources*, 1995 WL 449179 (1995) (stating that insufficient data exists to evaluate the risks associated with insuring victims of domestic violence); Shen, *supra* note 17, at A1 (quoting Deborah Senn, the Washington state insurance commissioner, who stated that there is no "bona fide evidence that the victims of abuse are a greater risk" and K.C. Eynatten, a spokesperson for State Farm, who stated that the insurance company used domestic violence as a classification despite the fact that they did not have any statistical evidence to support the view that it is associated with a higher risk of loss).

183. See *Capital Blue Cross v. Commonwealth Ins. Dep't*, 383 A.2d 1306, 1309 (Pa. Commw. Ct. 1978) (noting that underwriting decisions are not based on "an exact science"); Wortham, *supra* note 35, at 354 (describing informal methods insurance companies may also use in insurance decisions, such as lists of unacceptable risks that are informally passed amongst underwriters; Gaulding, *supra* note 32, at 1652 (suggesting that insurance decisions are more likely to be made on the basis of subjective beliefs); Morrison, *supra* note 3, at 269 (noting, however, numerous reasons why in actuality, insurance decisions are rarely based on sound statistical methodology).



lence as an insurance classification should be considered arbitrary and thus, invidious discrimination.<sup>184</sup>

In sum, victims of domestic violence lack control over their abusive environments, are not the cause of their higher risk of loss, and have been the subject of past invidious discrimination by the insurance industry.<sup>185</sup> Therefore, several of the factors traditionally used to prohibit or restrict the use of certain classifications, like race, are present and thus, legislation prohibiting the use of domestic violence as an insurance classification should be enacted.<sup>186</sup>

#### VI. Reasonableness as the Main Factor to be Used in Determining the Fairness of an Insurance Classification

Due to the varied interpretations of current unfair discrimination statutes, legislation that expressly forbids or restricts the direct or indirect use of domestic violence as an insurance classification should be enacted. Many states have begun to regulate the use of domestic violence as an insurance classification through the states' unfair discrimination statutes.<sup>187</sup> However, if there is no express statutory prohibition, the use of domestic violence as an insurance classification may be permissible because state courts have historically permitted the use of classifications that are statistically associated with a higher risk of loss.<sup>188</sup> Therefore, relying on the fair discrimination perspective, if domestic violence, or other factors, are statistically associated with a higher risk of loss, insurance companies may use these factors in insurance classifications.<sup>189</sup> Recently, however, some courts have begun to consider other relevant factors, such as public policy, social acceptability, and fairness, in determining whether a classification is reasonable or whether it should be interpreted as being prohibited by a state's unfair discrimination statute.<sup>190</sup> Thus, the underlying factor that courts are beginning to ad-

184. See generally *supra* notes 148-52 and accompanying text (discussing the lack of statistical support for the argument that domestic violence is associated with a higher risk of loss).

185. See generally Shelton, *supra* note 144, at 23 (stating that victims should not be victimized again by being denied insurance coverage); Shen, *supra* note 17, at A1 (noting that no sufficient statistical evidence exists to support the use of domestic violence as an insurance classification); Durborow & Fromson, *supra* note 16, at 7 (stating that domestic violence is a crime caused by the uncontrollable acts of another person).

186. See generally ABRAHAM, *supra* note 36, at 27-28 (describing the factors that have been used to restrict the use of certain classifications); Gaulding, *supra* note 32, at 1647 (stating that classifiers based on noncausal or immutable traits or classifiers that have been historically associated with invidious discrimination, would be forbidden under the antidiscrimination perspective).

187. See, e.g., ALASKA STAT. §§ 21.36.430, 21.54.100 (Michie 1998); MD. CODE ANN. INS. § 27-504 (1998); N.M. STAT. ANN. § 59A-16B-1 to 16B-10 (Michie 1997); TENN. CODE ANN. §§ 56-8-301 to 56-8-306 (1998).

188. See *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1100 n.6 (1983) (Powell, J., dissenting) (stating that most states have determined that classifications that are statistically associated with a higher risk of loss do not violate unfair discrimination statutes).

189. See *Insurance Serv. Office v. Commissioner of Ins.*, 381 So.2d 515, 517 (La. Ct. App. 1979) (holding that the failure to use classifications based on sex or age, when the classification is statistically sound, constitutes unfair discrimination); *Government Employees Ins. Co. v. Insurance Comm'r*, 630 A.2d 713, 720-21 (Md. 1993) (interpreting the state's unfair discrimination statute to permit the use of age as a classification if it is statistically sound).

190. See *Massachusetts Auto Rating & Accident Prevention Bureau v. Commissioner of Ins.*, 424 N.E.2d 1127, 1134 (Mass. 1981) (holding that the state insurance commissioner has the discretion to adjust classifications of risk in order to fulfill the legislative policy to ensure that automobile insurance is available to all eligible drivers at reasonable rates); *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542, 548 (Pa. 1984) (holding that public policy concerns require more than mere statistically sound classifications); *Capital Blue Cross v. Commonwealth Ins. Dept.*, 383 A.2d 1306, 1309 (Pa. Commw. Ct. 1978) (holding that to adequately protect the public, insurance regulators must

dress, in addition to the statistical association with risk of loss, is whether or not the classification is reasonable.<sup>191</sup>

Therefore, the ultimate question that should be addressed when analyzing whether a particular classification should be restricted, either expressly through unfair discrimination statutes or implicitly through an interpretation of unfair discrimination statutes, is whether the use of a classification is reasonable.<sup>192</sup> The consideration of traditional factors, including controllability, causation, and immutability, that are used to determine whether the use of a classification is permissible are based also on the reasonableness of a classification.<sup>193</sup> For example, if a particular trait, such as race, is uncontrollable, it is not necessarily fair or reasonable to use that trait as a means to impose higher insurance premiums. Thus, the main factor to consider in determining whether an insurance classification should be permitted is whether the classification is reasonable.<sup>194</sup>

The insurance industry, courts, legislatures, and regulatory officials should use a cost analysis test, weighing the costs to the insurance industry of not using the classification versus the costs to society of permitting the use of the classification, to determine the reasonableness of a classification.<sup>195</sup> Kenneth Abraham recognized the practicality of using a similar type of balancing test because few people rely exclusively on either the fair discrimination or the antidiscrimination perspective.<sup>196</sup> Abraham referred to this approach used to determine the validity of a classification, as "intuitive pragmatism" because it seeks to preserve the values of liberty, social utility, and equality.<sup>197</sup> Abraham reasoned that most individuals would be willing to sacrifice one of these values in order to respond to significant concerns about the preservation of another one of these values.<sup>198</sup>

Therefore, in determining the reasonableness of a classification, courts, the insurance industry, and legislatures should use a cost analysis test that is similar to the "intuitive pragmatism" approach advocated by Abraham. Thus, if the costs to society outweigh the costs to the industry and the public's desire for equality, public policy and social utility would require that the use of that particular classification be prohibited.<sup>199</sup>

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look at the assumptions upon which the classifications are based and thus beyond mere statistical support for the classification). *But see* *Health Ins. Assoc. of Am. v. Corcoran*, 551 N.Y.S.2d 615, 618-19 (App. Div. 1990) (requiring only actuarial justification for the use of HIV as an insurance classification).

191. *See Hartford Accident & Indem.*, 442 A.2d at 548 (stating that "public policy considerations require more adequate justification for rating factors than a simple statistical correlation with loss; . . . such as causality, reliability, social acceptability and incentive value in judging the *reasonableness* of a classification system") (emphasis added).

192. *See generally id.*

193. *See generally id.*

194. *See generally id.*

195. *See* Schatz, *supra* note 54, at 1794 (recommending a similar balancing test for examining what, if any, restrictions public policy would require on the use of HIV as an insurance classification).

196. *See* ABRAHAM, *supra* note 36, at 29-30 (stating that both the fair discrimination and antidiscrimination perspectives have some appealing qualities including the recognition of socially desirable regulations, regulations that are supported by public policy, and the desire to ensure equality).

197. *See id.* (describing this approach as intuitive because it is not based on an exact mathematical formula).

198. *See id.* (stating that most people, for example, would be willing to sacrifice equal treatment when large social welfare gains would outweigh this equal treatment).

199. *See generally id.*

### A. Restrictions on the Use of Domestic Violence as a Classifier: Costs to the Insurance Industry

The insurance industry is a private industry with the ultimate goal of making a profit.<sup>200</sup> Insurance companies state that this goal is accomplished through accurate calculations of an individual's risk of loss, wise investments of money received from premiums, and from the size of the pool of insureds.<sup>201</sup> The insurance industry argues that when premiums are based on accurate calculations of an individual's risk of loss, insurance companies are able to ensure the availability of funds to adequately satisfy any claims that arise.<sup>202</sup> Thus, insurance companies are able to make a profit from wise investments of those premiums prior to satisfaction of any claims.<sup>203</sup>

Therefore, the primary argument the insurance industry advances against restricting the use of domestic violence as a classifier is that if domestic violence is not used, premiums will not be based on accurate calculations of risk and the insurance industry will become less profitable.<sup>204</sup> Profitability would decrease because victims of domestic violence, who are at a higher risk of loss, will not be grouped together with other individuals who pose a similar risk, for the purposes of determining premiums.<sup>205</sup> The more accurate the assessment of risk, the less chance the total losses will exceed the cost of the premiums the insureds have paid.<sup>206</sup> If the assessment of risk is inaccurate, the insurer will be responsible for covering the excess losses.<sup>207</sup> Insurers' fears about profitability may be unsubstantiated, however, because many of the insurance companies that do not currently utilize domestic violence as an insurance classification remain profitable.<sup>208</sup> In addition, courts have generally held that economic concerns alone are insufficient to justify discriminatory practices.<sup>209</sup>

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200. See *Insurance Dep't. v. Philadelphia*, 173 A.2d 811, 824-27 (Pa. Super. Ct. 1961) (recognizing the need to consider insurers ability to earn a fair and reasonable profit in approvals of rate making); *Don't Let Insurers Cancel - Some Companies Compound Abuse*, *supra* note 1, at 10A (stating that insurance companies are "in the business of calculating risk for profit").

201. See *Massachusetts Auto. Rating & Accident Prevention Bureau v. Commissioner of Ins.*, 424 N.E.2d 1127, 1135 (Mass. 1981) (recognizing that insurers earn most of their profits through investing and not through underwriting); *Katt v. Commissioner of Ins.*, 505 N.W.2d 37, 40 (Mich. Ct. App. 1993) (holding that profit is necessary to ensure the availability of adequate resources to cover assumed risks and to satisfy claims).

202. See *Katt*, 505 N.W.2d at 40.

203. See *Massachusetts Auto. Rating*, 424 N.E.2d at 1135.

204. See *Shen*, *supra* note 17, at A1 (quoting David McMahon, vice president of First Colony Life Insurance Co., who stated that if insurance companies do not use domestic violence as a classification, insurance companies may become bankrupt).

205. See generally *Hellman*, *supra* note 41, at 398-99 (stating that the benefit of placing similar risk individuals in the same group is that the insurer is then able to offer more competitive rates to the lower risk groups because they are segregated from higher risk insureds).

206. See *Katt*, 505 N.W.2d at 40.

207. See *Gaulding*, *supra* note 32, at 1651.

208. See *In re N.J.A.C. 11:1-20*, 505 A.2d 177, 180 (N.J. Super. Ct. App. Div. 1986) (suggesting that the financial status of the entire insurance industry is favorable due to wise investments and allowable tax burdens and therefore, insurers must comply with regulations designed to ensure the "reasonable, equitable, and fair treatment" of the public); *Durborow & Fromson*, *supra* note 16, at 7 (noting that the companies that do not use domestic violence as a classification do not become bankrupt and can still provide affordable and competitive rates).

209. See *Kirsh v. State Farm Mutual Auto. Ins. Co.*, Cal. Rptr. 260, 264 (Ct. App. 1991) (holding that differential pricing based on the sex of the insured is not permissible "merely because it is profitable"); *Morrison*, *supra* note 3, at 286 (stating that the goal of insurance regulation should be to permit insurance companies to strive for profitability, and restrict the use of discriminatory practices).

Insurers also argue that because the insurance industry is a private industry, insurance companies should be able to conduct their business in a way that maximizes profitability and that any attempt to interfere with this legitimate goal constitutes an unconstitutional taking of private property for public use.<sup>210</sup> Therefore, in an effort to maximize profitability, insurance companies should be free to contract with insureds on the basis of risk.<sup>211</sup> Insurers argue that if their freedom to contract on the basis of risk is denied, the free market would be abridged because the accurate grouping of insureds according to risks also enables insurers to compete more effectively.<sup>212</sup> Insurance companies argue that because competition results in more reasonable prices, efficiency, and innovation, restraints on competition caused by restrictions on the use of classifications should not be implemented.<sup>213</sup>

The United States Supreme Court has ruled, however, that state governments may utilize their police powers to regulate the classifications used by insurance companies because insurance is private property affected with a public interest.<sup>214</sup> In addition, according to Professor Wortham risk classifications have generally not been successful in decreasing the cost of insurance.<sup>215</sup> Thus, because other more acceptable forms of competition exist, restricting the use of risk classifications will not seriously affect competition.<sup>216</sup> Professor Wortham has suggested that other, more desirable methods of competition, such as requiring the availability of standardized market information enabling consumers to comparison shop on price, would be more preferable alternatives than competition achieved through the use of classifications based on risk of loss.<sup>217</sup> Other methods of competition may be more preferable because these methods could result in a decrease in the cost of insurance for all insureds.<sup>218</sup> Therefore, due to the availability of more preferable, alternative means of competition, insurers

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210. See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) (holding that insurance is private property affected with a public interest and thus the government may utilize its police powers to regulate the industry); *Wilson v. Fair Employment & Housing*, 54 Cal. Rptr. 2d 419, 427 (Ct. App. 1996) (holding that the refusal to insure a pilot because of age does not bear "a reasonable relation to commercial objectives appropriate to an enterprise serving the public"); *In re N.J.A.C. 11:1-20*, 505 A.2d at 182, 185 (holding that emergency regulations enacted to protect public health, safety, and welfare did not constitute a taking).

211. See Morrison, *supra* note 3, at 266, 286 (stating that insurance companies assert that profitability, and not protecting public interests, is a permissible goal of a private industry).

212. See *generally Insurance Dep't. v. City of Philadelphia*, 173 A.2d 811, 820 (Pa. Super. Ct. 1961) (holding that the public interest justifies the need to regulate the insurance industry despite arguments that regulations constitute a taking of private property for public use and violate the concept of free enterprise).

213. See Wortham, *supra* note 35, at 403-04 (describing the four types of competition that occurs among insurers: competition by adjustment of price and service, product differentiation, loyalty and diligence of salespeople, and risk selection).

214. See *German Alliance Ins. Co.*, 233 U.S., at 412-13 ("[T]he business of insurance so far affects the public welfare as to invoke and require governmental regulation.").

215. See Wortham, *supra* note 35, at 405 (discussing statistics on property and casualty insurance costs presented to the Senate Judiciary Subcommittee in 1980).

216. See *id.* at 403-04.

217. See Wortham, *supra* note 34, at 873-74 (acknowledging problems, such as the "incomprehensibility" of insurance contracts, associated with competition achieved by providing information enabling consumers to comparison shop).

218. See Wortham, *supra* note 35, at 406 (stating that too much attention has been given to the risk selection process and too little attention has been given to other more desirable methods that increase competition).

would not have to rely merely on the use of classifications as a means of competition, which has generally not been necessary or successful.<sup>219</sup>

Insurers also assert that cross-subsidization would not be fair to low risk insureds because fairness requires each individual to pay only for their own risk of loss.<sup>220</sup> All insurance involves some subsidization, however, because insurance evolved as a means of distributing loss.<sup>221</sup> Insurers argue, however, that according to a survey released by the Insurance Research Council (IRC), consumers are opposed to subsidizing insurance for victims of domestic violence.<sup>222</sup> Domestic violence activists question the validity and reliability of this study because an insurance industry organization conducted the study.<sup>223</sup> It can also be argued that fairness requires that victims of crimes, like domestic violence, should not be victimized once again by the insurance industry through the use of classifications that result in the restriction of insurance coverage that is generally regarded as a necessity in this country.<sup>224</sup> Therefore, although insurers would assert that cross-subsidization is unfair to low risk insureds, the use of domestic violence as a classification is unfair to these crime victims because they are being victimized again by the insurance industry.<sup>225</sup>

Finally, insurers argue that if domestic violence is not used in making underwriting decisions, batterers would be given a financial incentive to batter their victims in order to receive the proceeds of a life insurance policy if the victim is killed.<sup>226</sup> Thus, insurers maintain that the denial of coverage, based on a history of abuse, protects the victims from further abuse, or even murder, by not giving the batterer an incentive to batter because the victim would not be able to receive life insurance.<sup>227</sup> Insurers,

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219. See *id.* at 403-07; Durborow & Fromson, *supra* note 16, at 7.

220. See *Telles v. Commissioner of Ins.*, 574 N.E.2d 359, 361-62 (Mass. 1991) (acknowledging that fair discrimination allows insurers to group individuals posing the same risk together for determination of premiums to ensure that individuals posing a lower risk do not subsidize those who present a higher risk of loss; therefore, unfair discrimination occurs only when individuals who pose the same risk are treated differently); *Health Ins. Ass'n of Am. v. Corcoran*, 551 N.Y.S.2d 615, 618-19 (App. Div. 1990) (stating that a goal of insurance regulation is to ensure that underwriting practices are fair to policyholders by not requiring cross-subsidization of differing risk categories).

221. See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 412 (1914) (stating that the fundamental goal of insurance is to widely distribute the risk of loss so that many individuals will bear the risk thereby decreasing the risk of great catastrophes); *Insurance Fed'n of Pa., Inc. v. Foster*, 587 A.2d 865, 870 (Pa. Commw. Ct. 1991) (quoting the testimony of the Vice President of Guardian Life Insurance Company of America in which he stated that the risk of loss is decreased by pooling the claims of many individuals).

222. See L.H. Otis, *IRC Domestic-Abuse Survey Sparks Charges of Industry Bias*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Sept. 22, 1997, at 4 (quoting from the IRC Report which stated that "despite the fact that most Americans think domestic violence is a serious problem, they are not willing to subsidize those living in households with a history of domestic violence in order to make insurance affordable for them").

223. See *id.* (quoting Deborah Senn, Washington Insurance Commissioner, who stated that the questions utilized in the national telephone survey were leading).

224. See Durborow, *supra* note 11 (stating that "insurers are damning women" if they seek medical attention and document their injuries and "damn[ing] them" if they do not, because the women will remain in the abusive environment); Wortham, *supra* note 35, at 394-396 (discussing the necessity of insurance).

225. See *Hartford Accident & Indemnity Co. v. Insurance Comm'r*, 482 A.2d 542, 548-49 (Pa. 1984) (stating that rates may be actuarially sound, resulting in no cross-subsidization, but still unfair because public policy considerations make it necessary to examine other factors including reliability, social acceptability, reasonableness, and causality); Durborow, *supra* note 11.

226. See Erwin, *supra* note 166, at A2; Seelye, *supra* note 14, at A7 (quoting K.C. Eynath, a spokeswoman for State Farm, who argued that batterers are given a financial incentive to kill to receive the proceeds of a life insurance policy).

227. See Ronald Powers, *Insurance Denied to Battered Women*, NEW ORLEANS TIMES - PICAYUNE,

however, are already adequately protected because insurance policies, and state law, usually prevent beneficiaries from collecting claims resulting from intentional misconduct.<sup>228</sup> In addition, according to experts, batterers abuse their victims in order to control and maintain dominion over their victims, not for financial reasons.<sup>229</sup> Therefore, insurers' concerns about potential financial incentives are unfounded.<sup>230</sup>

### B. The Use of Domestic Violence as a Classifier: Costs to Society

The social costs associated with the use of domestic violence as an insurance classification are extensive.<sup>231</sup> The effects of this classification are far-reaching because although the denial or high cost of insurance directly harms a victim of domestic violence, the consequences of this insurance decision have many indirect social implications including the promotion of a continuous cycle of abuse.<sup>232</sup>

For the domestic violence victim, the costs of the use of domestic violence as an insurance classification are great.<sup>233</sup> The use of this classification puts victims at a limitless risk of loss because they are often denied insurance or access to benefits, such as necessary medical treatment.<sup>234</sup> The risk of losing insurance coverage may discourage victims from seeking the medical attention or legal intervention they need.<sup>235</sup> As a result, the recent progress made by advocates and legislators in interrupting the cycle of abuse, will be undermined because the use of this classification will discourage reporting, treatment, prosecution, and prevention.<sup>236</sup> Therefore, be-

May 13, 1994, at A2; Seelye, *supra* note 14, at A7.

228. See Morrison, *supra* note 3, at 274.

229. See *Statement of the American Medical Association to the Committee of the Judiciary of the U.S. Senate on Domestic Violence*, 104th Cong. (1996); *Domestic Violence: Testimony Before the U.S. House of Representatives Comm. on Gov't Operations*, 1994 WL 541271 (1994) (stating that domestic violence often occurs as an attempt to assert coercive control over a partner); *Domestic Violence*, 103d Cong. (1994) (oral testimony of Patricia R. Salber, MD, FACEP, of the American College of Emergency Physicians before the House Gov't Operations Committee) (defining domestic violence as "a part of a pattern of coercive behaviors which an individual uses to establish and maintain power and control over another with whom he/she has or has had an intimate, romantic, or spousal relationship"). Insurers, however, may utilize these same policy provisions that exclude coverage for intentional acts, to deny claims made by the victim. See Otis, *supra* note 6, at 3 (discussing proposed federal legislation designed to protect victims of domestic violence from being further victimized by insurance companies); L.H. Otis, *No Compromise on Abuse Model Law*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., June 16, 1997, at 12 (stating that victim advocates argue that denial of victim's claims further victimizes the innocent victim).

230. See Morrison, *supra* note 3, at 274.

231. See generally Senn, *supra* note 5 (stating that the use of domestic violence as an insurance classification has undermined social policy goals of eliminating the social costs of abuse); *Domestic Violence: Testimony Before the U.S. House of Representatives Comm. on Gov't Operations*, 1994 WL 541271 (1994) (describing the reasons why domestic violence is a public health issue).

232. See 141 CONG. REC. H10720-01 (daily ed. Oct. 24, 1995) [hereinafter Roybal-Allard] (statement of Ms. Roybal-Allard, Chair of the Violence Against Women Task Force for the congressional caucus for women's issues) (stating that "domestic violence affects all of us directly or indirectly and whether we know it or not").

233. See generally Sloat, *supra* note 15, at 1A (quoting Deborah Senn, Washington State Insurance Commissioner, who stated that "refus[ing] to insure victims courageous enough to heed advocates' advice about disclosure simply ensures that the costly cycle of violence continues").

234. See 142 CONG. REC. E1013-03 (daily ed. June 6, 1996) (statement of the Honorable Earl Pomeroy) (citing several examples of insurance companies denying coverage, increasing costs of premiums, and refusing to pay for emergency room visits for victims of domestic violence).

235. See Senn, *supra* note 5 (stating that the use of medical and legal records discourages women from reporting abuse for fear that this information will be recorded in their records and later used to deny them insurance).

236. See Sanders, II *supra* note 16 (introducing the Victims of Abuse Insurance Protection Act);

cause victims will be more reluctant to seek treatment or to press charges they will be less likely to leave because they will not have contact with many medical providers or other individuals who could prove instrumental in the victim's decision to leave.<sup>237</sup> In addition, victims will not be as assured that they will be adequately protected from future abuse by their batterers because victims will be more reluctant to seek prosecution or protective orders.<sup>238</sup> As a result, children will continue to witness this abuse, or possibly be subjected to abuse themselves, and according to experts, will be more likely to become abusers or victims when they become adults.<sup>239</sup> Therefore, the cycle of abuse will continue in future generations.<sup>240</sup>

The continued use of domestic violence as an insurance classification, which discourages women from leaving their abusive situations, also may result in an increase in the prevalence of medical problems, especially birth defects.<sup>241</sup> As the research shows, the frequency of domestic violence attacks increases during pregnancy.<sup>242</sup> Thus, if women are subject to increased abuse for which they fail to seek medical treatment, the rate of birth defects is likely to increase.<sup>243</sup>

Society also has an interest in protecting victims of domestic violence, a crime, from further victimization by insurance companies.<sup>244</sup> Advocates argue that the government has an obligation to protect individuals against crime and that if the state has failed to fulfill this duty, the entire community, instead of the victim only, should share

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141 CONG. REC. S3744-04, S3752 (daily ed. March 9, 1995) [hereinafter Wellstone] (statement of Sen. Wellstone) (acknowledging that "[r]eporting domestic violence and seeking medical help is often the first step in ending the cycle" of domestic violence).

237. See Jeannette Vorell, *Insurers Shouldn't Hurt Victims Again*, PLAIN DEALER (Cleveland), May 23, 1997, at B10 (describing the experience of one woman who stated that the availability of insurance coverage, despite her history of abuse, permitted her to seek the counseling which was instrumental in prompting her to leave and divorce her abusive husband).

238. See Senn, *supra* note 5 (stating that victims of domestic violence will not report their abuse to police, seek protective orders, or obtain medical treatment and counseling if they fear that they may lose or be denied insurance coverage).

239. See 141 CONG. REC. H10720-01, H10723 (daily ed. Oct. 24, 1995) (statement of Ms. Waters and Ms. Jackson-Lee) (stating that research shows that children who witness abuse at home are more likely to become abusers or victims when they become adults). In addition, according to the research, children who witness abuse in the home "are at high risk for alcohol and drug use, depression, low self-esteem, poor impulse control, and sexual acting out." *Id.*

240. See *id.*

241. See *Domestic Violence: Testimony Before the U.S. House of Representatives Comm. on Gov't Operations*, 1994 WL 541271 (1994) (describing the various health problems associated with domestic violence such as premature deafness, immune system disorders, increased problems during pregnancy, and mental health consequences such as Post Traumatic Stress Disorder).

242. See *Webwire - Violence Against Women*, 1996 WL 256735 (May 15, 1996) (statement of the American Medical Association to the Committee on the Judiciary, U.S. Senate) (stating that according to one recent study, it is estimated that up to one-fourth of all pregnant women may be physically abused); Wellstone, *supra* note 236.

243. See *Domestic Violence: Testimony Before the U.S. House of Representatives Comm. on Gov't Operations*, 1994 WL 541271 (1994) (describing the risks associated with abuse during pregnancy, including "lower birth weight, low maternal weight gain, infections, anemia, smoking and use of alcohol or drugs"). Due to the health-related consequences of domestic violence and the high costs of abuse-related treatment, many advocates have classified domestic violence as a public health issue. See *id.* (citing a study conducted at Rush Presbyterian Medical Center that estimated the average annual, national health care costs associated with domestic violence to be \$857.3 million); *Webwire - Violence Against Women*, *supra* note 242.

244. 141 CONG. REC. H9223-05 (daily ed. Sept. 19, 1995) (statement of Mr. Fox) (discussing the need to coordinate legislative, police, and community action to reduce the frequency of domestic violence).

the costs of the subsequent injuries.<sup>245</sup> Therefore, because it is unfair to deny coverage or charge excessive rates to victims of a crime resulting from inadequate law enforcement efforts, society should bear the cost associated with these victims' excess risk of loss.<sup>246</sup>

Another cost to society resulting from the use of domestic violence as an insurance classification is the threat that individuals who are not victims of domestic violence may be misidentified as victims by insurance companies and classified as high risks.<sup>247</sup> One important source of information insurance companies rely on are medical records.<sup>248</sup> Insurance companies inspect medical records for certain types of multiple injuries that are often associated with domestic violence.<sup>249</sup> Therefore, due to the lack of perfect predictability, it is possible that people who have suffered similar injuries may be grouped with victims of domestic violence and denied insurance coverage.<sup>250</sup>

Finally, the necessity of insurance in the United States reflects a societal view that insurance should be accessible and affordable.<sup>251</sup> If domestic violence continues to be permitted as an insurance classification, these victims may be unable to drive,<sup>252</sup> purchase a home,<sup>253</sup> or enter domestic violence shelters.<sup>254</sup> Thus, if the use of domestic violence as an insurance classification is continued, society will be forced to continue to subsidize the extensive costs associated with the use of this classification, and the cycle of abuse will continue.<sup>255</sup>

245. See Hellman, *supra* note 41, at 387 (arguing that the belief that victims of domestic violence have not been adequately protected by the government, justifies the position that these victims should not be denied insurance or forced to pay higher rates).

246. See *id.*

247. See generally *Capital Blue Cross v. Commonwealth Ins. Dept.*, 383 A.2d 1306, 1309 (Pa. Commw. Ct. 1978) (noting that underwriting decisions are not based on "an exact science"); Wortham, *supra* note 35, at 354 (describing informal methods insurance companies use in making underwriting decisions, such as lists of unacceptable risks that are informally passed among underwriters); Gaulding, *supra* note 32, at 1652 (suggesting that insurance decisions are more likely to be made on the basis of subjective beliefs); Morrison, *supra* note 3, at 270 (acknowledging the lack of statistical accuracy in risk rating and the practice of some insurance companies of relying on assumptions and stereotypes rather than scientific and statistical analysis).

248. See *Insurance for Victims of Domestic Violence*, 1995 WL 449182 (July 28, 1995) (statement by Timothy T. Flaherty, MD, of the AMA, to the Committee on Labor & Human Resources, U.S. Senate) (discussing the AMA's role in reducing the prevalence of domestic violence).

249. See generally Hellman, *supra* note 41, at 357 (noting that insurers look for "poor medical histories" to determine risk of loss).

250. See generally Morrison, *supra* note 3, at 270.

251. See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 414-15 (1914) (discussing the necessity of insurance); Wortham, *supra* note 35, at 394-400 (asserting that society has an obligation to question the legitimacy of insurance classifications, because in the United States there is a public choice to fulfill insurance needs through the private sector). Wortham also suggests several ways of addressing the problem of insurance availability that is caused through the use of insurance classifications. See *id.* at 400-02.

252. See Durborow, *supra* note 11; Wortham, *supra* note 35, at 394 (stating that approximately one-half of the states require liability insurance in order to drive).

253. See Durborow, *supra* note 11 (acknowledging the need for homeowners insurance in order to rent or own a home); Wortham, *supra* note 35, at 396 (stating that fire insurance is necessary to obtain a mortgage).

254. See Sanders, II *supra* note 16 (acknowledging the problem shelters are having in obtaining property insurance); Durborow & Fromson, *supra* note 16, at 4-5 (describing specific situations where domestic violence shelters were denied insurance coverage).

255. See generally Roybal-Allard, *supra* note 232.



## VII. Conclusion

A cost analysis approach comparing the cost to society of using a particular insurance classification, such as domestic violence, to the cost to the insurance industry of not using the classification represents the most economical and socially desirable method of determining the permissibility of using particular insurance classifications. Application of this cost analysis approach to the use of domestic violence as an insurance classification reveals that the social costs of using the classification outweighs the costs to the insurance industry of not using the classification. The primary cost sustained by the insurance industry is economic, which courts generally have not recognized as a legitimate ground for discrimination. Therefore, in comparing this illegitimate cost incurred by the industry versus the numerous economic, physical, psychological, law enforcement, and other costs that society will face, it is clear that the social costs exceed the industry costs. Therefore, the use of domestic violence as an insurance classification is unreasonable and should not be utilized.

Thus, due to society's strong interest in the use of domestic violence in insurance classifications, legislation prohibiting the direct and indirect use of domestic violence as an insurance classification should be passed and current unfair discrimination laws should be interpreted to prohibit *any* use of domestic violence in insurance classifications. Finally, for this legislation, designed to protect victims of domestic violence, to be effective, it must provide victims with a private cause of action against insurance companies that violate these regulations. It is only through this mechanism that this legislation will be adequately enforced causing the insurance industry to stop *any* consideration of domestic violence in making its insurance decisions.

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