

# Race Sex and Genetic Discrimination in Insurance: What's Fair

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## NOTES

### RACE, SEX, AND GENETIC DISCRIMINATION IN INSURANCE: WHAT'S FAIR?

#### INTRODUCTION

What's fair? Only a philosopher or a lexicographer could begin to answer this question in the abstract. But consider its application in the following contexts:

(1) Ed, a fifty-year-old black man, applies for life insurance in order to provide financial security for his family. The insurance company offers Ed a policy, but charges him a higher premium than it charges fifty-year-old white men because statistics show that black men tend to have shorter life spans than white men.

(2) Carlos, a forty-year-old man, applies for the disability insurance offered by his employer. Because a recent genetic test showed that he is especially susceptible to a certain degenerative disease, Carlos must pay almost twice the amount his co-workers pay to receive the same level of coverage.

(3) Marie, a thirty-year-old woman, and her twin brother George apply to the same company for health insurance. Because women, on average, tend to use health care services more frequently than men, the company charges Marie much more than it charges George for similar coverage.

All three situations are arguably unfair: Ed, Carlos, and Marie could each claim that insurers should not be able to classify individuals in these ways. Ed would have the law on his side in every state,<sup>1</sup> and Carlos could challenge the insurer's decision under the laws of an increasing number of states.<sup>2</sup> Marie, on the other hand, could appeal to the laws of only one state.<sup>3</sup>

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<sup>1</sup> Ed would have a claim under state laws banning "unfair discrimination" or laws expressly prohibiting the use of race as a classifier. See *infra* parts I.B.3, II.A.

Here and in the following paragraphs this Note refers to overall trends in the law. Complexities, to the extent that they are relevant, are discussed in Part II. This Note discusses only personal lines of insurance (annuities and health, life, disability, auto, property, and liability insurance). The "fair discrimination" doctrine has not been applied to commercial lines of insurance, because these lines rely on individual assessments of risk for each insured, rather than hard-and-fast risk classifications.

<sup>2</sup> See *infra* part II.C.

<sup>3</sup> Montana is the only state that bans the use of gender as a classifier for every type of insurance. MONT. CODE ANN. § 49-2-309 (1993). Marie could appeal to federal law, however, if the health insurance plan was offered through her employer. See *infra* parts I.B.2, II.B.

This Note seeks to explain this disparity by asking the question: "What type of insurance discrimination is fair?" The question itself might seem odd, since the term "discrimination" is normally used pejoratively. But in the context of insurance, "discrimination is not necessarily bad, equality not necessarily good."<sup>4</sup> The laws regulating insurers' use of classification are called "unfair discrimination"<sup>5</sup> laws because some forms of discrimination do seem to be fair. Most people would agree, for instance, that automobile insurers should be able to "discriminate" against those who have been convicted for drunk driving or otherwise have poor driving records by charging them higher premiums.

The debate among scholars over more controversial types of insurance classification has polarized into two dominant perspectives:<sup>6</sup> the efficient discrimination perspective and the anti-discrimination perspective.<sup>7</sup> Under the former, it would be fair to charge Ed, Marie, and Carlos higher insurance rates, because race, sex, and genetic factors are statistically correlated to higher risks of loss.<sup>8</sup> Under the latter, it would not be fair to charge them higher rates, because people do not choose their race, their sex, or their genes: these are non-causal, immutable factors, historically linked to unfair treatment.

The current unfair discrimination laws do not reflect either of these perspectives in their pure form, since the laws generally allow

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<sup>4</sup> Herman T. Bailey et al., *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. 779, 782 (1976) (emphasis removed).

<sup>5</sup> The term comes from the National Association of Insurance Commissioners' Model Unfair Trade Practices Act, which defines as an unfair trade practice the act of "[m]aking or permitting any *unfair discrimination* between individuals of the same class and equal expectation of life in the rates charged . . . benefits payable . . . or in any of the other terms and conditions of such policy." MODEL UNFAIR TRADE PRACTICES ACT § 4(g)(1) (Nat'l Ass'n Ins. Comm'rs 1993).

<sup>6</sup> Leah Wortham, *Insurance Classification: Too Important to Be Left to the Actuaries*, 19 U. MICH. J.L. REF. 349, 350 (1986). Wortham argues that the insurance classification debate should include two "overlooked perspectives": (1) "an appreciation that insurance is a necessity for most Americans" and (2) an understanding that selection competition in the insurance market deflects insurers away from forms of competition that might achieve reduced overhead, improved service, and innovative products. *Id.* at 350-51. This Note will argue that Wortham's first "overlooked perspective" has actually played an important role in the insurance classification debate; it suggests that this perspective is not so much overlooked as under-acknowledged. See discussion *infra* part III.B.2.

<sup>7</sup> Commentators have adopted a variety of different terms to describe these two points of view. Kenneth Abraham, for instance, identifies three types of concerns: "accuracy-equity" concerns, "control-causality" concerns, and "suspect variable" concerns. KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 83-95 (1986). The first set of concerns informs the efficient discrimination view; the latter two sets of concerns inform the anti-discrimination view. Wortham actually uses the term "fair discrimination" rather than "efficient discrimination" to describe the first perspective. Wortham, *supra* note 6, at 350. To emphasize that what Wortham terms the "fair discrimination perspective" is distinct from the set of state "fair discrimination" laws, this Note employs the term "efficient discrimination" instead.

<sup>8</sup> See *infra* part II.

sex discrimination, or even require it,<sup>9</sup> while forbidding race and genetic discrimination. There are a number of possible explanations for this disparity. The laws may reflect the outcome of political battles, in which racial minorities and the "genetically fragile" won, and women lost. But this explanation is not very satisfying, since political power does not appear to be distributed this way in our society.

Another explanation is that insurance codes are simply a "rubbish heap,"<sup>10</sup> because "[i]nsurance regulation . . . is more the accretion of specific responses to immediately perceived problems than the product of ordered efforts to achieve fundamental objectives."<sup>11</sup> But this explanation is similarly unsatisfying, since it takes the position that there is no explanation.

A third explanation is that the laws are in fact "the product of [our collective] efforts to achieve fundamental objectives."<sup>12</sup> This explanation is the most interesting because it promises some insight into the question "what's fair?," at least for this society. But it is also quite challenging because it is not clear what those fundamental objectives could be. What sorts of beliefs or concerns would motivate us, as a society, to forbid race and genetic discrimination in insurance while allowing sex discrimination? What shared theory of fairness could produce these results?

This Note presents a theory to explain the current state of insurance discrimination law. In order to construct a coherent theory, however, this Note must go beyond the limits of the two dominant perspectives on insurance discrimination. It argues that neither of the dominant perspectives alone, nor any combination of them, can adequately explain the current state of insurance discrimination law.

Both the efficient discrimination perspective and the anti-discrimination perspective answer the question "what's fair?" by proposing that we have a moral right to be free from unjust discrimination.<sup>13</sup> From the efficient discrimination perspective, we have a right not to be classified for insurance purposes unless the classification corresponds to an accurate prediction of risk. From the anti-discrimination perspective, we have a right not to be classified for insurance purposes on the basis of unacceptable classifiers such as race, sex, or genetic

<sup>9</sup> See *infra* note 103 and accompanying text (discussing California's law requiring sex discrimination in insurance).

<sup>10</sup> Spencer L. Kimball, *Unfinished Business in Insurance Regulation*, 1969 WIS. L. REV. 1019, 1019.

<sup>11</sup> Robert Works, *Whatever's FAIR—Adequacy, Equity, and the Underwriting Prerogative in Property Insurance Markets*, 56 NEB. L. REV. 445, 446 (1977).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., C. Arthur Williams Jr., *Unfair Rate Discrimination in Property and Liability Insurance*, in INSURANCE, GOVERNMENT, AND SOCIAL POLICY: STUDIES IN INSURANCE REGULATION 209, 219-24 (Spencer L. Kimball & Herbert S. Denenberg eds., 1969) (discussing efficient discrimination as a moral concept).

factors. Each of these is a “negative right”<sup>14</sup>—a right to be let alone, rather than a right to be helped.<sup>15</sup>

This Note argues that despite our apparent cultural preference for negative rights,<sup>16</sup> our collective judgment about the fairness of race, sex, and genetic discrimination in insurance cannot be explained solely in those terms. Our collective judgment reflects a positive rights perspective as well: as a society we do believe that everyone is entitled to receive a certain amount of help, in the form of societal goods such as health care.

Participants in the debate over the fairness of genetic discrimination in insurance have used the rhetoric of negative rights to argue in support of laws forbidding insurers to use genetic factors as classifiers.<sup>17</sup> But as this Note’s analysis will show, no negative rights theory can adequately explain the differential treatment of race and genetic discrimination on the one hand, and sex discrimination on the other. This Note argues that negative rights reasoning has been employed, not because it reaches the result we collectively desire, but rather because a rhetoric of positive rights is not politically effective in our negative-rights-dominated culture. This point is of more than descriptive relevance, for as long as our rhetoric does not fit our reasoning, we will be unable to create a society that we can consider fair.

A cautionary comment: as used in this Note, pronouns such as “we,” “us,” and “our” refer to the majority of United States citizens.

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<sup>14</sup> On the distinction between negative and positive rights, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121-34 (1969); D. D. Raphael, *Human Rights, Old and New*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 54, 60-61 (D. D. Raphael ed., 1967); and Jeremy Waldron, *Introduction to THEORIES OF RIGHTS* 1, 11 (Jeremy Waldron ed., 1984).

<sup>15</sup> Cf. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983) (Posner, J.), *cert. denied*, 465 U.S. 1049 (1984). Writing for the Seventh Circuit, Posner stated:

[T]he Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. . . . [T]he difference between harming and failing to help is just the difference . . . between negative liberty—being let alone by the state—and positive liberty—being helped by the state.

*Id.*

<sup>16</sup> Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1392 (1984) (noting that “[i]n our culture, the image of negative rights overshadows that of positive ones”).

<sup>17</sup> See, e.g., Joseph M. Miller, Comment, *Genetic Testing and Insurance Classification: National Action Can Prevent Discrimination Based on the “Luck of the Genetic Draw,”* 93 *DICK. L. REV.* 729, 738-41 (1989) (stating the anti-discrimination arguments against genetic discrimination).

Scholars, insurers, legislators, journalists, and citizens at large have participated in the debate, and all of these participants have relied on negative rights rhetoric in constructing their arguments. See Regina Austin, *The Insurance Classification Controversy*, 131 *U. PA. L. REV.* 517, 518 (1983) (“The rhetoric of the [insurance classification] controversy has not been filtered through and purified into legal discourse. . . . [The arguments] are constructed of common language . . .”).

The use of these pronouns is not intended to imply that every individual agrees, or should agree, with the theory of fairness this Note examines; rather, the use of these pronouns reflects the Note's central hypothesis: that the laws permitting or banning race, sex, and genetic discrimination in insurance arise from widely shared beliefs about fairness. As a hypothesis, this claim is necessarily descriptive rather than normative. Using this hypothesis, this Note provides an explanation for the current disparities in "fair discrimination" law. It then concludes with a normative argument concerning the appropriateness of attempting to make the insurance system more fair by banning genetic discrimination.

Part I explains the economic factors that drive insurers to place applicants into different risk classifications and the various sources of law that limit insurers' freedom to do so.<sup>18</sup> Part II describes current insurance discrimination law for three types of classifiers: race, sex, and genetic factors.<sup>19</sup> Part III analyzes these laws under the assumption that they reflect a societal consensus about fairness and argues that only a theory of fairness that incorporates positive rights can explain the distinctions between race, sex, and genetic discrimination.<sup>20</sup> Finally, Part IV concludes that laws banning genetic discrimination actually fail to make the insurance system more fair. If we limit ourselves to negative rights theories of fairness, we must acknowledge that genetic factors are acceptable—even ideal—classifiers. If we rely instead on a positive rights theory to explain our desire to ban genetic discrimination, then we must acknowledge that banning genetic discrimination in insurance is not enough—to avoid hypocrisy, we must ensure that the benefits of insurance are extended to all.

## I

### CONSTRAINTS ON CLASSIFICATION

Insurers' classification choices—whether to classify insureds and by which factors—are limited by both economic and legal constraints. Part I.A explains the economic constraints that drive individual insurers to use risk classifications. These constraints include competition among insurers and adverse selection among insureds. Part I.B describes the legal constraints which prevent insurers from using risk classifications that we consider to be unfair.

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<sup>18</sup> See *infra* notes 21-75 and accompanying text.

<sup>19</sup> See *infra* notes 76-182 and accompanying text.

<sup>20</sup> See *infra* notes 183-277 and accompanying text.

### A. Economic Constraints

Insurance developed as a mechanism for distributing the risk of loss.<sup>21</sup> It allows the risk averse<sup>22</sup> to shift the burden of unacceptably large losses. The insurer agrees to assume the insured's risk in exchange for a premium equal to the insured's expected loss—the size of the possible loss multiplied by its probability—plus a small charge to cover the insurer's overhead costs. The insured benefits by exchanging the risk of suffering a large loss for the certainty of suffering a small one. If the insurer makes adequate calculations, it will not suffer a loss, since the total losses of its insureds should not exceed the sum of the premiums they have paid. An insurer who invests the premiums can make a profit.

An insurance system can operate without any classification of insureds if no insurer uses classifications or if there is no competition among insurers. Nineteenth century life insurance companies provide an example: each member of these "assessment societies" paid the same premium, regardless of age, and received the same benefit at death.<sup>23</sup> Modern "group insurance," often offered by large employers to their employees, similarly avoids classifying the risk of each insured.<sup>24</sup> In an insurance system without classifications, insurers pool the expected losses of all of their insureds, with each insured paying a premium equal to the average expected loss.

Insurers who use risk classifications may do so in three ways: in underwriting, coverage, or rating.<sup>25</sup> Underwriting refers to a preliminary decision about the insurability of an applicant.<sup>26</sup> An insurer might decide, for example, not to offer its homeowners' insurance policy to any applicant who has lost two or more dwellings to fire.<sup>27</sup> Coverage refers to the terms of the insurance contract: What types of harms are included? How are benefits structured and limited?<sup>28</sup> In

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<sup>21</sup> See generally ABRAHAM, *supra* note 7, at 1-2 (explaining why insurance systems developed); ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 9-15 (1987) (same).

<sup>22</sup> The term "risk averse" refers to a person's attitude toward loss. Given a choice between a 50% chance of losing \$100 and the certainty of losing \$50, a risk averse person would choose to lose \$50. A risk preferring person would rather take the 50% chance of losing \$100, while a risk neutral person would have no preference. JERRY, *supra* note 21, at 11. Many people are generally risk averse, and most people become risk averse as the magnitude of possible loss increases. *Id.*

<sup>23</sup> E. MCCONNEY, OUTLINE OF THE HISTORY OF LIFE INSURANCE IN THE UNITED STATES 30 (1927). The eventual demise of these societies also provides an example of the effects of adverse selection by insureds and competition among insurers. See *infra* notes 36-37 and accompanying text.

<sup>24</sup> JERRY, *supra* note 21, at 39, 627-39.

<sup>25</sup> Wortham, *supra* note 6, at 354.

<sup>26</sup> See ROBERT B. HOLTOM, RESTRAINTS ON UNDERWRITING: RISK SELECTION, DISCRIMINATION AND THE LAW 6-7 (1979).

<sup>27</sup> *Id.* at 10-11.

<sup>28</sup> Wortham, *supra* note 6, at 354 n.19.

the absence of regulation, for example, insurers may decide that disability coverage for women will include a longer waiting period and a lower benefit ceiling.<sup>29</sup> Rating assigns different premiums to different risk groups.<sup>30</sup> Insurers often decide, for example, that young men should pay higher premiums for auto insurance than young women.<sup>31</sup>

Underwriting, coverage, and rating decisions are based on insurers' predictions about the insureds' possible losses. Such predictions can never be more than guesses because there is no way to measure risk directly. Insurers must measure risk indirectly, using loss statistics that reflect experience with similar risks.<sup>32</sup> Underwriting decisions in particular tend to be made on the basis of very informal loss "statistics"—that is, "[personal] judgment based on experience."<sup>33</sup> Regardless of the method of measurement, however, the insurer's goal is the same. Insurers seek to predict each insured's actual risk as accurately as possible.

Two forces drive insurers to use risk classifications to set rates for the individual insurance market: adverse selection among insureds and competition among insurers.<sup>34</sup> Adverse selection results from the insureds' self-interest. Those who expect their losses to be lower than the losses of others in an insurance pool will tend to leave the pool or refrain from joining it, while insureds who expect higher losses will

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<sup>29</sup> *Id.*; see also *Insurance Costs Skyrocketing for Women*, TAMPA TRIBUNE, Jan. 15, 1995, at 5 ("The four largest [insurance] carriers justify their [differential treatment of women] with one simple fact: . . . the higher number of disability claims filed by working women . . .").

<sup>30</sup> Wortham, *supra* note 6, at 354 n.19.

<sup>31</sup> *Insurance Costs Skyrocketing for Women*, *supra* note 29.

<sup>32</sup> Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 495 (1961).

<sup>33</sup> HOLTOM, *supra* note 26, at 2. The author, an experienced underwriter, describes underwriting as an "art which was passed down from one underwriter to another." *Id.* at 5. The author's goal is to explain the factors upon which underwriters have traditionally relied, such as loss history, age, sexual preference, occupation, marital status, and attitude. He also advises underwriters how to respond to legal restrictions now placed on the use of some of these factors.

<sup>34</sup> Group insurance avoids the pressures of adverse selection and competition, although insurers may examine the risk of individual insureds in order to calculate the overall cost of the policy. JERRY, *supra* note 21, at 634-35. See generally Bailey et al., *supra* note 4 (arguing that adverse selection and competition should be the only constraints on insurers' classification choices).

Adverse selection and competition affect rating decisions more directly than underwriting or coverage decisions. However, all three decisions are interrelated. Setting extremely high rates may have the same effect as choosing not to underwrite or cover a certain risk (since the insured will then be unable to afford the insurance), while choosing to underwrite a high-risk individual or to cover a certain risk may raise the sum of an insurer's expected losses, and thus the insurer's rates. Commentary supporting the anti-discrimination perspective has focused on the use of classifications for rating, most likely because insurers now use sex primarily as a rating classifier, rather than as a factor in underwriting or coverage decisions. See *infra* part II.B. Underwriting and coverage decisions are more central to the positive rights theory outlined in Part III.B.



tend to remain in the pool or join it in greater numbers.<sup>35</sup> To compete, an insurer must capitalize on adverse selection. By defining narrow risk categories, an insurer can attract low risk insureds away from another insurer. Insurers who are unwilling to respond with equally narrow risk classifications will soon be driven into bankruptcy, as their losses mount while their premiums stay steady or drop.

The demise of the nineteenth century "assessment societies" stands as a parable of the power of these economic constraints.<sup>36</sup> The assessment societies' life insurance policies did not rate younger and older applicants separately; all members paid the same premium. In pools with a majority of older members, the younger members decided that the premium was not worth paying because it was too much higher than their actual expected loss. Younger members left the pools, and as a result, the pools needed to charge higher premiums to cover the new average expected loss. The higher premiums caused more members to leave, until finally the premiums became too high for any member to bear, and the assessment societies collapsed.<sup>37</sup>

Insurers' search for additional risk classifications ends when the cost of defining and measuring further risk factors exceeds the profit additional classification would achieve.<sup>38</sup> In an ideal market, adverse selection will drive insurers to create the maximally efficient classification system—one in which each insured's premium is equal to his or her expected loss, to the maximum extent measurable.<sup>39</sup>

## B. Legal Constraints

A wide variety of legal constraints could conceivably limit insurers' freedom to use classifiers such as race or sex. Possible legal constraints include federal and state constitutional law, federal regulations, and state regulations. In fact, however, only state regulations have addressed the issue directly.<sup>40</sup>

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<sup>35</sup> ABRAHAM, *supra* note 7, at 15.

<sup>36</sup> See, e.g., MCCONNEY, *supra* note 23, at 30-37 (recounting the history of the 19th century "assessment societies" to explain why insurers adopt classification systems); Bailey et al., *supra* note 4, at 783-85 (same).

<sup>37</sup> Bailey et al., *supra* note 4, at 783-85.

<sup>38</sup> ABRAHAM, *supra* note 7, at 78; Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OHIO ST. L.J. 835, 846 (1986).

<sup>39</sup> See generally ABRAHAM, *supra* note 7, at 64-100 (discussing risk classification and efficiency). Of course, the ideal market may not exist. Wortham argues that market failures are pervasive in the insurance industry, and thus that external regulation is necessary. Wortham, *supra* note 38, 840-41.

<sup>40</sup> See Bailey et al., *supra* note 4, at 804-23.

## 1. *Federal and State Constitutional Law*

The Fourteenth Amendment to the federal Constitution forbids states to deny citizens "equal protection of the laws."<sup>41</sup> Many state constitutions contain similarly broad prohibitions, and several have an Equal Rights Amendment (ERA) specifically prohibiting discriminatory treatment of women or minorities.<sup>42</sup> However, because these provisions only apply if "state action" is involved,<sup>43</sup> and because courts have rejected the idea that even extensive regulation is a form of state action,<sup>44</sup> plaintiffs challenging the legality of insurer classifications on constitutional grounds have not been successful.<sup>45</sup>

## 2. *Federal Statutes*

Although Congress has the power to regulate insurance as interstate commerce,<sup>46</sup> it has long operated under a policy favoring state-

<sup>41</sup> U.S. CONST. amend. XIV, § 1.

<sup>42</sup> See, e.g., WASH. CONST. art. 31, § 1; see also Phyllis N. Segal, *Sexual Equality, the Equal Protection Clause, and the ERA*, 33 BUFF. L. REV. 85, 88 (1984) (listing state ERAs).

<sup>43</sup> Wortham, *supra* note 6, at 363. Not all state courts have interpreted their states' Equal Protection Clauses or Equal Rights Amendments to require state action. See Bailey et al., *supra* note 4, at 821 n.171. However, despite the efforts of NOW and other groups, there has been no successful court challenge to the use of sex as a classifier.

Some insurance regulators have been able to ban the use of sex as a classifier under state "unfair discrimination" statutes. In *Hartford Accident and Indemnity Co. v. Insurance Commissioner*, 482 A.2d 542 (Pa. 1984), the Pennsylvania Supreme Court held that the state action question was "irrelevant" when a plaintiff insurer challenged the insurance commissioner's finding that gender-based auto insurance rates were unfairly discriminatory. *Id.* at 549. The court referred to the state ERA in order to determine that the commissioner could reasonably make this finding. *Id.* Compare *Telles v. Commissioner of Insurance*, 574 N.E.2d 359 (Mass. 1991), in which the Massachusetts Supreme Court found that the Commissioner of Insurance did not have the power under the Massachusetts fair discrimination statute to forbid the use of gender classification. *Id.* at 361-62. A concurrence in *Telles* argued that the decision did not foreclose an equal protection challenge to this and other Massachusetts insurance statutes that seem to allow sex discrimination. *Id.* at 363 (Abrams, J., concurring).

Older commentaries on insurance discrimination debate whether state action exists. See, e.g., Bailey et al., *supra* note 4, at 810-11. The newer commentaries simply state that state action is lacking. See, e.g., Stephen R. Kaufman, Comment, *Banning "Actuarially Sound" Discrimination: The Proposed Nondiscrimination in Insurance Act*, 20 HARV. J. ON LEGIS. 631, 633 n.22 (1983); Wortham, *supra* note 6, at 363. Case law may be changing in the opposite direction, especially where state laws seem to require a certain classification. See CAL. INSUR. CODE § 790.03(f) (West 1993) (mandating sex-based tables for annuities and life insurance). A 1985 California Attorney General opinion found that this statute violated federal and state equal protection guarantees, but no court challenge has been successful (perhaps because of the practical mootness of the statute, given Title VII's ban on sex-based employer pension plans).

<sup>44</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974).

<sup>45</sup> Wortham, *supra* note 6, at 363 n.57; see, e.g., *Murphy v. Harleysville Mut. Ins. Co.*, 422 A.2d 1097 (Pa. Super. Ct. 1980) (male plaintiff's challenge to sex discrimination in automobile insurance under Pennsylvania Equal Rights Amendment fails for lack of state action), *cert. denied*, 454 U.S. 896 (1981).

<sup>46</sup> *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944).

level regulations. The 1945 McCarran-Ferguson Act<sup>47</sup> established a presumption of state control over regulation: federal laws are not to be interpreted as applying to the insurance industry unless Congress clearly states the purpose of regulating insurance.<sup>48</sup> To date, Congress has not passed a statute designed to overcome this presumption.<sup>49</sup>

One federal statute has nonetheless had a significant impact on insurers' ability to classify insureds. Title VII of the Civil Rights Act of 1964 (Title VII)<sup>50</sup> makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>51</sup> In two landmark cases the Supreme Court applied Title VII to pension plans, which as employer-sponsored annuities are a type of insurance.<sup>52</sup> In *City of Los Angeles v. Manhart*,<sup>53</sup> the Court held that Title VII prohibits an employer from requiring female employees to contribute more to a pension fund than their male colleagues in order to receive the same monthly benefits.<sup>54</sup> In *Arizona Governing Committee v. Norris*,<sup>55</sup> the Court held that when contributions by men and women to a pension fund are equal, benefits must also be equal.<sup>56</sup>

Title VII thus limits an insurer's ability to classify risks when the insurer's policy is offered through an employer rather than directly to the public.<sup>57</sup> But *Manhart* and *Norris* tell us more about federal em-

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<sup>47</sup> 15 U.S.C. §§ 1011-1015 (1994); see JERRY, *supra* note 21, at 50.

<sup>48</sup> 15 U.S.C. § 1012 (1994).

<sup>49</sup> The Hatfield-Packwood-Dingell bill and the Metzenbaum bill both failed to pass. See Wortham, *supra* note 6, at 364, 370, 417 (discussing the key provisions of the bills).

<sup>50</sup> Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1988).

<sup>51</sup> 42 U.S.C. § 2000e-2(a)(1) (1988).

<sup>52</sup> JERRY, *supra* note 21, at 28. An annuity is an insurance contract in which "a financial institution (such as an insurer) . . . in exchange for the individual's prior payment, promises to make periodic payments to the individual for a stated amount of time." *Id.*

<sup>53</sup> 435 U.S. 702 (1978).

<sup>54</sup> *Id.* at 711.

<sup>55</sup> 463 U.S. 1073 (1983).

<sup>56</sup> *Id.* at 1083-86.

<sup>57</sup> Two other federal statutes might constrain insurers' freedom to classify. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1145 (Supp. V 1993), regulates employee pension plans and employer-sponsored health plans. ERISA's substantive regulations affect pensions, not health plans, so any substantive effect of ERISA would be redundant with *Manhart* and *Norris*'s interpretation of Title VII. See *id.* In fact, ERISA actually increases insurers' freedom to classify. ERISA's preemption of state regulations for self-insuring employers allows an increasing number of employers to escape state restrictions on the use of classifiers. See *infra* note 281 and accompanying text.

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (Supp. V 1993), prohibits both private and public employers from discriminating on the basis of disability. Although its definition of "disability" is broad, the ADA does not prevent insurers from using genetic information to classify insureds. Mark A. Rothstein, *Genetic Discrimination in Employment and the Americans with Disabilities Act*, 29 Hous. L. Rev. 23, 81 (1992). It

ployment discrimination doctrine than they tell us about our concept of fair discrimination in insurance—they override, rather than alter, the doctrine underlying the states' approach to sex discrimination in insurance.<sup>58</sup>

### 3. *State Statutes Forbidding "Unfair Discrimination"*

In contrast to the limited federal constraints on insurance discrimination, state law constraints are fairly extensive. State insurance regulations serve a variety of purposes.<sup>59</sup> For instance, they may require insurers to communicate terms and rates clearly to insureds in order to enhance competition,<sup>60</sup> or they may enact prohibitions against fraud in order to protect consumers from unscrupulous sales tactics.<sup>61</sup>

One purpose of state regulation of underwriting, coverage, and rating decisions is to protect the public from "unfair discrimination."<sup>62</sup> The earliest unfair discrimination statutes were designed to prevent the practice of "rebating," in which insurance agents gave a portion of their commissions to customers in order to induce them to purchase insurance.<sup>63</sup> Consumers, frustrated by the uncertainty that rebating introduced into the insurance purchasing process, pressed for statutes forbidding "different treatment of people in the same class and with the same life expectancy."<sup>64</sup> Many insurance agents supported these efforts, since the pressure to give rebates lowered their income.<sup>65</sup> By 1960, every state had adopted some version of the National Association of Insurance Commissioners' Model Unfair Trade

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remains controversial whether the ADA prevents employers from using genetic information to classify employees. See *infra* note 164 and accompanying text.

<sup>58</sup> See Lea Brilmayer et al., *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980) [hereinafter *Sex Discrimination in Employer-Sponsored Insurance Plans*] (taking this view of *Manhart*); Lea Brilmayer et al., *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222 (1983) [hereinafter *The Efficient Use of Group Averages as Nondiscrimination*] (arguing this view again).

<sup>59</sup> See generally Kimball, *supra* note 32 (listing various purposes).

<sup>60</sup> Wortham suggests that current regulations are too lax in this area. Wortham, *supra* note 6, at 421; see also Stewart W. Kemp, *Insurance and Competition*, 17 IDAHO L. REV. 547, 580-81 (1981) (arguing in support of a bill that would require easily readable policies and the preparation of "consumer shopping guides").

<sup>61</sup> One former insurance agent has argued that fraud is common in the health insurance market, and government regulation is inadequate to fight it. JOHN E. GREGG, *THE HEALTH INSURANCE RACKET AND HOW TO BEAT IT* (1973).

<sup>62</sup> Bailey et al., *supra* note 4, at 782.

<sup>63</sup> Wortham, *supra* note 6, at 384.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 385.

Practices Act.<sup>66</sup> This Act defines “unfair trade practice” as the act of “[m]aking or permitting any *unfair discrimination* between individuals of the same class and equal expectation of life in the rates charged . . . benefits payable . . . or in any other of the terms and conditions . . . .”<sup>67</sup>

State unfair discrimination statutes now provide the most important legal constraint on insurers’ use of classifications.<sup>68</sup> Modern interpreters have read more than a concern about rebates into the term “unfair,” a term that the Model Act leaves undefined. Although state legislators,<sup>69</sup> insurance commissioners,<sup>70</sup> and commentators<sup>71</sup> have often taken conflicting positions, all have relied on some version of a negative rights theory. They have not argued that all individuals have a right to insurance or to the societal goods that insurance provides. Rather, they have argued that individuals who are in a position to acquire insurance should not be differentiated by “unfair” classifiers.<sup>72</sup>

Two basic definitions of “fair” classifiers have been put forth. Fairness could mean that insurers’ classifications correspond to accurate predictions of risk—the efficient discrimination view. Fairness could also mean that insurers should only use characteristics that are (a) causally connected to the risk measured, (b) controllable, and (c)

<sup>66</sup> Bailey et al., *supra* note 4, at 782. Wortham suggests that insurers and state regulators pressed for the adoption of fair discrimination statutes in order to avoid application of federal antitrust laws under the McCarran-Ferguson Act. Wortham, *supra* note 6, at 386.

<sup>67</sup> MODEL UNFAIR TRADE PRACTICES ACT § 4(g)(1) (Nat’l Ass’n Ins. Comm’rs 1993); see also Bailey et al., *supra* note 4, at 782-83 n.17 (listing all the relevant state statutes as of 1976); Miller, *supra* note 17, at 747 (listing statutes); Wortham, *supra* note 6, at 382-83 (discussing state fair discrimination statutes). Cf. Karen A. Clifford & Russel P. Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1809-10 (1987) (stating that all states have fair discrimination statutes that apply to health insurance).

<sup>68</sup> ABRAHAM, *supra* note 7, at 37.

<sup>69</sup> See *infra* part II.C (discussing recent amendments to state unfair discrimination statutes that specifically define genetic discrimination as an unfair practice).

<sup>70</sup> State insurance commissioners in Florida, Louisiana, Massachusetts, New Jersey, and Wyoming have attempted to use their regulatory power to ban sex discrimination in insurance. FLORIDA ADMIN. CODE ANN. r. 4-43.03 (1990) (nullified by Department of Ins. v. Insurance Servs. Office, 434 So. 2d 908 (Fla. App. 1983)); 211 MASS. REGS. CODE §§ 35.00 *et seq.* (1987) (nullified by *Telles v. Commissioner of Ins.*, 574 N.E.2d 359 (Mass. 1991)); Insurance Servs. Office v. Commissioner of Ins., 381 So. 2d 515 (La. App. 1979) (overruling the Commissioner’s order banning sex discrimination); see also Austin, *supra* note 17, at 528-30 (discussing the failed New Jersey and Wyoming regulations).

<sup>71</sup> Compare Miller, *supra* note 17 (adopting anti-discrimination arguments to explain why genetic discrimination ought to be banned) with Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1 (1994) (adopting efficient discrimination arguments to explain why genetic discrimination should be permitted).

<sup>72</sup> Leah Wortham is an important exception to this generalization. She criticizes “the dominant perspectives,” arguing that they ignore important questions. Wortham, *supra* note 6, at 350.

not associated with historical or invidious discrimination—the anti-discrimination view.<sup>73</sup>

The prohibition of “unfair discrimination between individuals of the same class and equal expectation of life” leaves open the question of what type of discrimination is unfair. The reference to “individuals of the same class”<sup>74</sup> suggests that insurers can discriminate between individuals of *different* classes (as adverse selection and competition drive them to do) but on what bases may these different classes be formed? Participants in the debate over fairness in insurance discrimination have assumed that a definition of “fair classifiers” provides the answer to this question, debating only whether fairness requires anything other than the predictive accuracy of the classifiers used.<sup>75</sup> In order to determine which of these views, if either, reflects our societal consensus, it is necessary to examine current “unfair discrimination” law for race, sex, and genetic factors.

## II

### CURRENT “UNFAIR DISCRIMINATION” LAW

Insurers use experience or statistics to determine whether a potential classifier is linked to high or low expected loss.<sup>76</sup> A high correlation between two factors does not in itself show causation—the frequency of rooster calls at sunrise, for example, does not mean that roosters cause the sun to rise.<sup>77</sup> But from the insurer’s perspective causation is irrelevant: a statistical link alone can be used to construct statistically accurate risk classifications. Insurers have used race, sex, and genetic factors as classifications because race, sex, and genetic factors are each statistically linked to level of risk.

#### A. Race as a Factor

Race is statistically correlated with many things, including, for example, life expectancy—blacks on average live between six and seven

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<sup>73</sup> See *supra* note 7 (discussing alternative labels for these two perspectives).

<sup>74</sup> MODEL UNFAIR TRADE PRACTICES ACT § 4(g)(1) (Nat’l Ass’n Ins. Comm’rs 1993).

<sup>75</sup> But see *supra* note 6 (Wortham is an exception).

<sup>76</sup> Wortham, *supra* note 38, at 845. Not all predictive classifiers are used—only the “cost-effective ones.” *Id.* at 846; see also ABRAHAM, *supra* note 7, at 78 (discussing non-cost-effective classifiers). Wortham labels the extra requirements as “stability, reliability, and administrative convenience.” Wortham, *supra* note 38, at 846. Wortham suggests that insurers may also wish to use classifications that do not predict riskiness, noting that “[s]ome evidence indicates that classifications may be chosen to attract buyers . . . who own more property and thus are more likely to buy larger and multiple policies.” *Id.* at 845. This is the exception rather than the rule, however.

Intuition may play as large a role as statistics in the underwriting context. See HOLTOM, *supra* note 26, at 2; see also *supra* note 33.

<sup>77</sup> See *infra* part III.A for a further discussion of the importance of causation.

fewer years than whites.<sup>78</sup> Such correlations have existed for many years.<sup>79</sup> It is reasonable to assume that the differences stem from American history and culture, rather than race itself (defined biologically).<sup>80</sup> But the correlations themselves could be used to define insurance risk classes: whites would need to pay more for annuities, for example, while blacks might need to pay higher rates for life insurance.<sup>81</sup>

For many years insurers did use race as a classifier. Although some states banned race classifications after the Civil War,<sup>82</sup> in other states race was a commonly used classifier through the 1950s,<sup>83</sup> and insurers frequently charged whites and blacks different rates for annuities and life insurance.<sup>84</sup> Eventually, however, race classification began to be seen as a repugnant practice.<sup>85</sup> Some states passed statutes specifically forbidding the use of race as a classifier,<sup>86</sup> while other

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<sup>78</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 87 (1994) (Table No. 114, listing different life expectancies for black and white populations).

<sup>79</sup> See Bailey et al., *supra* note 4, at 793 n.54 (citing mortality census data from 1973); Robert H. Jerry, II & Kyle B. Mansfield, *Justifying Unisex Insurance: Another Perspective*, 34 AM. U. L. REV. 329, 351 n.135, 352 (1985) (citing a 1950 study of mortality differences among "blacks, Caucasians, and Orientals," and noting "[t]hroughout this century, the average nonwhite person has had a shorter lifespan than the average white person"); Kimball, *supra* note 32, at 496 (noting in 1961 "the undeniable fact that mortality experience for all Negroes is less favorable than experience for all whites").

<sup>80</sup> It is not at all clear that race can be defined biologically. See JAMES E. BOWMAN & ROBERT F. MURRAY, JR., *GENETIC VARIATION AND DISORDERS IN PEOPLES OF AFRICAN ORIGIN* 15-21 (1990). While "categorizations of human populations are capricious," *id.* at 21, Bowman and Murray nonetheless present a study of the genetic characteristics of peoples of African origin. They note some genetic differences; for instance, they examine differences in the incidence of sickle cell anemia. *Id.* at 192. The few genetic differences that have been found, however, do not account for differences in mortality or the other statistical differences in risk that interest insurers.

<sup>81</sup> Jerry & Mansfield, *supra* note 79, at 352 ("Viewed solely from the economic perspective of the insurer, a black person is a better risk in an annuity contract than a similarly situated white person, and a white person is a better risk on a life insurance contract than a similarly situated black person.").

<sup>82</sup> *Id.* Wortham notes two such early bans: MASS. GEN. LAWS ANN. ch. 175, § 122 (West 1977) (first passed in 1884) and MICH. COMP. LAWS ANN. § 500.2082 (West 1983) (first passed in 1869). Wortham, *supra* note 6, at 365 n.68.

<sup>83</sup> Wortham, *supra* note 6, at 365.

<sup>84</sup> *Id.* at 351.

<sup>85</sup> Jerry & Mansfield, *supra* note 79, at 353.

<sup>86</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 20-283, sub. 2 (West 1990); ARK. CODE ANN. § 23-66-206(7) (G) (Michie 1987); CAL. INS. CODE §§ 10140-10141 (West 1993); CONN. GEN. STAT. ANN. § 38a-816 (West 1992); ILL. COMP. STAT. ANN. ch. 215 § 5/424 (Smith-Hurd 1980); KY. REV. STAT. ANN. § 304.12-085 (Baldwin 1994); MD. ANN. CODE art. 48a, § 234B(d) (1994); MASS. ANN. LAWS ch. 175, § 122 (Law. Co-op. 1987); MICH. COMP. LAWS ANN. § 500.2082 (West 1993); MONT. CODE ANN. § 33-18-210 (1995); N.J. STAT. ANN. § 17:29B-4(7)(c), (d) (West 1994); N.Y. INS. LAW § 2606 (McKinney 1985); N.D. CENT. CODE ANN. § 26.1-04-03 (Supp. 1981); OHIO REV. CODE ANN. § 3911.16 (Anderson 1989); PA. STAT. ANN. tit. 40, § 1171.5(7)(iii) (1992); R.I. GEN. LAWS § 42-62-14 (1993); WASH. REV. CODE ANN. §§ 49.60.178 *et seq.* (West 1991); WIS. STAT. § 942.04(1)(d) (1959).

states assumed this result under their unfair discrimination statutes.<sup>87</sup> By the late 1960s, insurers had converted to race-neutral actuarial tables;<sup>88</sup> by the 1980s, insurers claimed not to use race classification at all.<sup>89</sup>

Ironically, bans on race classification may have made some types of insurance less accessible to blacks. Insurers who could not charge blacks more for property insurance, for example, chose not to offer insurance in certain locales.<sup>90</sup> This "redlining" practice has not been found to violate race discrimination bans, since it relies on classifications other than race.<sup>91</sup> However, anti-discrimination proponents might find redlining and other forms of "impact" discrimination just as problematic as the explicit use of race as a classifier. If anti-discrimination proponents were concerned with results rather than means, they might demand a ban on the use of any classifier that had an adverse impact on a protected category of persons. Federal legislation has adopted another approach: the Fair Access to Insurance Requirements (FAIR) program, for example, provided federal reinsurance of the riot hazard to insurers who offered property insurance in high risk urban areas.<sup>92</sup> Commentators have recommended similar solutions to the problem of impact discrimination in business insurance.<sup>93</sup> In general, the solution to impact discrimination seems to lie outside the definition of "unfair discrimination."

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<sup>87</sup> Bailey et al., *supra* note 4, at 793.

<sup>88</sup> Jerry & Mansfield, *supra* note 79, at 353. The conversion to race-neutral tables may have been driven as much by the anticipation of imminent regulation as by regulation itself. *Id.* at 352 n.139 ("The change probably occurred when insurers realized that the torrent of federal legislation prohibiting racial discrimination in various aspects of society could reach insurance practices if the industry did not take steps to eliminate such discrimination."); see also HOLTOM, *supra* note 26, at 173 ("Where data are not so certain, underwriters should immediately drop all consideration of these factors; any continuation under these circumstances will only lead to further laws and regulations.").

<sup>89</sup> Wortham, *supra* note 6, at 365.

<sup>90</sup> Jerry & Mansfield, *supra* note 79, at 353 n.41; see Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874 (1988) (analyzing the extent of housing segregation).

<sup>91</sup> Jerry & Mansfield, *supra* note 79, at 353 n.41.

<sup>92</sup> The FAIR program was established by the Urban Property Insurance Protection and Reinsurance Act, 12 U.S.C. § 1749bbb-3 to § 1749bbb-10 (1982). Although the program terminated in 1983, 12 U.S.C. § 1749bbb(b)(1) (1994), many states have continued the program on their own. Wortham, *supra* note 6, at 396. See generally Works, *supra* note 11 (analyzing the FAIR program).

<sup>93</sup> Martin J. Katz, *Insurance and the Limits of Rational Discrimination*, 8 YALE L. & POL'Y REV. 436 (1990) (describing the impact of "rational discrimination" on blacks seeking business insurance and suggesting that the government subsidize the cost of insurance for black businesses, rather than attempt to forbid such rational discrimination).



## B. Sex as a Factor

Sex, like race, correlates with many risk factors, including life expectancy,<sup>94</sup> number of automobile accidents,<sup>95</sup> and use of medical services.<sup>96</sup> As with race, it is not clear that the biology of sex causes any of these risks,<sup>97</sup> although the biological differences between men and women are far greater than those dividing the various races.<sup>98</sup> Insurers have used these statistical differences as the basis for sex discrimination with respect to underwriting, rating, and coverage.<sup>99</sup>

The debate over the legitimacy of sex discrimination in insurance which took place in the 1980s was highly polarized, with one side advocating the efficient discrimination view and the other advocating the anti-discrimination view.<sup>100</sup> Although neither side conceded the

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<sup>94</sup> Jerry & Mansfield, *supra* note 79, at 340 (noting that, on average, women live longer than men); BUREAU OF THE CENSUS, *supra* note 78, at 87.

<sup>95</sup> JERRY, *supra* note 21, at 338-39 (noting that on average women have fewer accidents than men); BUREAU OF THE CENSUS, *supra* note 78, at 136 (statistics on fatal automobile accidents); ABRAHAM, *supra* note 7, at 91 (noting that driver's sex accounts for greater than one-third of the explainable variance of expected loss distribution among drivers.).

<sup>96</sup> Jerry & Mansfield, *supra* note 79, at 343 (noting that the cost of maternity coverage increases the cost of health and disability insurance for women).

<sup>97</sup> See Charles E. Lewis & Mary Ann Lewis, *The Potential Impact of Sexual Equality On Health*, 297 NEW ENG. J. MED. 863 (1977) (arguing that morbidity and mortality differences between men and women are more related to behavior and role in society than to biologic inheritance).

<sup>98</sup> This is especially true to the extent that race is a socially constructed concept. See BOWMAN & MURRAY, *supra* note 80, at 15-21.

<sup>99</sup> Janet Sydlaske, Comment, *Gender Classifications in the Insurance Industry*, 75 COLUM. L. REV. 1381 (1975); see also *Insurance Costs Skyrocketing for Women*, *supra* note 29 (explaining that disability insurers who offered unisex pricing in the 1980s have now returned to sex-distinct rates, charging women up to 50% more than men for the same coverage).

<sup>100</sup> Sydlaske, *supra* note 99, at 1403 (arguing for a judicial or legislative ban on use of sex as a classifier); Spencer L. Kimball, *Reverse Sex Discrimination: Manhart*, 1979 AM. B. FOUND. RES. J. 83 [hereinafter *Reverse Sex Discrimination*] (adopting the efficient discrimination view, and thus arguing that the Supreme Court's decision ordering Title VII employers to offer only unisex pension plans was in error); *Sex Discrimination in Employer-Sponsored Insurance Plans*, *supra* note 58 (arguing that employer-sponsored pensions should be neutral, under the anti-discrimination view); Spencer L. Kimball, *Reprise on Manhart*, 1980 AM. B. FOUND. RES. J. 915 [hereinafter *Reprise on Manhart*] (defending the efficient discrimination view); Douglas Laycock & Teresa A. Sullivan, *Sex Discrimination as "Actuarial Equality": A Rejoinder to Kimball*, 1981 AM. B. FOUND. RES. J. 221 (responding to *Reprise on Manhart*, *supra*, emphasizing that Title VII requires the imposition of the anti-discrimination view); Mayer G. Freed & Daniel D. Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. B. FOUND. RES. J. 585 (disagreeing with Brillmayer et al.'s interpretation of Title VII in *Sex Discrimination in Employer-Sponsored Insurance Plans*, *supra* note 58); George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489 (1982) [hereinafter *The Economics of Gender Discrimination*] (arguing that efficient discrimination demands the use of sex as a classifier for employer-offered pensions); *The Efficient Use of Group Averages as Nondiscrimination*, *supra* note 58 (criticizing Benston's logic and data in *The Economics of Gender Discrimination*, *supra*, and arguing once more for the anti-discrimination view); George J. Benston, *Discrimination and Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues and a Response to Professors Brillmayer, Laycock, and Sullivan*, 50 U.

philosophical debate, those supporting the use of sex as a classifier won in the legislative arena.<sup>101</sup> Only Montana flatly forbids sex discrimination in insurance.<sup>102</sup> California actually *requires* the use of gender-specific tables for life insurance and annuities.<sup>103</sup> Most states tolerate the use of sex as a classifier as a form of fair discrimination; where regulators have attempted to ban sex discrimination under unfair discrimination statutes, courts have rebuffed them, stating that actuarially sound discrimination "cannot be unfair."<sup>104</sup> Ironically for women, the one exception to states' toleration of sex discrimination is

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CHI. L. REV. 250 (1983) [hereinafter *Discrimination and Economic Efficiency*] (responding to the arguments in *The Efficient Use of Group Averages as Nondiscrimination*, *supra* note 58); Mary W. Gray & Sana F. Shtasel, *Insurers Are Surviving Without Sex*, 71 ABA J. 89 (Feb. 1985) (discussing *Norris* and arguing against sex discrimination in insurance generally).

<sup>101</sup> "Legislative arena" is here limited to state law. If *Manhart* and *Norris's* interpretations of Title VII apply to all forms of employer-sponsored insurance, then they represent a large victory for the anti-discrimination proponents at the federal level.

See Kaufman, *supra* note 43, for a discussion of (failed) federal legislation banning the use of sex (as well as race, color, religion, or national origin) as a classifier. Kaufman argues that the nondiscrimination bill would not be very costly. *Id.* at 638-39. Cf. GENERAL ACCOUNTING OFFICE, ECONOMIC IMPLICATIONS OF THE FAIR INSURANCE PRACTICES ACT (1984) (concluding that the bill's short-run effects would be significant).

One commentator notes an interesting political twist on the fair discrimination debate: President Reagan supported efforts to ban the use of sex classifications because the legislation fit with Reagan's opposition to affirmative action. DOUGLAS CADDY, LEGISLATIVE TRENDS IN INSURANCE REGULATION 95-96 (1986).

<sup>102</sup> MONT. CODE ANN. § 49-2-309 (1991). Insurance industry lobbyists have been seeking repeal of the ban on sex discrimination. Wortham, *supra* note 6, at 366 n.78.

<sup>103</sup> CAL. INS. CODE § 790.03(f) (West Supp. 1993). The provision was designed to ensure that women buying life insurance receive the full benefit of their greater life expectancy (and presumably also to ensure that men's annuities reflect their shorter life expectancies). A 1985 California Attorney General Opinion found that § 790.03(f) violates the Fourteenth Amendment's Equal Protection Clause and the Equal Protection Clause of Article I, § 7, of the California constitution. Yet, despite this acknowledgement, no court challenge has been successful. See, e.g., *Fiske v. Gillespie*, 246 Cal. Rptr. 552 (Ct. App. 2d Dist. 1988) (suit to enjoin the insurance commissioner from spending funds to enforce § 790.03(f) dismissed because too little money was involved to give plaintiffs standing as taxpayers). However, this provision does not apply to pensions offered by employers who are covered by Title VII. See *Manhart* and *Norris* discussion, *supra* notes 50-58 and accompanying text; see also S.D. CODIFIED LAWS ANN. § 58-24-6.1 (Supp. 1990) (defining unfair discrimination as rates "to reflect equitably the difference in expected losses and expenses").

<sup>104</sup> *Department of Ins. vs. Insurance Servs. Office*, 434 So. 2d 908 (Fla. Dist. Ct. App. 1983), *petition denied*, 444 So. 2d 416 (Fla. 1984). In *Department of Insurance*, the court overturned FLA. ADMIN. ANN. r. 4-43.03 (1990), which banned sex discrimination in automobile insurance. The Louisiana Insurance Commissioner's attempted ban of sex discrimination in automobile insurance was similarly rejected. *Insurance Servs. Office v. Commissioner of Ins.*, 381 So. 2d 515 (La. Ct. App. 1979). In rejecting the ban, the court concluded that if there was "a sound statistical basis" for the discrimination, then it was not unfair. *Id.* at 517. In *Telles v. Commissioner of Ins.*, 574 N.E.2d 359 (Mass. 1991), the Supreme Court of Massachusetts held that the state insurance commissioner did not have the authority under the state fair discrimination statute to prohibit life insurance underwriting decisions based on sex differences in mortality. Regulators in New Jersey and Wyoming have also failed in their attempts to ban sex discrimination in insurance. Austin, *supra* note 17, at 528 n.57.

in automobile insurance, where statistics support charging women lower premiums.<sup>105</sup> A number of state legislatures have declared that sex discrimination in automobile insurance is unfair, without extending the argument to other types of insurance.<sup>106</sup> Apparently Kenneth Abraham guesses wrongly when he supposes that “[t]he symbolic effect of eliminating sex-based classifications only when they [benefit] women would probably be intolerable.”<sup>107</sup>

The effect of sex discrimination in insurance can be quite dramatic. Disability insurance provides an example. After offering unisex pricing in the early 1980s, all four of the nation’s major disability insurers have now returned to sex-distinct pricing, in response to the statistics showing that women tend to file a higher number of claims.<sup>108</sup> As a result, the cost of disability insurance for women rose thirty-nine percent in 1994, and women today may need to pay fifty percent more than men to get the same coverage.<sup>109</sup>

The preceding discussion focuses on sex discrimination in insurance rates. However, during the 1970s more lawsuits were brought to challenge sex discrimination in underwriting and coverage than in rating.<sup>110</sup> State statutes and regulations reflect the same focus. Bailey notes a trend “to assure that coverage, in like kind and amount, is uniformly available to individuals without regard to sex.”<sup>111</sup> The rea-

<sup>105</sup> ABRAHAM, *supra* note 7, at 91. If insurers switched to unisex rates for automobile insurance, young women’s rates would rise by 26% and young men’s rates would drop by 6%. *Id.*

<sup>106</sup> See HAW. REV. STAT. § 294-33 (1976); MASS. GEN. LAWS ANN. ch. 175, §§ 22E, 24A (West 1987); MICH. COMP. LAWS ANN. § 500.2027 (West 1993); N.C. GEN. STAT. § 58-3-25 (1994). Cf. FLA. STAT. ANN. § 627.0651(6) (West 1984) (For automobile insurance, “[o]ne rate shall be deemed unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses.”).

<sup>107</sup> ABRAHAM, *supra* note 7, at 95. Abraham actually writes “only where they disadvantage women,” *id.* (emphasis added), but it is clear from context that he meant the opposite. He states that although a ban on sex discrimination in automobile insurance would probably result in less economic inefficiency than a ban on sex discrimination in annuities, banning one and not the other should be unacceptable, given historical discrimination against women. *Id.* at 94-95. Wortham cautions:

Although one is tempted to ascribe the regulatory enthusiasm regarding automobile insurance to the benefits men receive from the elimination of gender classification, there are probably a number of other factors as well. The primary concern in automobile insurance is not the insured but liability to third parties. The fact that automobile insurance is often required has been considered important. . . . Many states have more elaborate state code provisions concerning automobile insurance than other lines.

Wortham, *supra* note 6, at 395 n.267.

<sup>108</sup> *Insurance Costs Skyrocketing for Women*, *supra* note 29.

<sup>109</sup> *Id.*

<sup>110</sup> Sydney J. Key, *Sex-Based Pension Plans in Perspective*. City of Los Angeles Department of Water and Power v. Manhart, 2 HARV. WOMEN’S L.J. 1, 40-43 (1979).

<sup>111</sup> Bailey et al., *supra* note 4, at 802. “While some states have achieved this result by legislation, most have tried to reach the same result by adoption of regulations under their Unfair Trade Practices Acts.” *Id.*

son for the distinction between rating and underwriting and coverage is not immediately apparent. Wortham mentions the distinction as an oddity: "Many states restrict the use of sex classification in underwriting and coverage, but there are few such restrictions regarding rating even though significant rate differentials can have the same effect as a refusal to underwrite if the rate is . . . unaffordable."<sup>112</sup>

### C. Genetic Factors

Genes are segments of deoxyribonucleic acid (DNA) found in human cells.<sup>113</sup> The sequence of DNA bases in each gene encodes hereditary information<sup>114</sup> that controls human traits, physical characteristics, and disease predispositions.<sup>115</sup> Scientists use the label "genotype" to distinguish different versions of the same gene and the label "phenotype" to distinguish different traits, characteristics, or predispositions produced by genes.<sup>116</sup> Many different genotypes can produce the same phenotype, and different phenotypes can arise from the same genotype.<sup>117</sup> The latter is true because genes alone are not usually determinative. Both genotype and the environment—"nature and nurture"—affect phenotype.<sup>118</sup>

Over the past twenty-five years, researchers have made tremendous progress in their quest to locate genes along the genome<sup>119</sup> and to understand the roles and effects of various genes. In 1970 almost no genes had been mapped; in 1991 nearly 2000 had been.<sup>120</sup> The Human Genome Project<sup>121</sup> has greatly increased the rate of new mappings. The goal of the Project is to determine the entire human DNA sequence, to identify all 100,000 or more genes, and to provide new tools to analyze the effects of these genes.<sup>122</sup>

<sup>112</sup> Wortham, *supra* note 6, at 366.

<sup>113</sup> Paul R. Billings, *The Scientific Basis of the "Genetic Revolution": A Selective Review*, in *THE GENOME, ETHICS AND THE LAW: ISSUES IN GENETIC TESTING* 23, 26 (1992) [hereinafter *THE GENOME*] (summarizing the current understanding of gene structure and function, as part of a report of a conference held by the AAAS-ABA National Conference of Lawyers and Scientists and the AAAS Committee on Scientific Freedom and Responsibility, June 14-16, 1991).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 25.

<sup>116</sup> *Id.*

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

<sup>118</sup> *Id.* at 29-30.

<sup>119</sup> The genome or "gene home" refers to the site where genes reside within the cell. *Id.* at 27. The chromosomes are one genome; human cells also contain DNA within mitochondria. *Id.*

<sup>120</sup> Tabitha M. Powledge, *Ethical and Legal Implications of Genetic Testing: A Synthesis*, in *THE GENOME*, *supra* note 113, at 4.

<sup>121</sup> The National Institutes of Health sponsor the Human Genome Project or Human Genome Initiative. *THE GENOME*, *supra* note 113, at v.

<sup>122</sup> Powledge, *supra* note 120, at 4; *see also* Begley et al., *The Genome Initiative*, *NEWSWEEK*, Aug. 31, 1987, at 58 (describing the goals of the Project).

Genetic tests can discover whether a person has a certain genotype, either by recognizing the actual DNA sequence of that gene (or genes), or by identifying nearby “markers.”<sup>123</sup> There are three main kinds of genetic tests available:<sup>124</sup> those that search for carriers,<sup>125</sup> those that search for people currently affected with a disease,<sup>126</sup> and those that search for people who may become ill in the future.<sup>127</sup> All three types of genetic tests might play a role in the insurance context, but the last type of test plays the most central role in the insurance discrimination debate. Insurers would not normally be interested in whether an insured was a carrier (*i.e.*, had a carrier genotype) so long as he or she was not at risk of developing the disease (*i.e.*, developing the phenotype).<sup>128</sup> Insurers would use the second type of test to enforce a “pre-existing conditions” exclusion clause.<sup>129</sup> Only the last type of test predicts an insured’s expected loss; thus, this is the type of genetic test that allows an insurer to practice “fair discrimination.”

Efficient discrimination requires only that a classifier be statistically correlated with risk. Some genes are statistically correlated with risk in the strongest possible sense.<sup>130</sup> Huntington’s disease, a progressive neurodegenerative disorder, provides an example.<sup>131</sup> It

123 THE GENOME, *supra* note 113, at 30.

124 Powledge, *supra* note 120, at 3-4.

125 *Id.* Carriers are people who do not have and will not develop a disease, but who are at risk of having a child with the disease.

126 *Id.* at 4. This type of test is often used prenatally or shortly after birth to identify genetic traits such as Down syndrome and phenylketonuria. *Id.*

127 *Id.*

128 *But see* Mark A. Rothstein, *Discrimination Based on Genetic Information*, 33 JURIMETRICS J. 13, 15-16 (1992) (hypothesizing that insurers—or employers acting as insurers—may reject applicants who are carriers because the insurer would be liable for the costs of the applicant’s children as well as the costs of the applicant).

129 *See* David Cooper & Michael Barefoot, *Can You Buy Insurance for Your Genes?*, NEW SCIENTIST, July 16, 1987, at 51. Cooper and Barefoot report in their survey that a British insurance company “declared its intention to exclude benefit for any condition that was detected before the start of the policy.” *Id.* at 51.

130 Alfred G. Knudson, Jr., *Pathodemes: Heredity, Environment, and Populations of Disease Susceptibility*, in GENETICS OF CELLULAR, INDIVIDUAL, FAMILY, AND POPULATION VARIABILITY 165 (Charles F. Sing & Craig L. Hanis eds., 1993). Knudson notes that there are rare “individuals who have a genetic predisposition to cancer that is virtually independent of their environmental exposures,” *id.* at 166, and notes that certain other diseases are entirely genetically determined, *id.* at 168. For a discussion of how genetic factors might cause or contribute to the development of cancer, see YVONNE BASKIN, *THE GENE DOCTORS: MEDICAL GENETICS AT THE FRONTIER* 66-80 (1984).

131 *See generally* COMMITTEE ON ASSESSING GENETIC RISKS, INST. OF MED., *ASSESSING GENETIC RISKS: IMPLICATIONS FOR HEALTH AND SOCIAL POLICY* 87-89 (Lori B. Andrews et al. eds., 1994) [hereinafter *ASSESSING GENETIC RISKS*] (describing the nature of Huntington’s disease and ethical problems related to early testing); Gwen Terrenoire, *Huntington’s Disease and the Ethics of Genetic Prediction*, 18 J. MED. ETHICS 79, 79-85 (1992) (same); *see also* Cheryl L. Becker, Note, *Legal Implications of the G-8 Huntington’s Disease Genetic Marker*, 39 CASE W. RES. L. REV. 273, 301-302 (1988-89) (arguing that insurers should not have access to the Huntington’s disease genetic test results).

strikes individuals between the ages of thirty and fifty, causing spasmodic, involuntary movements, memory loss, personality changes, chronic depression, and eventually death.<sup>132</sup> In 1983, researchers discovered a genetic marker linked to the Huntington's disease gene.<sup>133</sup> In 1993, researchers discovered the gene itself.<sup>134</sup> This genotype is determinative: every individual who has the Huntington's disease gene will develop Huntington's disease.<sup>135</sup>

Most genotypes, however, are not determinative. A type of chronic spinal arthritis called "ankylosing spondylitis" provides an example. Ninety percent of those with this disease carry a certain genetic marker called "B27," but the vast majority of people with B27 (about nine percent of the population) do not develop the disease.<sup>136</sup> Thus, while the B27 genotype is correlated with a higher risk of developing ankylosing spondylitis, it does not guarantee the development of the disease. Cancer provides another example. Most cancers have been linked to genetic factors, but few cancers are purely genetic in origin.<sup>137</sup> One in two hundred people carries the gene for a certain type of colon cancer, for instance, but only about sixty-five percent of these people are likely to develop the cancer.<sup>138</sup> Heart disease, diabetes, and mental illness are other examples of diseases that are linked to both genes and environment.<sup>139</sup>

Because of these statistical links, insurers can use genetic factors to predict an insured's expected loss.<sup>140</sup> Genetic factors apply most obviously to classification for health insurance and life insurance, although they could be used for other types of insurance as well.<sup>141</sup>

<sup>132</sup> ASSESSING GENETIC RISKS, *supra* note 131, at 88.

<sup>133</sup> *Id.*

<sup>134</sup> Philip Elmer-Dewitt, *The Genetic Revolution*, TIME, Jan. 17, 1994, at 46, 49. The Huntington's disease gene was particularly difficult to identify because it is located in a "hard-to-reach" spot on Chromosome 4, and because both the normal gene and the Huntington's disease gene are "stuttering genes"—their DNA sequence contains a repeated "word" of nucleotides. *Id.* The normal gene contains this word from 11 to 34 times; the Huntington's disease gene contains 37 to 100 copies. *Id.* The symptoms of the disease may be more severe, and the onset of symptoms may be earlier, for those whose defective gene has 80-100 copies of the repeated "word." *Id.*

<sup>135</sup> Becker, *supra* note 131, at 273.

<sup>136</sup> BASKIN, *supra* note 130, at 49-51.

<sup>137</sup> See *supra* note 130.

<sup>138</sup> Elmer-Dewitt, *supra* note 134, at 51.

<sup>139</sup> See BASKIN, *supra* note 130, at 48-65.

<sup>140</sup> In fact, race and sex discrimination could both be considered special types of genetic discrimination, since race and sex are largely genetic characteristics. However, the term "genetic discrimination" is normally only used to refer to discrimination based on genotypes that are linked to *disease* phenotypes.

<sup>141</sup> For example, automobile insurers would want to know whether an insured was at risk of developing epilepsy, and disability insurers would want to know whether an insured had a predisposition to any disabilities.

Professor Mark Rothstein points out some of the other possible uses of genetic information outside of the insurance context:

Life and health insurers generally scrutinize possible insureds carefully in order to make underwriting, coverage, or rating decisions. A 1988 Office of Technology Assessment (OTA) study showed that “eight percent of individual [health insurance] applicants are rejected outright and another twenty-eight percent either pay more than the standard premium or receive substandard coverage that typically excludes certain illnesses or types of coverage.”<sup>142</sup> These decisions have been made in the past without the benefit of genetic testing results,<sup>143</sup> primarily because genetic tests were too expensive to be cost-effective; at \$450 to \$1000 per test, insurers were better off relying on the infor-

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What about a mortgage lender trying to decide whether to agree to loan hundreds of thousands of dollars for a thirty-year mortgage? Besides a termite inspection, might they also want a genetic inspection of the mortgagor? Or a medical school admissions committee or scholarship committee? There might be great reluctance to invest tens of thousands of dollars in an individual whose future health problems will prevent him or her from ever practicing medicine. Or a potential partner in a joint venture about to invest large sums of money? Partners often have life insurance policies for such contingencies; wouldn't they want to know about their partner's future health? And wouldn't an individual's future health also be relevant to an adoption agency, or a court in a child custody dispute, or medical personnel trying to decide which individuals qualify for organ transplants? In what election year will the public and press demand to learn the genetic profiles of presidential candidates?

Rothenstein, *supra* note 128, at 13-14. These types of genetic discrimination raise slightly different questions of fairness than the questions genetic discrimination in insurance pose, since they involve discrimination by non-insurers, and since they involve access to different sorts of societal goods.

<sup>142</sup> Robert Lowe, *Genetic Testing and Insurance: Apocalypse Now?*, 40 DRAKE L. REV. 507, 513 (1991) (citing findings from U.S. CONGRESS OFF. OF TECH. ASSESSMENT, MEDICAL TESTING AND HEALTH INSURANCE (1988) [hereinafter OTA STUDY]). The OTA STUDY contained the following table:

Risk Classifications by Commercial Health Insurers:  
Common Conditions Requiring a Higher Premium,  
Exclusion Waiver, or Denial

<i>Higher Premium</i>	<i>Exclusion Waiver</i>	<i>Denial</i>
Allergies	Cataract	AIDS
Asthma	Gallstones	Ulcerative colitis
Back strain	Fibroid tumor (uterus)	Cirrhosis of liver
Hypertension (controlled)	Hernia (hiatal/inguinal)	Diabetes mellitus
Arthritis	Migraine headaches	Leukemia
Gout	Pelvic inflammatory disease	Schizophrenia
Glaucoma	Chronic otitis media (recent)	Hypertension (uncontrolled)
Obesity	Spine/back disorders	Emphysema
Psychoneurosis (mild)	Hemorrhoids	Stroke
Kidney stones	Knee impairment	Obesity (severe)
Emphysema (mild to moderate)	Asthma	Angina (severe)
Alcoholism/drug use	Allergies	Coronary artery disease
Heart murmur	Varicose veins	Epilepsy
Peptic ulcer	Sinusitis (chronic or severe)	Lupus
Colitis	Fractures	Alcoholism/drug abuse

OTA STUDY, *supra*, at 60 (Table 2-5). “Higher premium” is a rating decision; “exclusion waiver” is a coverage decision; “denial” is an underwriting decision.

<sup>143</sup> OTA STUDY, *supra* note 142, at 141 (“At present, [only] a small proportion of applicants are tested.”).

mation on the insured's medical history questionnaire.<sup>144</sup> Soon, however, cost-effective genetic tests will allow insurers to make decisions about expected loss in a more fine-tuned way—instead of asking the insured whether any of the insured's relatives had Huntington's disease, ankylosing spondylitis, cancer, or other diseases with genetic components, insurers will measure the insured's risk directly.<sup>145</sup>

For a number of years, insurance industry observers have been predicting widespread use of genetic tests. A 1987 OTA survey of biotechnology companies found that nearly half of the companies expected insurers to regularly conduct genetic tests by the year 2000.<sup>146</sup> This estimate may be too conservative: evidence suggests that insurers may be able to use a wide variety of genetic tests even sooner. Insurance companies have made substantial investments to develop genetic tests for use in screening programs,<sup>147</sup> and some companies have already established laboratories that offer tests for Huntington's disease, cystic fibrosis, adult polycystic kidney disease, and hemophilia.<sup>148</sup> The market for genetic testing kits is likely to grow very rapidly.<sup>149</sup>

Some genetic discrimination is likely to occur in the workplace, because many employers act as insurers by offering group health insurance plans to their employees.<sup>150</sup> With group plans priced by the employer's claims history, employers have an incentive to try to hire only lower risk applicants.<sup>151</sup> This form of genetic discrimination could be significant because two-thirds of all people with health insurance obtain that insurance through their employers.<sup>152</sup> As health care

<sup>144</sup> T.H. Cushing, *Should There Be Genetic Testing in Insurance Risk Classification?*, 60 DEF. COUNS. J. 249, 252 (1993).

<sup>145</sup> See *ASSESSING GENETIC RISKS*, *supra* note 131, at 35.

<sup>146</sup> U.S. CONGRESS OFF. OF TECH. ASSESSMENT, *GENETIC MONITORING AND SCREENING IN THE WORKPLACE* (1990) (reporting results of the 1987 survey); see also Kathleen McAuliffe, *Predicting Diseases*, U.S. NEWS & WORLD REP., May 25, 1987, at 64-65 (reporting that Michael McGinnis, director of the United States Office of Disease Prevention and Health Promotion, predicts that most people will get genetic health profiles by the year 2000).

<sup>147</sup> Marc Lappé, *The Limits of Genetic Inquiry*, 17 HASTINGS GEN. REP. 5, 8 (Aug.-Sept. 1987). Lappé reports observations made by Neil Holtzman, a Johns Hopkins University geneticist who works for the Office of Technology Assessment. *Id.*

<sup>148</sup> Lowe, *supra* note 142, at 519 (citing an unpublished Staff Report from the Office of Technology, M. Hewitt & N. Holtzman, *The Commercial Development of Tests for Human Genetic Disorders* 1, 3 (Feb. 1988)).

<sup>149</sup> *Id.* at 520.

<sup>150</sup> *OTA STUDY*, *supra* note 142, at 43-44.

<sup>151</sup> See Lowe, *supra* note 142, at 513 ("Premium rates [for group insurance] are usually based on an evaluation of the risk of the entire group or on actual claims of the group in previous years."); *OTA STUDY*, *supra* note 142, at 5. Employers can practice this sort of cost containment without using genetic tests; for example, they may attempt to exclude applicants who smoke, are infected with HIV, or have high cholesterol levels. Rothstein, *supra* note 57, at 29.

<sup>152</sup> Rothstein, *supra* note 128, at 14.



costs rise, employers' efforts to screen potential employees will probably rise as well.<sup>153</sup>

Just as with race and sex discrimination, genetic discrimination in insurance has generated controversy. Here, however, an overwhelming majority has taken the same side: as a society we have reacted strongly, and negatively, against the use of genetic classifiers. Legal scholars caution that current laws are inadequate to prevent genetic discrimination by insurers and suggest regulations that would prevent this form of discrimination.<sup>154</sup> Newspaper and magazine articles reflect growing concern among the general public.<sup>155</sup> A 1985 Harris

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<sup>153</sup> The average cost per employee for employer health insurance rose from \$1724 in 1985 to \$3605 in 1991; insurance costs in general are rising 10% to 20% per year. Rothstein, *supra* note 128, at 14. If 5% of health insurance claimants account for about 50% of health care expenditures, *id.* at 14-15, then employers are highly motivated to identify and avoid hiring that 5%. A recent survey of 400 employers found that 15% of the employers planned by the year 2000 to check the genetic status of potential employees and their dependents before making employment offers. Shannon Brownlee & Joanne Silberner, *The Assurances of Genes*, U.S. NEWS & WORLD REP., July 23, 1990, at 57.

<sup>154</sup> See Becker, *supra* note 131 (arguing that insurers should not be permitted to test for the Huntington's disease gene); Lowe, *supra* note 142 (discussing the problems genetic testing poses for health insurance); Miller, *supra* note 17 (arguing that genetic discrimination in insurance should be banned); Rothstein, *supra* note 57 (criticizing the ADA for its lack of application to genetic discrimination); Kimberley Nobles, Note, *Birthright or Life Sentence: Controlling the Threat of Genetic Testing*, 65 S. CAL. L. REV. 2081 (1992) (suggesting regulations to control the use of genetic testing); Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J. L. & MED. 109 (1991) (discussing risks of genetic discrimination and the inability of current federal laws, including the ADA, to prevent those risks). *But cf.* Epstein, *supra* note 71 (arguing that efficient genetic discrimination ought to be permitted).

<sup>155</sup> See, e.g., Alex Barnum, *Down Side to Scientific Success: Insurers Use Genes to Deny Coverage*, S.F. CHRON., Dec. 2, 1992, at A1; Judy Berlfein, *Genetic Testing: Health Care Trap*, L.A. TIMES, Apr. 30, 1990, at B2; Sandra Blakeslee, *Gene Defects Make Insurance Difficult to Get: Wary Patients Avoid Tests*, MIAMI HERALD, Jan. 27, 1991, at 1H; Sandra Blakeslee, *Insurance Denied Some with Genetic Abnormalities*, STAR TRIB., Dec. 27, 1990, at 11A; Jim Detjen, *Will Genetics Revolution Mark Some as Victims? One Scientist Has Documented 50 Cases of Genetic Discrimination*, PHIL. INQ., Nov. 10, 1991, at A1; *Double Helix Battles*, WASH. POST, May 1, 1992, at A26 (editorial) ("The implications of this [genetic] information extend to questions about . . . genetic discrimination and even the potential ruin of the health insurance system."); *Experts Warn of Genetic Prejudice*, PLAIN DEALER, Oct. 19, 1991, at 8A; *Genetic Testing: Protecting the Rights of the Insured*, STAR TRIB., Feb. 14, 1995, at 12A (editorial); Debra Gordon, *Breast Cancer Activists Worry that a Bad Gene Will Cancel Insurance: They Want the 1996 Assembly to Enact a Shield Against Prejudice*, VIRGINIAN-PILOT, Jan. 19, 1995, at A1; Peter Gorner, Book Review, *Promise and Menace in the Gene-Mapping Project*, CHI. TRIB., July 1, 1992, at 3 (Tempo section); *Health Fairness, Insurance Sense*, PLAIN DEALER, Mar. 20, 1992, at 6C ("Soon, exploding knowledge about genetic disease markers will put the entire population at risk for health-insurance exclusions or tailoring that may leave many exposed to potentially crushing health-care costs."); *Health Report*, TIME, Nov. 15, 1993, at 33 ("The Bad News . . . Genetic screening has already cost some American workers their jobs and health insurance. . . . Unless laws are passed to protect the confidentiality of DNA-test results, the problem will only get worse as scientists discover genetic links to more and more diseases."); Daniel J. Kevles & Leroy Hood, *The Genetic Labyrinth*, L.A. TIMES, Nov. 8, 1992, at 28, 30 (Magazine) ("The torrent of new human genetic information will undoubtedly challenge many socioeconomic values and practices. . . . [M]edical or life insurers might ex-

poll found that seventy-five percent of respondents thought that insurers should not be able to use genetic tests to decide whom to insure,<sup>156</sup> while a more recent Time/CNN poll found that ninety percent of respondents held this opinion.<sup>157</sup>

When similar opposition to race discrimination in insurance developed, some courts interpreted their states' fair discrimination laws as prohibiting race discrimination.<sup>158</sup> But genetic discrimination has not yet been attacked through the courts, perhaps because the public reaction against genetic discrimination has grown so swiftly that it demands a swifter and broader response than state courts can provide. Recent decisions by courts rejecting challenges to AIDS discrimination suggest another possible explanation: the efficient discrimination perspective, rather than the anti-discrimination perspective, may have become entrenched as the dominant approach to interpreting state unfair discrimination laws.<sup>159</sup> In *Life Insurance Association v. Commissioner of Insurance*,<sup>160</sup> for example, the Massachusetts Supreme Court held that the Massachusetts insurance commissioner could not prevent insurance companies from testing for the AIDS virus in order to make underwriting decisions, stating that "insurers have the right to classify risks and to elect not to insure risks if the discrimination is fair."<sup>161</sup>

Some existing state statutes explicitly ban genetic discrimination in insurance—but only if there is no actuarial justification for the dis-

exploit [genetic information] to exclude [people] from coverage."); Robin Marantz-Henig, *Pitfalls of Genetic Screening: New Techniques Raise Difficult Ethical Questions*, WASH. POST, Jan. 29, 1991, at Z14; John Matthews, *Bias Based on Genetic Testing Targeted*, SACRAMENTO BEE, May 7, 1995, at A3; Susan Moffat, *Plan for DNA Database Assailed*, L.A. TIMES, Jan. 16, 1992, at A5 ("[P]rivacy advocates fear that [genetic information] could be used to exclude people from jobs or insurance coverage."); Richard Saltus, *Perils Amid Promises of Gene Research: Scientists Warn of Danger of Discrimination*, BOSTON GLOBE, Apr. 9, 1991, at A17; David Satterfield, *Genetic Test Question: What About Insurance?*, MIAMI HERALD, Mar. 1, 1993, at 1C; Donna Shaw, *Genetic Gains Raise Fear of a New Kind of Bias*, PHIL. INQ., Nov. 23, 1990, at A1; Larry Thompson, *The Price of Knowledge: Genetic Tests That Predict Dire Conditions Become a Two-Edged Sword*, WASH. POST, Oct. 10, 1989, at Z7.

<sup>156</sup> Joan O'C. Hamilton, *The Giant Strides in Spotting Genetic Disorders Early*, BUS. WK., Nov. 18, 1985, at 82, 85.

<sup>157</sup> Elmer-Dewitt, *supra* note 134, at 48.

<sup>158</sup> See *supra* notes 82-87 and accompanying text.

<sup>159</sup> See Miller, *supra* note 17, at 750 (arguing that "inertia exists. . . [because] judicial interpretations of the statutes permitting any reasonably-based classification . . . have been in existence for several decades. . . [and the] insurance industries vigorously defend [this] interpretation [of] unfair discrimination statutes.").

<sup>160</sup> 530 N.E.2d 168 (Mass. 1988).

<sup>161</sup> *Id.* at 171; see also *Health Ins. Ass'n v. Corcoran*, 531 N.Y.S.2d 456, 460 (Sup. Ct. 1988) (holding that the New York insurance commissioner could not prevent insurance companies from using AIDS tests in making insurance decisions because the New York fair discrimination law allows risk classification based on actuarial differences).

crimination.<sup>162</sup> These laws fail to settle the controversy over genetic discrimination, because the public has objected to *any* form of genetic discrimination, not simply non-actuarially justified discrimination. Federal statutes such as the Americans with Disabilities Act<sup>163</sup> permit genetic discrimination by insurers and do not explicitly forbid genetic discrimination by employers.<sup>164</sup> Thus, pressure has mounted on state legislatures to pass new, broad bans on genetic discrimination.

State legislatures are beginning to respond. Some have focused on genetic discrimination by employers. In 1989, for example, Oregon amended its unlawful employment practices statute to forbid employers from requiring applicants or employees to undergo "genetic screening."<sup>165</sup> Although the amendment did not define the term "genetic screening," it could be understood to prevent employers from

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<sup>162</sup> ARIZ. REV. STAT. ANN. § 20-448.E (1994); MONT. CODE ANN. § 33-18-206 (1994); *see also* CAL. INS. CODE §§ 10143-10144 (West 1993) (forbidding discrimination against carriers and against those physically impaired when such discrimination would not be actuarially justified).

Several states specifically forbid discrimination against those with sickle cell trait. *See, e.g.,* FLA. STAT. ANN. § 448.075 (West 1981) (employment discrimination); FLA. STAT. ANN. §§ 626.9706-9707 (West 1984) (insurance discrimination); LA. REV. STAT. ANN. § 22:652.1 (West 1995) (insurance discrimination); LA. REV. STAT. ANN. §§ 23:1001-1004 (West 1985) (employment discrimination); N.J. STAT. ANN. § 10:5-5(y) (West 1991) (employment discrimination); N.J. STAT. ANN. § 10:5-12(a) (West 1991) (insurance discrimination); N.C. GEN. STAT. § 58-58-25 (1991) (insurance discrimination); N.C. GEN. STAT. § 95-28.1 (1989) (employment discrimination). These laws, like the Maryland and California laws, reflect the efficient discrimination view, because sickle cell trait does not predict a higher risk of illness for the individual who has it. Individuals with sickle cell trait (those with only one copy of the sickle cell gene) are only carriers; they do not have, and will not develop, sickle cell disease. *See supra* note 125 and accompanying text (discussing genetic tests for carriers); BASKIN, *supra* note 130, at 129 (discussing the confusion that once existed regarding the difference between sickle cell anemia and sickle cell trait).

<sup>163</sup> 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

<sup>164</sup> *See* Gostin, *supra* note 154 (discussing the ADA and ERISA); Nobles, *supra* note 154, at 2105-17 (discussing Title VII, the Rehabilitation Act, the ADA, the Privacy Act, and the proposed Human Genome Privacy Act of 1990); Rothstein, *supra* note 57 (discussing the ADA); Rothstein, *supra* note 128, at 16-17 (discussing the ADA and ERISA).

The extent of ADA coverage for employees remains unclear. The statute prohibits discrimination against those who are "regarded as" having a disability, 42 U.S.C.A. § 12102(2)(C) (1995), but leaves as an open question whether a person with an asymptomatic genetic condition falls into this category. Originally the EEOC interpreted the statute to preclude coverage for individuals with a genetic predisposition to illness. *See* Rothstein, *supra* note 128, at 17 (citing Letter from Ronnie Blumenthal, Acting Director of Communications and Legislative Affairs, EEOC, to Rep. Bob Wise, Chairman, House Subcommittee on Government Information, Justice, and Agriculture (Nov. 22, 1991)); ASSESSING GENETIC RISKS, *supra* note 131, at 272 (discussing the EEOC's negative response to a request from an NIH-DOE Joint Working Group to broaden its rules to include protection for individuals who are susceptible to a genetic disorder). Recently, however, the EEOC reversed itself. In a new compliance manual issued March 15, 1995, the commission stated that the term "disability" includes a genetic predisposition to disease. *See* Warren E. Leary, *Using Gene Tests to Deny Jobs is Ruled Illegal*, N.Y. TIMES, Apr. 8, 1995, at A4. The EEOC's latest interpretation is currently the most authoritative, since no court has yet addressed this question.

<sup>165</sup> OR. REV. STAT. § 659.227 (1990).

rejecting genetically high risk applicants, an action employers might otherwise take to control their group health insurance costs. In 1991 the California legislature passed a broader prohibition on genetic discrimination in employment, although Governor Wilson vetoed this legislation.<sup>166</sup> In 1992 Wisconsin adopted a prohibition similar to California's, specifying that employers cannot require genetic testing or use information from genetic tests administered by others.<sup>167</sup> Several other states have followed suit.<sup>168</sup>

Legislatures have also addressed genetic discrimination by insurance companies. Arizona and Montana have passed bills forbidding insurance companies from denying life insurance based on a genetic condition.<sup>169</sup> The Ohio legislature considered a series of bills, ranging from a narrow ban on insurers' use of laboratory genetic tests to a broad ban on insurers' use of "hereditary" information (from genetic tests or from medical history questionnaires),<sup>170</sup> before finally passing a bill that prevents health insurers from using genetic test results in underwriting, coverage, or rating decisions.<sup>171</sup> Other states that have recently banned genetic discrimination by health insurers include California,<sup>172</sup> Colorado,<sup>173</sup> Georgia,<sup>174</sup> New Hampshire,<sup>175</sup> and Wisconsin.<sup>176</sup>

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<sup>166</sup> Cal. A.B. 1888 (1991). The law would have prohibited employment discrimination based on genetic characteristics, defined as "any scientifically or medically identifiable gene or chromosome, or alteration thereof, which is known to be a cause of a disease or disorder, or determined to be associated with a statistically increased risk of development of a disease or disorder, and which is asymptomatic of any disease or disorder." *Id.* The legislature is currently considering another bill to prohibit employers from practicing genetic discrimination. Cal. S.B. 970 (1995).

<sup>167</sup> WIS. STAT. ANN. § 111.372 (West 1994).

<sup>168</sup> Iowa, Florida, and Rhode Island have also passed bans on genetic discrimination in employment. See Christine Gorman, *The Doctor's Crystal Ball*, TIME, Apr. 10, 1995, at 60 (discussing Iowa and Rhode Island laws); Sandra Sugawara, *Biotech Debate: Who Will Read the Gene Maps?*, WASH. POST, July 5, 1992, at H1 (discussing Iowa and Florida laws). The Texas legislature is currently considering a bill that would ban genetic discrimination by both employers and insurers. 1995 Tex. H.B. 343; see also L.M. Sixel, *Employing Genetics in Hiring: Bill Would Curb Use in Testing*, HOUS. CHRON., Mar. 6, 1995, at 1 (Business) (discussing the Texas bill and similar legislation pending in 10 other states).

<sup>169</sup> Sugawara, *supra* note 168.

<sup>170</sup> See *Gene-Detection Blues: Healthy Persons with Unhealthy Profiles Face Bias*, PLAIN DEALER, Mar. 3, 1992, at 1D; Vindu P. Goel, *DNA Bill, DOA in '92, Has New Life*, PLAIN DEALER, Feb. 21, 1993, at 2E; Vindu P. Goel, *Gene Makeup Becomes Another Insurance Battle*, PLAIN DEALER, Apr. 14, 1993, at 5B; *Health Fairness, Insurance Sense*, PLAIN DEALER, Mar. 20, 1992, at 6C; Sugawara, *supra* note 168.

<sup>171</sup> OHIO REV. CODE ANN. § 3901.49 (Anderson 1994).

<sup>172</sup> CAL. INS. CODE § 10140 (Deering 1995).

<sup>173</sup> COLO. REV. STAT. § 10-3-1104.7 (1994) (covering health, group disability, and long-term care insurers).

<sup>174</sup> 1995 Ga. Laws 494.

<sup>175</sup> 1995 N.H. Laws 101.

<sup>176</sup> WIS. STAT. § 631.89 (1994).

A large number of other states are considering bans against genetic discrimination by insurers, with the majority now focusing on discrimination by health insurers.<sup>177</sup> Brenda Trolin of the National Conference of State Legislatures commented in 1992: "We anticipate even more activity in this area . . . . At least half the states are debating this issue."<sup>178</sup>

Like race and sex discrimination, genetic discrimination is seen as more problematic when it occurs at the underwriting stage. Media stories have focused on specific examples of individuals being denied insurance and on possible future discrimination in underwriting.<sup>179</sup> The effort by state legislatures to ban genetic discrimination by employers demonstrates a special concern with underwriting, because employers' group insurance plans do not classify employees for the purpose of rating and coverage decisions—once an applicant is hired or retained (a de facto underwriting decision), genetic discrimination ceases to be an issue. Legislators promoting anti-discrimination bills often base their arguments on the inequity of adverse underwriting decisions, stating, for example, that "there have been cases in Minnesota where people have been turned down for coverage based on genetic tests, and we want that to stop."<sup>180</sup> Sometimes the wording of the bill reflects this preoccupation with underwriting. For example, the Colorado statute forbids insurers to use the results of genetic tests "for any nontherapeutic purpose" (presumably including rating, coverage, and underwriting decisions) but then also specifically forbids the use of genetic test results "for any underwriting purpose."<sup>181</sup> Finally, states such as Arizona and Montana have passed laws specifically forbidding discrimination only with respect to underwriting.<sup>182</sup>

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<sup>177</sup> Bills are being considered in Florida, 1995 FL S.B. 2872; Hawaii, 1995 HI S.B. 299, 1995 HI S.B. 576, 1995 HI S.B. 1556; Indiana, 1995 IN S.B. 634; Kansas, 1995 KS H.B. 2251; Massachusetts, 1995 MA H.B. 4485; Minnesota, 1995 MN H.B. 259, 1995 MN 278, 1995 MN 754; New York, 1995 N.Y.S.B. 4607; Oregon, 1995 OR S.B. 276; Pennsylvania, 1995 PA H.B. 1662; and Texas, 1995 TX H.B. 343.

<sup>178</sup> Sugawara, *supra* note 168; see also Gorman, *supra* note 168, at 60 (discussing state efforts to ban genetic discrimination); Peter N. Spotts, *Ethics and the Law Try to Keep Pace with Genetic Testing*, CHRISTIAN SCI. MONITOR, Apr. 14, 1995, at A3 (same).

<sup>179</sup> See, e.g., *Health Report*, *supra* note 155 ("Genetic screening has already cost some American workers their . . . insurance. . . . Unless laws are passed . . . the problem will only get worse. . . .").

<sup>180</sup> Patricia Lopez Baden, *Health Care: Panel OKs Bill to Ban Insurers from Using Genetic Tests to Deny Coverage*, STAR TRIB., Mar. 30, 1995, at 2B (quoting the sponsor of the Minnesota bill). The sponsors of this bill argue that it is necessary "to stop insurers from screening out people who have not even been diagnosed with a disease." Brian Cox, *Minn. Debates Bill to Prohibit Genetic Testing*, NAT. UNDERWRITER, Mar. 20, 1995, at 24.

<sup>181</sup> COL. REV. STAT. § 10-3-1104.7(2)(b) (1994).

<sup>182</sup> ARIZ. REV. STAT. ANN. § 20-448(d) (1990); MONT. CODE ANN. § 33-18-206 (1993).

### III FAIRNESS THEORIES

If the laws on race, sex, and genetic discrimination are “the product of [our collective] efforts to achieve fundamental objectives,”<sup>183</sup> we ought to be able to explain what those “fundamental objectives” are and how they operate. They can be loosely described as “fairness”—but how does fairness account for the distinction between race and genetic discrimination on the one hand, and sex discrimination on the other? How does it account for the emphasis on discrimination in underwriting as opposed to coverage or rating? This Part criticizes the explanatory power of the two dominant perspectives on fairness in insurance discrimination, both of which are negative rights theories. It then proposes an alternative positive rights theory and argues that this positive rights theory wields more explanatory power than either of the negative rights theories.

#### A. The Negative Rights Theories

##### 1. *Efficient Discrimination and Anti-Discrimination*

The state “unfair discrimination” statutes described in Part I.B.3 raise, but do not settle, the question of what fairness means in the insurance classification context. This Note has labeled the two dominant perspectives on this question “efficient discrimination” and “anti-discrimination.”<sup>184</sup> According to the first perspective, “to discriminate fairly [is] to measure as accurately as is practicable the burden shifted to the insurance fund by the policy holder and to charge exactly for it, no more and no less.”<sup>185</sup> According to the second perspective, discrimination cannot be fair unless it is based on classifiers that are (a) causally connected to the risk measured, (b) controllable, and (c) not associated with historical or invidious discrimination.<sup>186</sup>

Both efficient discrimination and anti-discrimination are negative rights theories.<sup>187</sup> They apply to the means by which insurers make underwriting, coverage, or rating decisions, not to the results of those decisions. They do not demand that any particular applicant receive insurance, coverage for certain risks, or a certain rate. Rather, they demand that if an individual wishes to acquire insurance and is financially able to acquire it, then the insurer must not classify him or her in certain ways. From the efficient discrimination perspective, in-

<sup>183</sup> See *supra* notes 10-12 and accompanying text.

<sup>184</sup> The argument that these two perspectives are dominant is Wortham's. See Wortham, *supra* note 6, at 360. This Note uses the label “efficient discrimination” in place of “fair discrimination.” See *supra* note 7 and accompanying text.

<sup>185</sup> *Reverse Sex Discrimination*, *supra* note 100, at 105.

<sup>186</sup> See *supra* notes 14-15 and accompanying text.

<sup>187</sup> See *supra* notes 13-15 and accompanying text.

insureds have a right not to be classified for insurance purposes unless the classification corresponds to an accurate prediction of risk. From the anti-discrimination perspective, insureds have a right not to be classified for insurance purposes if the classification is based on unacceptable "suspect" classifiers.

Insurers and economists offer persuasive arguments in support of the efficient discrimination perspective.<sup>188</sup> Efficient discrimination means that classifiers accurately predict expected losses. Predictive accuracy has two components: (1) separation—the degree to which insureds in different risk classes have different expected losses,<sup>189</sup> and (2) reliability—the degree to which class membership is free of fraud and administrative error.<sup>190</sup> According to this perspective, a classification system that is maximally separated and maximally reliable is fair because it requires each insured to pay a premium that approximates as closely as possible his or her expected loss—"no more and no less."<sup>191</sup>

For example, suppose that statistics show a strong correlation between driver height and number of car accidents: people under 5'6" virtually never have accidents, while people over 5'6" have, on average, three accidents per year. Assuming that height is inexpensive to measure and difficult to fake, insurers will classify insureds by height. The two classes of insureds (short and tall) will be highly separated and highly reliable. Insurers will charge short people a lower premium than tall people for the same coverage. If insurers failed to use height as a classifier, short people could claim that the system was unfair to them: why (they would ask) should we *subsidize* tall people? By charging one premium equal to the average of tall and short people's risk, the system without height classifications would force short people to pay both for their own expected losses and for part of the expected losses of tall people.<sup>192</sup>

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<sup>188</sup> See *The Economics of Gender Discrimination*, *supra* note 100, at 493-505.

<sup>189</sup> ABRAHAM, *supra* note 7, at 69-71.

<sup>190</sup> *Id.* at 71.

<sup>191</sup> *Reverse Sex Discrimination*, *supra* note 100, at 105. This approach expresses fairness in terms of rating rather than underwriting or coverage. Promoters of the efficient discrimination view always use rating decisions for their examples. This may just be for the sake of expository convenience. Their analysis arguably holds for underwriting and coverage as well, especially since the three decisions are interrelated. See *supra* note 34. But efficient discrimination proponents' focus on rating may also stem from a desire to avoid questions about the fairness of excluding people from the insurance market altogether. See *infra* part III.B.

<sup>192</sup> Subsidies always exist in any insurance classification, because some insureds will suffer larger losses than other insureds, even where their expected losses are equal. "[T]he distinction between expected and random losses is central to the notion of efficient classification. . . . Individual insureds are assessed the risk of suffering expected losses and are charged accordingly; the risk of suffering random losses is distributed among all insureds." ABRAHAM, *supra* note 7, at 77. Thus, complaints about "subsidies" are actually complaints

Proponents of the anti-discrimination perspective put forth a different set of arguments.<sup>193</sup> They agree that insureds should pay only for their own expected losses; they do not argue for subsidization. However, they disagree with the efficient discrimination proponents about the type of factors that should play a role in the calculation of expected loss. Efficient discrimination requires the use of any classification which increases the separability and reliability of the system. Anti-discrimination demands that insurers use only factors that are (a) causally connected to the risk measured, (b) controllable, and (c) not associated with historical or invidious discrimination.<sup>194</sup>

Anti-discrimination proponents would likely take a different view of the auto insurance classification described above. Suppose that the best explanation for the height-accident correspondence is that cars are designed to fit short people, not tall people. In that case, height does not directly cause accidents; poorly designed cars cause accidents. Suppose also that height, an uncontrollable personal characteristic, had been the basis for extensive societal discrimination. Under these circumstances, the efficient discrimination analysis would remain the same; its proponents would still argue that height classifications must be used to avoid unfair subsidization of tall people's insurance costs.<sup>195</sup> Anti-discrimination proponents, on the other hand, would reject the use of height as a classifier, arguing that height is an unfair classifier because it is a noncausal, uncontrollable, suspect factor. With no other risk factors to rely on, anti-discrimination proponents would argue that insurers should group tall and short people into a single classification.<sup>196</sup>

According to the anti-discrimination view, including short and tall people in the same risk class would not result in subsidies.<sup>197</sup> Subsidies can be calculated only by comparing the expected losses of dif-

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that expected losses (or rather, losses that could have been expected) are being distributed as if they were random.

<sup>193</sup> See, e.g., *The Efficient Use of Group Averages as Nondiscrimination*, *supra* note 58.

<sup>194</sup> See ABRAHAM, *supra* note 7, at 69, 89-96. Controllability is really a subset of causality. Controllability is also linked to efficiency because classifications based on controllable factors allow people to minimize their insurance costs by minimizing their expected loss.

<sup>195</sup> Efficient discrimination proponents would argue that this classification is economically efficient. See ABRAHAM, *supra* note 7, at 77-78 (explaining that efficient classification systems may encourage allocation of an optimal amount of resources to loss prevention, since they allow insureds to compare loss prevention costs with the actual costs of insurance).

<sup>196</sup> Of course, insurers would be free to seek out other, acceptable risk factors such as driving record or car safety features, and to construct risk classifications based on these factors. In fact, increased efficiency may be a side effect of the anti-discrimination view, since it forces insurers to look for causal, controllable risk factors, which insureds seeking to minimize their insurance costs will then take steps to reduce.

<sup>197</sup> See ABRAHAM, *supra* note 7, at 76; *The Efficient Use of Group Averages as Nondiscrimination*, *supra* note 58, at 234 ("Race and sex cannot be used as proxies for some other variable—such as longevity—even if it is efficient to do so. . . . [b]ecause sex and race are



ferent members of the same risk class. By definition, if height is not an acceptable risk classifier, there can be no difference in the expected losses of tall and short people; thus, ignoring height does not mean that short people are subsidizing tall people. Unacceptable risk classifiers are irrelevant to the calculation of expected losses in much the same way that non-cost-effective risk classifiers<sup>198</sup> are irrelevant.<sup>199</sup> For example, it is possible that an expensive, in-depth psychological study of each insured could reliably predict each insured's risk of having a car accident. Efficient discrimination proponents would not demand that the study be used to classify insureds if the cost of the study was greater than the value of the classifications produced; in that case, use of the study results for classification would be unfair to all insureds, since it would benefit none of them. Anti-discrimination proponents would argue that the short drivers in the scenario described above have no more right to cry "unfair subsidization!" than the psychologically low-risk drivers: in neither case can insureds demand that insurers use "unfair" classifiers.

The efficient discrimination view rests on the intuitive unfairness of subsidization. However, it does not rely on intuition alone to define fairness; it also equates fairness with economic efficiency.<sup>200</sup> Charging insureds premiums that reflect their expected losses increases efficiency, because it discourages insureds from purchasing insurance when it would be cheaper to invest in loss prevention.<sup>201</sup> Efficiency gains occur even when the classifiers used are not within the insured's control: "The insured [in that case] still has the incentive to optimize his or her overall cost of protecting against risk, through safety expenditures or reductions in activity levels, so long as such expenditures produce greater protection than a similar investment in insurance."<sup>202</sup>

Anti-discrimination proponents challenge the equation of fairness with economic efficiency on a number of grounds. Regina Austin argues that insurance classification systems reinforce social

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immutable, irrelevant to distinguishing between otherwise identical individuals, and historically abused as classifiers . . .").

<sup>198</sup> Non-cost-effective classifiers are those classifiers which cost so much to measure that their use would not give the insurer a competitive advantage. See *supra* notes 34-39 and accompanying text (discussing how adverse selection and competition drive insurers to use all discoverable, cost-effective classifiers).

<sup>199</sup> Abraham describes situations in which insurers would choose not to use non-cost-effective classifiers. ABRAHAM, *supra* note 7, at 78 ("[I]t is a bit misleading to say that these situations involve subsidies since it would be inefficient to make the investment necessary to discover and eliminate them.").

<sup>200</sup> See Wortham, *supra* note 38, at 840 (noting that economic efficiency is a "dominant theme" underlying the efficient discrimination perspective).

<sup>201</sup> ABRAHAM, *supra* note 7, at 78.

<sup>202</sup> *Id.* at 80.

stratification.<sup>203</sup> Classifiers such as occupation, age, sex, marital status, student status, and territory correlate with one's position in society as well as one's expected loss.<sup>204</sup> By preferring certain occupations, ages, and so on, insurers reinforce social norms and hierarchies.<sup>205</sup> Guidelines written for underwriters provide evidence supporting Austin's claim. For example, one experienced underwriter suggests that married couples with stay-at-home wives are better risks for homeowners' insurance because in such households someone is more likely to be home to prevent burglaries.<sup>206</sup> However, Austin's complaint is not really distinguishable from the basic anti-discrimination argument. By objecting to the use of historically invidious classifiers, the anti-discrimination argument also objects to classifications that would reinforce social stratification and social injustice.

Leah Wortham argues that unregulated use of classifiers among insurers does not actually lead to economically efficient classification systems; market imperfections such as high transaction costs and imperfect information mean that competition fails to drive price to marginal cost.<sup>207</sup> Guidelines written for underwriters contribute to the suspicion shared by anti-discrimination proponents that underwriters' "actuarial facts" are really just subjective opinions.<sup>208</sup> One writer's comments on the negative implications of homosexuality are particularly revealing. He explains, "the principal reason underwriters considered sexual deviates as undesirable was that insurance acceptability was based on the norm; situations which were abnormal presented uncertainties which eroded the base of insurance predictability."<sup>209</sup>

However, neither of these concerns challenges the core of the efficient discrimination view. Taken together, insurance market failures and insurers' subjectivity may mean that classification systems will not reach the ideal of actuarially accurate premiums. But that does not mean that efficient discrimination is incoherent as a theory of fairness; it only means that truly efficient discrimination may be difficult to achieve.

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<sup>203</sup> See Austin, *supra* note 17, at 534 (observing that "insurance 'risk' classifications correlate with a fairly simplistic and static notion of social stratification").

<sup>204</sup> *Id.* at 534-45.

<sup>205</sup> *Id.* at 545.

<sup>206</sup> HOLTOM, *supra* note 26, at 31.

<sup>207</sup> Wortham, *supra* note 38; see also Wortham, *supra* note 6, at 381 ("[T]he illusion of a statistical, scientific system that is a model of fairness because each pays his own way[ ] is somewhat removed from reality.").

<sup>208</sup> See Austin, *supra* note 17, at 534 n.92 (arguing that " 'bias' plays a role in the classification process").

<sup>209</sup> HOLTOM, *supra* note 26, at 27.

2. *Initial Conflict—Why Ban Race Discrimination and Not Sex Discrimination?*

Given that efficient discrimination and anti-discrimination are both coherent theories of fairness, fair discrimination laws might reflect either view. The actual state of the law should demonstrate which of these theories we have adopted as a society, that is, it should reveal our collective theory of fairness. But current unfair discrimination laws do not lend themselves to such a simple interpretation because they generally distinguish between race and sex discrimination. Under efficient discrimination, both race and sex discrimination should be allowed because both race and sex are statistically correlated with risk and inexpensive to measure.<sup>210</sup> Under anti-discrimination, neither form of discrimination should be allowed because race and sex are both uncontrollable, historically invidious classifiers. Neither theory alone can explain why race discrimination is considered repugnant, while sex discrimination is so unremarkable that insurers include premium tables with separate “male” and “female” columns in their advertisements.<sup>211</sup>

Commentators on both sides of the debate have noted this inconsistency and have argued that the laws should be changed to eliminate it. Wortham and other anti-discrimination proponents argue that sex, like race, should be banned as a classifier.<sup>212</sup> Bailey, Benston, and other efficient discrimination proponents argue that race, like sex, should be a permissible classifier.<sup>213</sup>

3. *Proposal—Fairness is Determined by a Merger of the Two Dominant Perspectives*

There are many different ways to understand the apparent inconsistency between insurance discrimination laws and the two dominant

<sup>210</sup> See *supra* parts II.A, B.

<sup>211</sup> See, e.g., N.Y. TIMES, Mar. 8, 1994, at A16 (An advertisement from Savings Bank Life Insurance lists “sample low cost SBLI term insurance premiums” with separate male and female columns. At age 60, for example, the female premium for a \$100,000 policy is \$264, while the premium for males is \$449.).

<sup>212</sup> Jerry & Mansfield, *supra* note 79, at 333 (“[S]ociety should view gender as it now views race . . .”); *The Efficient Use of Group Averages as Nondiscrimination*, *supra* note 58, at 234 (“Race and sex cannot be used as proxies for some other variable—such as longevity—even if it is efficient to do so. . . [b]ecause sex and race are immutable, irrelevant to distinguishing between otherwise identical individuals, and historically abused as classifiers . . .”); Wortham, *supra* note 6, at 369 (“Sex should be treated like race . . .”).

<sup>213</sup> Bailey et al., *supra* note 4, at 793 n.54 (“This approach [banning race discrimination in insurance] can be criticized on the basis of statistics reflecting that black mortality experience is worse than that of whites. . . Racially blind underwriting may, then, be unfair discrimination.”); *Discrimination and Economic Efficiency*, *supra* note 100, at 278 (As long as invidious discrimination is not practiced, “the use of an employee’s race, sex, or age as a predictive variable would be no more or less unfair than use of that person’s educational credentials . . .”).

theories of fairness: perhaps we should not expect laws to reflect societal views on fairness, or perhaps the laws reflect varying degrees of political power, not varying principles.<sup>214</sup> Alternatively, the dominant theories—expressed by commentators involved in a highly polarized debate—may simply fail to capture a societal consensus that actually does exist.

The “real” theory of fairness—*i.e.*, the theory that reflects our societal consensus, as expressed through the fair discrimination laws—may be a nuanced combination, or merger, of the efficient discrimination and anti-discrimination theories. This would explain why both sides of the debate can argue so persuasively, yet can fail to present theories of fairness that match the fair discrimination laws. Here is an outline of a possible merged theory of fairness:

- (1) The use of a classifier is generally fair if the classifier is correlated with a risk factor, *i.e.*, if it helps to predict an insured’s expected loss.
- (2) Exception: A classifier with the following characteristics may *not* be used, even if it is correlated with a risk factor:
  - (a) the classifier is highly suspect, having been the basis for extensive societal discrimination, *and*
  - (b) the classifier does not seem to be causally connected to the risk factor.

Part (1) corresponds to the efficient discrimination perspective; this is the default in the merged theory. The exception in part (2) corresponds to the anti-discrimination perspective, although it is not identical to this perspective. First, contrary to the anti-discrimination view, the exception is concerned with the degree of suspectness, not simply whether a classifier is suspect. Second, the exception is not concerned with whether the classifier is immutable or controllable by the insured, but only with whether the classifier is causally connected to risk.

The latter distinction is subtle because control and causality are complex and related concepts.<sup>215</sup> We can probably agree that people do not control factors such as gender, while they do control risk factors such as smoking. Between these extremes, however, lie numerous other factors that are more difficult to characterize:<sup>216</sup> what if, for example, a person is a bad driver because his or her impoverished circumstances did not permit the normal training and practice? Whether a factor is controllable is not a factual question; it is a norma-

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<sup>214</sup> See *supra* notes 9-11 and accompanying text.

<sup>215</sup> See ABRAHAM, *supra* note 7, at 89 (noting that control and causality are at times, “conceptually distinct notions” and at others, conceptually indistinguishable).

<sup>216</sup> *Id.* at 90.

tive conclusion about personal responsibility.<sup>217</sup> This normative conclusion is not part of the merged theory.

The merged theory's reliance on causality could be just as problematic. Like control, causality is not a simple factual question to be measured by scientific instruments.<sup>218</sup> It is an extremely complex and little understood subject, in science as well as in law. To the extent that there is a statistical linkage between two things, we can assume that causation—of some sort—is involved as well. The problem with mere statistical linkage is that we do not know two facts: (i) the direction of the causation and (ii) the number of intervening or related factors.<sup>219</sup> Fact (ii) is the point at which causation theories become complex: why should we ever "privilege" one of a group of statistically linked factors? Ideology may affect our choices; for instance, do we want to hypothesize that women's biology causes differences in their visual-spatial abilities, or do we want to identify societal factors? The problem is more general than the question of nature versus nurture. Causality, like controllability, is a normative conclusion, because without a framework to guide us, we have no *a priori* reason to pick one factor as cause and the other as result.

However, causality can play a role in our society's theory of fairness regardless of whether it is real (in some objective sense) or only perceived, because we do share fairly consistent intuitions about causality. The merged theory recognizes classifiers as fair if they "seem grounded in a causal explanation."<sup>220</sup> Since the merged theory tries to capture our perceptions about fairness, it is acceptable for perceptions to play a role within that theory.

#### 4. *Application to Race and Sex Discrimination*

If the merged theory is an accurate description of our societal beliefs about fairness, it should distinguish between race and sex dis-

<sup>217</sup> *Id.*

<sup>218</sup> See generally CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 347-54 (1965) (discussing the nature of causation); KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 56-62 (1968) (same).

<sup>219</sup> The rooster example given earlier may clarify this point. The fact that roosters tend to crow at sunrise does not tell us whether the roosters' crowing causes the sunrise, or the sunrise causes the roosters' crowing. Furthermore, we do not know whether there exists some intervening factor, such as increased heat or light, which is the actual or direct cause of the roosters' crowing. In that case we might say that the sunrise resulted in a higher temperature or additional light, which then caused roosters to crow. Alternatively, a related factor may be the cause, either directly or indirectly through other intervening factors, of both the sunrise and the roosters' crowing. In that case, the statistical link between roosters' crowing and the sunrise implies the existence of causation (by the unknown related factor) without implying either that roosters cause the sun to rise or that the sun causes roosters to crow.

<sup>220</sup> Wortham, *supra* note 6, at 380 (emphasis added) (arguing that this is enough for legitimacy).

crimination in insurance. Both race and sex discrimination pass part (1) of the merged theory because they are both correlated to risk factors. Thus, if the merged theory is to explain the difference between them, it must distinguish them under the test in part (2).

Part (2)(a) of the merged theory, which asks whether the classification has been the basis for extensive societal discrimination, applies differently to race and sex. Although it is hard to quantify or compare the degree of discrimination suffered by different groups, in this society we have concluded that race discrimination has been more extensive, more harmful, and more invidious than sex discrimination.<sup>221</sup> The Supreme Court's application of different levels of scrutiny to claims of race and sex discrimination embody this conclusion. Justice Powell states the Court's view clearly in *Regents of the University of California v. Bakke*:<sup>222</sup> "[T]he perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. [This explains why] the Court has never viewed such classification as inherently suspect or as comparable to racial . . . classifications for the purpose of equal protection analysis."<sup>223</sup> Federal civil rights laws reflect the same conclusion, since they limit recovery by sex discrimination plaintiffs but not race discrimination plaintiffs.<sup>224</sup>

This difference alone could explain why race discrimination is banned while sex discrimination is allowed. But the two forms of discrimination also differ under part (2)(b) of the merged theory, which asks whether the classifier seems to be causally connected to the risk factor. Courts that have rejected race discrimination have reasoned that causality is required for fairness and that race does not cause the higher risks with which it is correlated. The Supreme Court of Wisconsin, for example, banned race discrimination in life insurance because it did not believe that race causes the mortality differences between blacks and whites.<sup>225</sup>

Other courts have rejected sex discrimination because they believe that sex is not the cause of higher risk. In *Hartford Accident &*

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<sup>221</sup> Some feminists might well disagree, since sex discrimination has certainly been extensive, harmful, and invidious; they might also think that comparison of suffering is not possible, even if it were relevant. But these arguments would miss the point, because this Part is not exploring whether the merged theory of fairness reflects everyone's views, but only whether it reflects the majority or collective view.

<sup>222</sup> 438 U.S. 265 (1978).

<sup>223</sup> *Id.* at 303; see also Freed & Polsby, *supra* note 100, at 615-17 (arguing that race and sex discrimination should be treated differently because they arose in different historical and political contexts).

<sup>224</sup> Compare Civil Rights Act of 1991, § 102(b)(3) (imposing a ceiling on damages recovered under Title VII) with 42 U.S.C. 1981 (1988) (no ceiling for damages recovered under the Civil Rights Act of 1866).

<sup>225</sup> *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953).

*Indemnity Co. v. Insurance Commissioner*,<sup>226</sup> for example, the Pennsylvania Supreme Court upheld the state insurance commissioner's ban on sex-based automobile insurance rates. The court stated that "public policy considerations require more adequate justification for rating factors than simple statistical correlation with loss; . . . criteria such as causality [should also be considered] in judging the reasonableness of a classification system."<sup>227</sup> Elaborating in a concurrence, Justice Hutchinson concluded that

Absent at least a causal relation between sex and accident incidence a difference in auto insurance rates between men and women is plainly an unfair discrimination based on sex. No causal connection is shown on this record. . . . [The] correlation simply provides a convenient measuring rod for setting rate differentials occasioned by other factors not so easily identified . . . .<sup>228</sup>

*Hartford's* holding is limited to automobile insurance. This narrow holding would be compatible with the merged theory of fairness if the court believed that the differing biology of men and women does cause other risk differences, such as the difference in mortality rate. The distinction is plausible because physical factors do seem to be more directly connected to mortality than to automobile accident incidence; societal differences may well have a larger impact on the latter. Thus, the *Hartford* court's narrow ban of sex discrimination in automobile insurance provides further evidence that the merged theory accurately captures our collective view of fairness.<sup>229</sup>

Some commentators have agreed with the courts that race and sex discrimination can be distinguished on the basis of causality. In 1961, for example, the noted insurance scholar Spencer Kimball said that "a sound underwriting judgment" could sometimes be of "questionable validity":<sup>230</sup>

Not all categories for which considerable statistical evidence can be developed are in fact sound, since the defining characteristics chosen may have only a partial correspondence with the true causal factors. For example, Negroes have often been "rated up" in life insurance, based on the undeniable fact that mortality experience for *all* Negroes is less favorable than experience for *all* whites. It requires little sophistication to appreciate the danger in using these categories, for such factors as a less favorable public health environment may well bias the statistics.<sup>231</sup>

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<sup>226</sup> 482 A.2d 542 (Pa. 1984).

<sup>227</sup> *Id.* at 548.

<sup>228</sup> *Id.* at 550.

<sup>229</sup> See *supra* note 107 for Abraham and Wortham's alternative explanations of the narrow bans on sex discrimination in automobile insurance.

<sup>230</sup> Kimball, *supra* note 32, at 496-97.

<sup>231</sup> *Id.* at 496.

Eighteen years later, Kimball was still convinced that race and sex discrimination should be distinguished on the basis of causality. He argued in a 1979 article that although "race and sex are alike in some ways, they are very different in others . . . . Race is only an inaccurate surrogate for the true factors, and has no demonstrable effect in itself. . . . For sex, however, there seems to be clear genetic or biological differences in mortality . . . ." <sup>232</sup>

Insurers have also argued for the merged theory of fairness. One insurance association explained in 1974 that the distinction between race and sex discrimination is appropriate because "racial differences in claim costs are actually a reflection of socio-economic differences, whereas gender differences cut across socio-economic classes." <sup>233</sup> In response to pressure from anti-discrimination proponents in the early 1980s, insurers "respond[ed] by saying that race and religion, in fact, are proxies. Blacks do not have shorter life expectancies . . . because they are black. Shorter life expectancy is associated with poverty, and proportionately more blacks than whites are poor." <sup>234</sup>

According to the merged theory of fairness, we find the use of a classifier fair if it is correlated with a risk factor, unless the classifier is highly suspect and seems causally unrelated to the risk factor. This theory can account for the distinction between race and sex discrimination in state unfair discrimination laws because although both race and sex are correlated with risk factors, race is considered more invidious and seems less causally related to risk factors. <sup>235</sup> The narrow bans on sex discrimination in automobile insurance provide further support for this explanation, because legislatures have imposed such bans in response to the suspicion that sex differences, while they may cause differences in mortality, do not directly cause differences in accident incidence.

<sup>232</sup> *Reverse Sex Discrimination*, *supra* note 100, at 111-13.

<sup>233</sup> Sydlaske, *supra* note 99, at 1391 (citing statements made by life insurance association to the New York Assembly Standing Committee on Insurance, Mar. 6, 1974).

<sup>234</sup> CADDY, *supra* note 101, at 105.

<sup>235</sup> While the arguments of some commentators might seem to undermine the merged theory's explanatory value, they do not undermine the theory's explanatory value very much. Wortham argues that sex is not a good predictor of mortality because the relationship between sex and mortality has changed over time. Wortham, *supra* note 6, at 374 n.126. Brilmayer also argues that sex is not as good a predictor as others seem to think it is. *The Efficient Use of Group Averages as Nondiscrimination*, *supra* note 58, at 236, 239-47. These arguments are hotly contested. See, e.g. *Discrimination and Economic Efficiency*, *supra* note 100 (Benston's second response to Brilmayer et al.'s argument). But even if it could be proven that sex is no more causal than race, this would not necessarily undermine the merged theory: what is important is what people *think* is true, not what is true.



5. *Problem—The Merged Theory Cannot Account for Genetic Discrimination Bans*

If race and sex discrimination were the only forms of discrimination at issue, it would be reasonable to assume that the merged theory represents our societal consensus on fairness. However, the merged theory does not explain the bans on genetic discrimination. In fact, the merged theory predicts just the opposite public reaction to genetic discrimination than that which has occurred.

Public outcry over genetic discrimination has invoked the rhetoric of anti-discrimination: ninety percent of Americans now think that genetic discrimination is unfair<sup>236</sup> because “innate, unalterable differences should not be the basis for [insurance] discrimination,”<sup>237</sup> and editorials discussing new legislation congratulate the sponsors for “rightly view[ing] the anti-genetic-bias requirement as a matter of basic equity.”<sup>238</sup> By contrast, a recent OTA survey found that “[i]nsurers generally believed that it was fair for them to use genetic tests to identify those at increased risk of disease [because] genetic information is not viewed as a special type of information. What seems important to insurers when making insurability and rating decisions is the particular condition, not that the condition is genetically based.”<sup>239</sup> Insurers believe that they should be able to classify applicants based on their genetic risk, like any other risk factor; this, they argue, is fair discrimination.<sup>240</sup> Thus far, legislators have been listening more closely to the public outcry against genetic discrimination than to the insurance lobby.<sup>241</sup>

In order to account for this outcome, the merged theory would need to find genetic discrimination unfair. Genetic discrimination, like race and sex discrimination, does not fail part (1) of the merged theory<sup>242</sup> because genetic factors are correlated with greater risk. Genetic discrimination actually passes part (1) more easily than race or sex discrimination because the statistical correlation between genes and disease can be very strong—up to 100%—and because correlations can be pinpointed with great certainty.<sup>243</sup>

Thus, if the merged theory has any explanatory power, genetic discrimination must fail part (2) of the merged theory. But in fact genetic discrimination passes parts (2) (a) and (2) (b) more easily than

<sup>236</sup> See Elmer-Dewitt, *supra* note 134, at 48 (citing 1994 TIME/CNN poll results).

<sup>237</sup> Lowe, *supra* note 142, at 510 (citing results from a 1989 insurance industry study of public attitudes about genetic discrimination).

<sup>238</sup> *Health Fairness, Insurance Sense*, *supra* note 155.

<sup>239</sup> ASSESSING GENETIC RISKS, *supra* note 131, at 269-70.

<sup>240</sup> See *id.* (discussing insurer reactions); Kevles & Hood, *supra* note 155 (same).

<sup>241</sup> See *supra* part II.C (discussing legislation).

<sup>242</sup> See *supra* part III.A.3.

<sup>243</sup> See *supra* notes 119-39 and accompanying text.

either race or sex discrimination. Genetic factors could not be the basis for invidious historical discrimination under part (2) (a), as race has been, because the first gene was identified only about twenty years ago.<sup>244</sup>

Of course, scientists and the general public have understood for many years that disease can be inherited through some mechanism. But a susceptibility to inherited disease is not the factor at issue in the fairness debate. The public outcry has not been against classifying individuals based on their general susceptibility to inherited illness, as determined through a family medical history, but rather against classifying individuals based on the results of a laboratory genetic test.<sup>245</sup> The state laws reflect this specific concern by banning insurers' use of genetic tests while continuing to permit the use of family medical histories.<sup>246</sup> If a susceptibility to inherited disease were the factor at issue, it might be reasonable to conclude that it is seen as highly suspect<sup>247</sup> (although some might question why it is seen as more suspect than sex). But genetic factors—the factors at issue in the fairness debate—cannot possibly be “highly suspect” classifiers, because it is only very recently that we have been able to classify people by their genes.

Genetic factors pass part (2) (b) of the merged theory just as easily, because they are definitely causally connected to the risk factor (disease). In this context we do not need intuition to determine the causal connection, because we know the basic mechanism: faulty genes make faulty proteins, which result in a disease or heightened susceptibility to a disease.<sup>248</sup>

Despite this failure to explain genetic discrimination bans, the merged theory might still have some explanatory value. Although the merged theory finds that genetic discrimination is *more* fair than either race or sex discrimination, there may be other reasons for rejecting genetic discrimination which override this result. In fact, a

<sup>244</sup> See *supra* note 120 and accompanying text.

<sup>245</sup> See *supra* notes 155-57 and accompanying text.

<sup>246</sup> See *supra* notes 165-77 and accompanying text. The Ohio law is particularly instructive in this context. Although the legislature considered a broad ban on insurers' use of “hereditary” information (from genetic tests or from medical history questionnaires), the law the legislature actually passed, like the laws in other states, only bans the use of genetic test results. See *supra* notes 170-71.

<sup>247</sup> See, as an example of historical discrimination against those with inherited disease, *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.) (upholding constitutionality of enforced sterilization scheme with the comment that “[t]hree generations of imbeciles is enough”).

<sup>248</sup> See generally BASKIN, *supra* note 130, at 48-80 (describing the connections between genes and disease); BILLINGS, *supra* note 113, at 39-75 (describing basic research into gene functions).

number of possible reasons do exist. However, none of them is strong enough to explain why we consider genetic discrimination unfair.

One possibility is that the bans are designed to restrain insurers who might react irrationally to genetic information. The gene researchers, at least, do not seem to have much confidence in insurers' proper use of genetic information.<sup>249</sup> Insurers may not deserve much confidence, given that they have reacted irrationally in the past: insurers have been known to deny coverage to an individual because he or she carries a single copy of the gene for sickle cell anemia or Gaucher disease, even though such a carrier has zero risk of developing these diseases.<sup>250</sup> But concern with irrational behavior cannot explain the genetic discrimination bans that have been under consideration, because these bans do not merely enforce "rational" or efficient discrimination—they ban discrimination even when a genetic factor is correlated with a higher risk of disease.

Another possibility is that genetic discrimination is being banned because practicing genetic discrimination could be an indirect way to practice race discrimination, which the merged theory of fairness forbids.<sup>251</sup> Certain genetic diseases such as sickle cell anemia and Tay Sachs disease do occur largely in one racial group.<sup>252</sup> However, this concern would not explain why legislatures are passing broad bans, not limited to "suspect diseases."

A third possibility is that the bans are meant to prevent health insurers from excessive profit-taking. Health insurers claim that bans on genetic discrimination will hurt them, because such bans will lead to an adverse selection spiral.<sup>253</sup> But this is unlikely to happen, because low risk insureds cannot leave the insurance market without forgoing health care.<sup>254</sup> The insurers' real desire may be short term profit-taking: if they can cut the highest risk people without lowering rates, they will make a much larger profit (since five percent of health insureds account for approximately fifty percent of costs<sup>255</sup>). Insurers could continue to make this excessive profit until competition with other insurers drove rates down to marginal cost again. This process might take quite a while given existing market failures.<sup>256</sup>

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<sup>249</sup> See Dennis S. Karjala, *A Legal Research Agenda for the Human Genome Initiative*, 32 JURIMETRICS J. 121, 173 (1992) (expressing doubts about insurers' ability to use genetic information correctly).

<sup>250</sup> Gostin, *supra* note 154, at 118.

<sup>251</sup> *Id.* at 110-12.

<sup>252</sup> *Id.* at 111.

<sup>253</sup> See *supra* part I.A (discussing how adverse selection can hurt employers).

<sup>254</sup> See Lowe, *supra* note 142, at 520.

<sup>255</sup> Rothstein, *supra* note 128, at 14-15.

<sup>256</sup> See Wortham, *supra* note 38, at 859-84 (describing market failures).

Although this possibility is significant, it also fails to explain the public and legislative reaction to genetic discrimination. If excessive profit taking were the real concern, one would expect that the debate over genetic discrimination would focus on this problem. Instead, the concerned public and legislators promoting genetic discrimination bans never mention insurers' profits, only the inequity to individuals of genetic classification. A related possibility, that genetic discrimination bans are designed to avoid the externalities caused when people do not have health insurance,<sup>257</sup> is similarly unsupported by the public outcry. Neither insurer profits nor externalities explain the vehemence or focus of the attacks on genetic discrimination.

## 6. Summary

Negative rights theories cannot explain current insurance discrimination laws. Because the efficient discrimination theory and the anti-discrimination theory explain fairness by defining "fair classifiers," they cannot explain the focus in unfair discrimination laws on underwriting; according to the negative rights theories, it is only the nature of the classifier that counts, not the purpose for which it is used.

Furthermore, negative rights theories cannot explain why current unfair discrimination laws distinguish between race and sex discrimination. Efficient discrimination would allow both race and sex classifiers, and anti-discrimination would forbid both. A merged theory can account for the distinction between race and sex discrimination, but it fails to explain why genetic discrimination is unfair. In fact, the merged theory finds genetic factors to be *ideal* classifiers—quite the opposite of our collective judgment. Although additional reasons for banning genetic discrimination exist, none of them is strong enough to overcome the merged theory's acceptance of genetic discrimination.

## B. A Positive Rights Theory of Fair Discrimination

### 1. From Negative Rights to Positive Rights

Negative rights, which "require nothing of the state or other citizens except forbearance,"<sup>258</sup> pervade our culture. One scholar has noted approvingly that these are "Bill of Rights values,"<sup>259</sup> and the

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<sup>257</sup> See *id.* at 875.

<sup>258</sup> Charles M. Freeland, Note, *The Political Process as Final Solution*, 68 *IND. L.J.* 525, 535 (1993).

<sup>259</sup> *Id.*

courts have generally agreed that the Constitution guarantees only negative rights.<sup>260</sup>

The dominance of negative rights may be diminishing, however. Several authors have recently argued that recognition of positive rights by international law will lead to recognition of positive rights within the United States.<sup>261</sup> There is already widespread public support for entitlement programs such as Medicare, Food Stamps, and Social Security.<sup>262</sup> Commentators argue that we should recognize a constitutional right to equality of educational opportunity<sup>263</sup> and a right to minimal subsistence.<sup>264</sup> Current insurance discrimination law provides evidence that we are beginning to accept a positive right to certain other social goods as well.

## 2. *Proposal: A Positive Rights Theory of Fairness*

More than thirty years ago Spencer Kimball noted that the purpose of insurance regulation seemed to be shifting toward socialization of risk:

If socialization of risk is viewed as an objective of insurance regulation, it at once alters the basic focus of the enterprise from one essentially private (albeit subject to control in the public interest) to one which is essentially public, permitted to exist in private form only to the extent that it fulfills society's demands. Despite all our predilections to the contrary, it seems a fact that the basic focus of the enterprise *is* changing—subtly and gradually, but inexorably—and the new and pervasive demands of society are becoming more influential.<sup>265</sup>

Kimball offered the adoption of mandatory automobile insurance, and the subsequent requirement that insurers share the burden of insuring high risk drivers as part of an assigned risk plan, as an exam-

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<sup>260</sup> See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) (Rehnquist, C.J.) (“[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) (“[T]he Constitution is a charter of negative rather than positive liberties.”), *cert. denied*, 465 U.S. 1049 (1984).

<sup>261</sup> Gerard Quinn, *Civil Commitment and the Right to Treatment Under the European Convention on Human Rights*, 5 HARV. HUM. RTS. J. 1 (1992); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HASTINGS L.J. 79 (1992).

<sup>262</sup> See THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 47, 48 (1990) (citing surveys).

<sup>263</sup> Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992); Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599 (1992).

<sup>264</sup> Judges, *supra* note 261, at 660.

<sup>265</sup> Kimball, *supra* note 32, at 513.

ple of this shift.<sup>266</sup> In 1977 the Michigan Commissioner of Insurance issued a report that defined certain types of insurance, including automobile insurance, as "essential"<sup>267</sup> and then recognized "a guaranteed right to essential insurance."<sup>268</sup>

Despite these early voices acknowledging the possibility of a right to insurance, Leah Wortham argued in 1986 that the debate over classification lacked "an appreciation that insurance is a necessity for most Americans."<sup>269</sup> In other words, the debate over classification has ignored the possibility of a positive right to insurance. This should not be surprising. The "overlooked perspective"<sup>270</sup> is *necessarily* overlooked under the two "dominant perspectives"<sup>271</sup>—efficient discrimination and anti-discrimination—because they are both negative rights theories.

However, as Part III.A demonstrated, the label "dominant" might be misleading here. Neither efficient discrimination, anti-discrimination, nor a merger of the two can account for the current unfair discrimination laws. Negative rights theories are dominant, but only as rhetoric. The positive rights theory is not overlooked; it is simply underacknowledged. The "real" theory of fairness in insurance classification, the one which captures our collective judgments about the fairness of race, sex, and genetic discrimination, does not overlook the fact that certain forms of insurance are essential. Under the "real" theory, a positive rights theory, this fact is central.

Positive rights flow from a theory of distributive justice. It is outside the scope of this Note to propose such a theory. For the purpose of the Note, it is only necessary to point out that coherent theories of distributive justice are possible. Norman Daniels's theory serves as an example. He has outlined a distributive justice theory that includes a positive right to health care.<sup>272</sup> Justice exists, according to Daniels, if everyone has access to enough health care to allow them "normal species functioning."<sup>273</sup> In economic terms, health care is an "opportunity good."<sup>274</sup> Under Daniels's theory, it is a moral right as

<sup>266</sup> *Id.* at 514.

<sup>267</sup> INSURANCE BUREAU, MICH. DEPT. OF COMMERCE, *ESSENTIAL INSURANCE IN MICHIGAN: AN AVOIDABLE CRISIS* 3-4 (1977).

<sup>268</sup> *Id.* at 56.

<sup>269</sup> Wortham, *supra* note 6, at 350.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFF. 146, 160-74 (1981) [hereinafter *Health Care Needs and Distributive Justice*]; see also Allen E. Buchanan, *The Right to a Minimum of Decent Health Care*, 13 PHIL. & PUB. AFF. 55, 62-66 (1984) (disputing certain points in Daniels' theory); Norman Daniels, *Fair Equality of Opportunity and Decent Minimums: A Reply to Buchanan*, 14 PHIL. & PUB. AFF. 106 (1985) (defending the theory).

<sup>273</sup> *Health Care Needs and Distributive Justice*, *supra* note 272, at 160.

<sup>274</sup> Karjala, *supra* note 249, at 173.

well because a positive right to health care is used to guarantee equality of opportunity.<sup>275</sup>

This positive rights theory—that people have a right to certain forms of insurance or to the benefits that insurance provides—need not replace the merged theory described in Part III.A. Rather, it could add an initial step to the merged theory:

- (0) An insurance classification system (in its entirety) is not fair if it results in the denial of a positive right, including, for example, a positive right to health care.
- (1) Otherwise, the use of a classifier is fair if the classifier is correlated with a risk factor, *i.e.*, if it helps to predict an insured's expected loss.
- (2) Exception: if a classifier has the following characteristics, it may *not* be used, even if it is correlated with a risk factor:
  - (a) the classifier is highly suspect, having been the basis for extensive societal discrimination, *and*
  - (b) the classifier does not seem to be causally connected to the risk factor.

This theory combines both positive and negative rights. To distinguish it from the merged theory presented in Part III.A.3, it can be labeled the "mixed" theory.

### 3. *Application to Race, Sex, and Genetic Discrimination*

The mixed theory can give a better account of current unfair discrimination laws than any of the negative rights theories—efficient discrimination, anti-discrimination, or a merger of the two—provide. It can explain, not only the overall pattern of unfair discrimination laws, but also the details that the negative rights theories have to label "oddities."<sup>276</sup>

The mixed theory, like the merged theory, would forbid race discrimination under the anti-discrimination exception in part (2). But the mixed theory can also explain why a ban on race classifications is not sufficient: it explains why the federal government enacted the Fair Access to Insurance Requirements (FAIR) program in response insurers' redlining practice<sup>277</sup> (permitted under the merged theory because redlining does not depend on racial classifiers). If we believe that individuals have a positive, moral right to have access to property or business insurance in order to participate fully in society, we cannot consider insurance practices fair when they deny individuals this right.

The mixed theory also accounts for the laws concerning sex discrimination in insurance. Sex discrimination in rating passes part (0)

<sup>275</sup> *Health Care Needs and Distributive Justice*, *supra* note 272, at 160.

<sup>276</sup> See *supra* note 112 and accompanying text.

<sup>277</sup> See *supra* note 92 and accompanying text.

of the mixed theory because differential rates have not excluded women from the insurance market altogether. Where sex discrimination in coverage or underwriting has excluded women from the insurance market, and thus from some essential societal benefits, states have forbidden sex discrimination.<sup>278</sup>

Finally, the mixed theory accounts for the greatest puzzle in insurance discrimination laws thus far: the rush to ban genetic discrimination, particularly in the health insurance context. Genetic discrimination strikes us as unfair, not because there is anything illegitimate about genetic classification per se, but because an insurance system that uses genetic classifications can deny individuals access to health care—something to which they have a positive right. Such discrimination fails part (0) of the mixed theory. When genetic classification is used to deny access to less essential forms of insurance, such as life insurance, we do not find it as offensive—this type of genetic classification passes parts (0), (1), and (2) of the mixed theory. The greater emphasis on genetic discrimination in underwriting also follows from part (0) of the mixed theory, since underwriting decisions are more likely than coverage or rating decisions to deny access to a positive right.

#### IV IMPLICATIONS

The mixed positive rights/negative rights theory can explain why states are rushing to ban genetic discrimination. But if we rely on this theory to explain why we choose to ban genetic discrimination, then we must acknowledge that banning genetic discrimination in insurance is not enough. Recent census data showed that 37 million people in the United States have no access to health care, and that an additional 189 million have only limited access.<sup>279</sup> Because banning genetic discrimination in insurance does nothing to aid these people, it is hypocritical to argue that a collective belief in a positive right to health care requires us to ban genetic discrimination.

The word "hypocrisy" is appropriate here because the bans on genetic discrimination are not merely underinclusive. They are underinclusive in a particular direction: bans on genetic discrimination provide a benefit to those members of society who are in a position to make their concerns heard by the media and state legislatures, while failing to provide a benefit to the more invisible members of society. In effect, the proponents of genetic discrimination bans are arguing,

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<sup>278</sup> See *supra* notes 110-12 and accompanying text (Sex discrimination lawsuits have focused on underwriting and coverage rather than rating; state laws and regulations likewise restrict the use of sex discrimination in underwriting and coverage but not rating.).

<sup>279</sup> OTA STUDY, *supra* note 142, at 161 (citing Census Bureau figures).



“there exists a positive right to health care, but it applies only to me (and people like me).” The use of negative rights rhetoric both reflects and reinforces this attitude, while disguising its intrinsic hypocrisy.

The use of negative rights rhetoric leads to a more immediate failure as well: the narrow bans on genetic discrimination inspired by negative rights rhetoric will not even help many of the people they were designed to assist.<sup>280</sup> Because the Employee Retirement Income Security Act of 1974 (ERISA)<sup>281</sup> exempts self-insured plans from state regulation, sixty percent of all covered workers are currently under self-insurance plans, and increasing numbers of employers are self-insuring.<sup>282</sup> Thus, the genetic discrimination bans are misguided even at their core: a state ban on genetic discrimination in insurance cannot hope to protect the large percentage of individuals who receive insurance from a provider whom the state does not regulate.<sup>283</sup>

Laws banning genetic discrimination simply fail to make the insurance system more fair. If we limit ourselves to negative rights theories of fairness, we must acknowledge that genetic factors are acceptable—even ideal—classifiers. If we rely instead on a positive rights theory to explain why we wish to ban genetic discrimination, then we must acknowledge that banning genetic discrimination in insurance is an inadequate way to create a fairer society. To avoid hypocrisy under a positive rights theory of fairness, we must ensure that the benefits of insurance are extended to all.

### CONCLUSION

As Lucinda Finley noted in a similar context, “[t]he limits of our reform imaginations are usually defined by the search to extend more rights to more people. As long as the concept of rights remains based on the value of noninterference . . . we can travel only so far in re-

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<sup>280</sup> See Myk Cherskou, *Fighting Genetic Discrimination: Lawyer, denied insurance on basis of father's disease, backs protective laws*, ABA J., June 1992, at 38 (complaining about genetic discrimination yet arguing for a narrow ban that would not have protected her).

<sup>281</sup> 29 U.S.C. §§ 1001-1145 (Supp. V 1993).

<sup>282</sup> See Miller, *supra* note 17, at 744.

<sup>283</sup> Kenneth Abraham also notes that narrow bans on certain types of classifiers seem to have more appeal than their actual effectiveness merits. He suggests that “[t]hese ad hoc methods of risk distribution may be inefficient, subject to circumvention by the market, and only partially effective. But they have the virtue, at least for proponents of risk-redistribution, of being *possible to implement*. More than anything else, this may explain their attractiveness.” ABRAHAM, *supra* note 7, at 100 (emphasis added). However, if we consider carefully just how ineffective genetic discrimination bans are, they may become less attractive to us. Once we acknowledge the true hypocrisy and ineffectiveness of banning genetic discrimination, we may become willing to attempt a more difficult but effective solution: designing a national health care system.

structuring institutions."<sup>284</sup> In the context of insurance discrimination, our imagination has been constrained by our negative rights rhetoric. We have attempted to make our society more fair by extending more and more negative rights, gene by gene, classifier by classifier. This approach will never work, because it is fundamentally incompatible with the demands of our collective conscience. To successfully reform our society, to make it as fair as we want it to be, we must transcend the boundaries of our negative rights rhetoric.

*Jill Gauldin*†

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<sup>284</sup> Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1161-62 (1986).

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