With All Deliberate Speed: Discrimination in United States Insurance Law

Patricia A McCoy[*]

Abstract

In most respects, US law has extensive prohibitions against discrimination based on race, colour, religion, gender, and national origin (and sometimes other grounds) enshrined in the US Constitution and in numerous federal statutes.[1] The extent and breadth of these anti-bias measures have fostered strong US norms against discrimination harming members of these protected groups. One holdout, however, has been the area of risk classification in insurance, where disparate treatment and disparate impact often continue to be countenanced legally. Even today, state laws regularly condone intentional insurance discrimination, particularly based on sex, and disparate impact bias is rampant in insurance. This resistance to anti-discrimination mandates in insurance is structural in nature, being the product of the decentralised US system of insurance regulation and blind faith in actuarial risk classification models. This glaring oversight in US anti-discrimination law and the resistance of the states to reform necessitate a strong solution. This article proposes an overarching federal statute outlawing insurance discrimination in personal lines based on race, national origin, religion, gender, and like suspect classifications in order to bring insurance law in line with the strong anti-discrimination principles that otherwise prevail in the US.

Keywords: insurance, discrimination, intentional discrimination, disparate impact, risk classification, algorithmic underwriting.

---

[*] Professor McCoy holds an endowed chair at Boston College Law School.

[1] States have enacted parallel anti-discrimination laws as well. *See*, e.g., National Conference of State Legislatures, ‘Discrimination – Employment Laws’ (2015) <www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx>; The Policy Surveillance Program, ‘State Fair Housing Protections’ (2019) <lawatlas.org/datasets/state-fair-housing-protections-1498143743>.

1. Introduction

In the landmark 1955 case of *Brown v Board of Education*, the United States (US) Supreme Court ordered public elementary and secondary schools to end racial segregation 'with all deliberate speed'.[2] Despite the historic import of that decision, lower courts and school boards seized on the words 'deliberate speed' to drag their heels in school desegregation for decades.[3]

Since those turbulent times, the US adopted important federal laws banning discrimination in wide swaths of public and private life. Notwithstanding those laws and the norms they represent, *de jure* race and sex discrimination lives on in US insurance. There is no comprehensive federal statute prohibiting discrimination based on suspect factors in personal lines of insurance. Similarly, state laws outlawing discrimination in insurance are sporadic and numerous state laws officially countenance insurance discrimination. The one attempt at a uniform anti-discrimination law for insurance — a 2008 model law proposed by the National Association of Insurance Commissioners — has only been adopted by one state (North Dakota). Like school boards and local courts in the wake of *Brown*, insurance companies, state legislatures, and state insurance commissioners are addressing discrimination in insurance 'with all deliberate speed'.

Insurance discrimination has strong adverse consequences for economic equity, posing reason for concern. Discrimination by insurers based on race and gender entrenches wealth disparities resulting from past discrimination and erects high obstacles to future socioeconomic mobility, financial security, and economic equality. Denial of homeowners' coverage disproportionately blocks Black and Hispanic customers from homeownership, which is the most important path to wealth for ordinary households in the US. Lack of auto coverage can deny minority customers from owning the cars they need to commute to better-paid jobs. Higher average insurance premiums for people of colour and women make it harder for them to save and burden the already-pressed personal finances of groups who suffered and continue to experience pay discrimination.

In view of these harms, this article asks why dissent in the form of anti-discrimination challenges to insurance underwriting and pricing practices is so weak in the US? The paucity of anti-discrimination provisions in insurance is especially striking given the strong federal laws against discrimination in other US sectors, as Section 2 describes. Section 3 explores the tension between risk classification and anti-discrimination goals in US insurance law. Due in part to that tension, *de jure* intentional discrimination persists in striking respects in US insurance. Disparate impact discrimination in insurance is even more broadly countenanced by state law.

In Section 4, I analyse why insurance is an exception to the strong anti-discrimination norms in the US. Part of the reason is greater legal tolerance accorded overt sex discrimination. But an even greater reason is the blind trust Americans place in actuarial models and the implicit assumption that actuarial justification outweighs eradication of

[2] 349 U.S. 294, 301 (1955).
[3] *See,* e.g., Brian J Daugherity and Charles C Bolton, *With All Deliberate Speed: Implementing Brown v Board of Education* (University of Arkansas Press, 2008).

race and sex discrimination. Section 5 explores these themes in a recent California ruling banning gender as a rating category in auto insurance. In Section 6, I recommend federal reforms to bring insurance into line with national anti-discrimination norms. Section 7 concludes.

2. Federal anti-discrimination safeguards and norms in the United States

The US has strong, longstanding prohibitions and norms against discrimination. Originally these provisions were targeted at bias based on race and colour. Later, many of these provisions were extended to bias based on certain other classifications.

The earliest of these strictures date back to the end of the US Civil War, beginning with the 1865 ratification of the Thirteenth Amendment to the US Constitution[4] outlawing slavery. Three years later, the states ratified the Fourteenth Amendment to the US Constitution,[5] which states in relevant part in Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The last two phrases of this quotation, known as the 'Due Process and Equal Protection Clauses', provided a powerful constitutional and normative foundation for numerous later anti-discrimination statutes in the US.

Following the promising advances of the 1860s and early 1870s toward racial equality, the US descended into decades of racial backlash, culminating in the vicious Jim Crow laws of the turn of the century and *de jure* segregation by race. The federal government did not begin to dismantle this system until 1941, when US President Franklin Delano Roosevelt issued an executive order banning 'discrimination in the employment of workers in [defence] industries and in Government, because of race, creed, [colour], or national origin'.[6] Starting that same decade, the US Supreme Court issued an important string of rulings overturning different types of governmentally sanctioned racial discrimination as unconstitutional. In *Shelley v Kraemer* in 1948,[7] the court prohibited judicial enforcement of racially restrictive covenants in real estate sales, followed by *Brown v Board of Education* in 1954,[8] which ordered an end to

[4] U.S. Const., Amendment XIII. Congress enacted the Civil Rights Act of 1866 to implement the Thirteenth Amendment. That statute granted citizenship without regard to race, colour, or prior slavery or involuntary servitude and granted all citizens 'full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .' Act of 9 April 1866, Ch. 31, 14 Stat. 27 (re-enacted by Enforcement Act of 1870, Ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. § 1981(a)).

[5] U.S. Const., Amendment XIV. The Fifteenth Amendment to the U.S. Constitution, ratified in 1870, forbade denying any citizen the right to vote based on the person's 'race, [colour] or previous condition of servitude'. U.S. Const., Amendment XV.

[6] Executive Order 8802 (1941). Subsequently, President Harry S Truman issued Executive Order 9981, which decreed 'equality of treatment and opportunity for all persons in the armed services without regard to race, [colour], religion or national origin'. *See generally* Donald R McCoy and Richard T Ruetten, *Quest and Response: Minority Rights and the Truman Administration* (University of Kansas Press 1973).

[7] 334 U.S. 1 (1948).

[8] 347 U.S. 483 (1954).

racial segregation in public elementary and secondary schools. With *Brown*, there ensued a long line of Supreme Court decisions outlawing racial segregation in other contexts.[9]

During this same time period, Congress slowly stirred to action. An early twentieth-century effort was the Civil Rights Act of 1957,[10] which sought to reverse Jim Crow-era laws disenfranchising Black voters. It took years of further racial turmoil and civil rights advocacy before Congress finally passed landmark legislation in the form of the Civil Rights Act of 1964.[11] The 1964 Act banned segregation in private businesses offering public accommodation such as restaurants, theatres and hotels, as well as in public facilities including public schools and universities, libraries, and swimming pools, on the grounds of race, colour, religion, or national origin.[12] The next year ushered in the enactment of the Voting Rights Act of 1965,[13] which further strengthened safeguards for freedom to vote regardless of race or colour.

The assassination of Martin Luther King, Jr., in 1968, provided urgent impetus for additional anti-discrimination laws. Within a week of Dr King's murder, Congress passed the Civil Rights Act of 1968,[14] which outlawed discrimination on the basis of race, colour, religion, sex, familial status, or national origin in housing and residential mortgage credit. The 1968 Act was followed by the Equal Credit Opportunity Act of 1974,[15] which prohibited discrimination in any aspect of a credit transaction according to sex or marital status.

The Civil Rights Act of 1968 was one of the early examples of federal laws against sex discrimination.[16] Five years previously, Congress had enacted the Equal Pay Act of 1963,[17] which forbade wage discrimination based on sex. The following year, in the Civil Rights Act of 1964,[18] Congress banned employment discrimination based on sex, as well as on the basis of race, colour, religion, and national origin. Subsequently, the Pregnancy Discrimination Act of 1978[19] extended safeguards to pregnant women against workplace discrimination. More recent cases construing these

---

[9] *See,* e.g., FindLaw, 'Civil Rights: U.S. Supreme Court Decisions' (2017) < www.findlaw.com/civilrights/civil-rights-overview/civil-rights-u-s-supreme-court-decisions.html>; *Loving v Virginia*, 388 U.S. 1 (1967) (banning laws against racial intermarriage); *Boynton v Virginia*, 364 U.S. 454 (1960) (prohibiting racial segregation in public transportation and in bus terminals).
[10] Pub. L. No. 85-315, 71 Stat. 634. Congress later amended the 1957 Act in 1960 and 1964 to strengthen the statute's original provisions. Civil Rights Act of 1960, title VI, Pub. L. No. 86-449, 74 Stat. 86; Civil Rights Act of 1964, title I, Pub. L. No. 88-352, 78 Stat. 241.
[11] Pub. L. No. 88-352, 78 Stat. 241.
[12] *Id.*, titles II-IV. *See, e.g., Heart of Atlanta Motel, Inc v United States*, 379 U.S. 241 (1964) (holding that a motel that refused accommodations to Black travellers violated title II of the Civil Rights Act of 1964).
[13] Pub. L. No. 89-110, 79 Stat. 437.
[14] Title VIII, Pub. L. No. 90-284, 82 Stat. 73. Some provisions of Title VIII also ban discrimination based on handicap.
[15] Title VII, Pub. L. No. 93-495, 88 Stat. 1521. Today, this Act as amended bans credit discrimination based on race, colour, religion, national origin, sex or marital status, or age. 15 U.S.C. § 1691(a)(1).
[16] For catalogues of leading US Supreme Court decisions on women's rights, from the 1960s through 2017, see American Civil Liberties Union, 'Timeline of Major Supreme Court Decisions on Women's Rights' < www.aclu.org/sites/default/files/field_document/101917a-wrptimeline_0.pdf>; FindLaw, *supra* note 8.
[17] Pub. L. No. 88-38, 77 Stat. 56.
[18] Section 703, Pub. L. No. 88-352, 78 Stat. 241. Other, later federal laws and cases prohibited employment discrimination based on age and disability. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, 81 Stat. 602; Rehabilitation Act of 1973, Section 50l, Pub. L. No. 93-112, 87 Stat. 355; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; FindLaw, *supra* note 8.
[19] Pub. L. No. 95–555, 92 Stat. 2076.

and related protections have banned discrimination against homosexual and transgender individuals as unlawful bias based on sex.[20]

More general guarantees against discrimination by government are founded in the Equal Protection Clause of the Fourteenth Amendment to the US Constitution. The US Supreme Court has subjected discrimination based on race, national origin, and religion to strict scrutiny under that Clause in recent decades.[21] The Supreme Court's jurisprudence only accords gender discrimination intermediate scrutiny, however, under the Equal Protection Clause.[22] Separately, the First Amendment to the US Constitution proscribes discrimination based on religion.[23]

US anti-discrimination provisions apply to government actors and, in numerous cases, to private persons and entities as well. The Equal Protection Clause of the Fourteenth Amendment forbids denial of equal protection by the States (and by implication, localities). Subsequently, the US Supreme Court extended the same prohibition to actions by the federal government through the Due Process Clause of the Fifth Amendment to the US Constitution.[24] Meanwhile, private businesses such as restaurants, hotels, theatres, cinemas, and sporting arenas offering accommodations to the public are barred from discrimination when serving customers based on race, colour, religion, or national origin.[25] No employer, either private or public, may discriminate against job applicants or employees based on race, colour, religion, sex, or national origin.[26] Similarly, private real estate market participants and mortgage lenders may not discriminate against customers based on race, colour, religion, sex, familial status, or national origin.[27]

US law sanctions discrimination based on two main theories. Most commonly, US anti-discrimination laws ban intentional discrimination based on prohibited grounds. This so-called 'disparate treatment' theory prohibits intentionally treating someone worse based on membership in a protected group.[28] Disparate treatment cases are amenable to two types of proof, either of which is sufficient to establish a claim. First, plaintiffs may rely on proof of overt discrimination, which consists of statements that a business openly discriminated based on a prohibited factor.

---

[20] *See,* e.g., *Bostock v Clayton County*, *Georgia*, 590 U.S. __, No. 17-1618, slip op. (2020) (employment discrimination); FindLaw, *supra* note 8.
[21] *See,* e.g., *Miller v Johnson*, 515 U.S. 900, 904 (1995); *Church of Lukumi Babalu Aye, Inc v Hialeah*, 508 U.S. 520, 533 (1993).
[22] *Craig v Boren*, 429 U.S. 190 (1976).
[23] U.S. Const., Amendment I.
[24] *Bolling v Sharpe*, 347 U.S. 497 (1954).
[25] Civil Rights Act of 1964, title II, Pub. L. No. 88-352, 78 Stat. 241. These provisions find their authority in the Commerce Clause of the US Constitution. U.S. Const., Art. I, § 8, cl. 3; *Heart of Atlanta Motel, Inc v United States*, 379 U.S. 241, 249-262 (1964).
[26] Civil Rights Act of 1964, Section 703, Pub. L. No. 88-352, 78 Stat. 241.
[27] Civil Rights Act of 1968, title VIII, Pub. L. No. 90-284, 82 Stat. 73.
[28] *See,* e.g., *Bostock v Clayton County*, *Georgia*, 590 U.S. ___, No. 17-1618, slip op. at 7-9 (2020). The definition of a 'protected group' varies according to the statute or case in question, but generally includes groups demarcated by race, national origin, religion, or gender, and can also include groups based on marital status, sexual orientation, disability, income, and other criteria.

Alternatively, plaintiffs may adduce evidence that a defendant treated a customer worse based on a prohibited factor.[29] Either type of evidence can be difficult to muster, making disparate treatment claims generally hard to prove.

In the second theory, courts have construed many American anti-discrimination statutes to also permit proof of discrimination based on 'disparate impact'.[30] Disparate treatment claims focus on the *motivation* for different treatment; disparate impact claims focus on the *effect* of policies or actions that are non-discriminatory on their face.[31] Not all provisions are amenable to disparate impact analysis: rather, the Supreme Court has held that a statute's text must refer to the discriminatory effect of actions and not just to the defendant's mindset in order to allow disparate impact claims.[32] But when disparate impact theory applies, it prohibits facially neutral actions that have an adverse disparate impact on one or more members of a protected group. The only exception is for actions that are a business necessity, unless the plaintiff can prove the existence of an alternative that results in less disparate impact.[33] While statistical proof of adverse outcomes to members of a protected class is not necessary for disparate impact claims, such proof is commonly used.[34]

In short, US law has extensive prohibitions against discrimination based on race, colour, religion, gender, and national origin (and sometimes other grounds) enshrined in the US Constitution and in numerous federal statutes.[35] The extent and breadth of these anti-bias measures have fostered strong US norms against discrimination harming members of these protected groups. One holdout, however, has been the area of risk classification in insurance, where disparate treatment and disparate impact often continue to be countenanced legally.

3. Risk classification and discrimination in tension in US insurance law

Discrimination has been particularly difficult to root out in personal lines of insurance, such as auto and homeowners' coverage, in the US due to the risk classification that is intrinsic to the business of insurance. US insurers commonly differentiate among applicants and policyholders based on risk, both for purposes of coverage and pricing. There are strong business reasons to do so. Risk classification promotes solvency by helping insurers ensure that revenues cover

[29] Board of Governors of the Federal Reserve System, 'Federal Fair Lending Regulations and Statutes: Overview' *Consumer Compliance Handbook* (2006) 2 <www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_over.pdf>.
[30] *Texas Department of Housing and Community Affairs v The Inclusive Communities Project*, 576 U.S. 519 (2015) (recognising disparate impact claims for housing discrimination under Title VIII of the Civil Rights Act of 1968); *Griggs v Duke Power Co*., 401 U.S. 424 (1971) (same for employment discrimination claims under Title VII of the Civil Rights Act of 1964); *Smith v City of Jackson*, 544 U.S. 228 (2005) (same for claims under the Age Discrimination in Employment Act of 1967).
[31] *Texas Department of Housing and Community Affairs v The Inclusive Communities Project*, 576 U.S. 519, 533 (2015).
[32] *Id.*
[33] *Id.* at 531.
[34] *See,* e.g., US Department of Justice, 'Section VII: Proving Discrimination – Disparate Impact' *Title VI Legal Manual* <www.justice.gov/crt/fcs/T6Manual7#I>.
[35] States have enacted parallel anti-discrimination laws as well. *See, e.g.,* National Conference of State Legislatures, 'Discrimination – Employment Laws' (2015) <www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx>; The Policy Surveillance Program, 'State Fair Housing Protections' (2019) <lawatlas.org/datasets/state-fair-housing-protections-1498143743>.

costs. In addition, risk classification discourages moral hazard by penalising risky behaviour with higher prices or termination of coverage. Risk classification is said to further curb adverse selection by denying coverage to high-risk customers or charging them such high rates as to be tantamount to denial of coverage.[36]

In many instances, risk classification distinguishes among customers based on legitimate and quantifiable risks, without discriminating based on prohibited grounds. One example is where an auto insurer charges more to customers convicted of driving under the influence of alcohol. Another example is charging homeowners less to insure homes equipped with fire alarms.

In other circumstances, however, risk classification collides with anti-discrimination norms in the US. Intentional discrimination based on suspect categories[37] – most notably based on gender – remains legal in many instances in the US insurance industry. Meanwhile, save in narrow circumstances, US insurance law does not police disparate impact discrimination by insurers at all.

This section opens by discussing why federal anti-discrimination laws do little to circumscribe discrimination by US insurers. After that, the section will discuss the limited effectiveness of state laws in curbing discrimination by insurers based on suspect classifications.

3.1 Weak federal protections against discrimination by insurers based on suspect classifications

The anti-discrimination laws discussed in Section 2 are all federal in nature. Due to peculiarities of US insurance law, however, those federal anti-discrimination laws have little or no effect in halting discrimination by insurers on grounds of suspect classifications.

The most important reason why federal anti-discriminations safeguards do not adequately protect insurance company customers involves the federal McCarran-Ferguson Act, which relegated regulation of the business of insurance to the states, to the exclusion of the federal government. Two provisions of McCarran-Ferguson exert this effect. First, McCarran-Ferguson contains an affirmative command that the 'business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business'.[38] Second, the so-called 'reverse pre-emption' provision of the Act forbids federal pre-emption of any state law enacted for the purpose of regulating the business of insurance, unless the federal statute in question 'specifically relates to the business of insurance':[39]

---

[36] Tom Baker, Kyle D Logue and Chaim Saiman, *Insurance Law and Policy* (5th edn, Wolters Kluwer 2021) 257-259. There is substantial doubt, however, that adverse selection is as strong as insurers claim. Peter S Siegelman, 'Adverse Selection in Insurance Markets: An Exaggerated Threat' [2004] 113 *Yale LJ* 1223.

[37] 'Suspect categories' include the same classifications that define 'protected groups', including race, national origin, colour, religion, gender, and similar categories. *See* note 27 *supra*.

[38] 15 U.S.C. § 1012(a).

[39] 15 U.S.C. § 1012(b).

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . ."[40]

As a result of these two provisions, state law often displaces federal statutes when it comes to discrimination by insurers against customers based on suspect classifications.

There are narrow exceptions to this general rule. One of the most important concerns Title VIII of the Civil Rights Act of 1968, which most courts construe to prohibit discrimination in homeowners' insurance because of the race, colour, religion, sex, disability, familial status, or national origin of the buyer, owner, and/or occupants of a dwelling.[41] Separately, the Genetic Information Non-Discrimination Act, passed by Congress in 2008, bans insurers from using genetic information in health insurance decisions.[42] In a related vein, the federal Affordable Care Act prohibits discrimination based on gender in health insurance pricing, while permitting but constraining price discrimination in health insurance with respect to age.[43]

Other federal provisions affect the pricing or coverage of group insurance policies at workplaces by banning discrimination by employers when offering those policies. For instance, Title VII of the Civil Rights Act of 1964 prohibits employers from charging employees more for contributions to workplace benefits such as pension plans or group insurance based on prohibited factors, including gender.[44] In a similar vein, the federal government has construed the Americans With Disabilities Act[45] to forbid employers from denying:

> "[A] qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks."[46]

Under both provisions, insurers can still engage in risk classification in all of these lines of insurance; the two statutes instead constrain employers' ability to choose group policies that discriminate based on prohibited grounds.

Note, however, that these federal prohibitions against discrimination in insurance are relatively discrete and fail to address many other types of discrimination in personal lines, including in auto insurance, life insurance, and annuities. Meanwhile, the Equal Protection and Due Process guarantees in the US Constitution are limited to discrimination by government actors. As a result, federal anti-discrimination protections in insurance are sparse, leaving the McCarran-

[40] 15 U.S.C. § 1012(b).
[41] 42 U.S.C. §§ 3604-3605; *see* Dana L Kaersvang, 'Note: The Fair Housing Act and Disparate Impact in Homeowners Insurance' [2006] 104 *Mich. L. Rev.* 1993, 1997-2002 (discussing cases and legislative history).
[42] Pub. L. No. 110-233, § 102(b)(1)(B), 122 Stat. 881.
[43] 42 U.S.C. § 300gg(a).
[44] *City of Los Angeles v Manhart*, 435 U.S. 702 (1978).
[45] 42 U.S.C. § 12101.
[46] 29 C.F.R. app. § 1630.16(f).

Ferguson Act to entrust most anti-discrimination safeguards in insurance to the states. State insurance law protections against discrimination based on suspect classifications are largely weak, however, as I now discuss.

3.2 State policing of discrimination by insurers

Almost all of the 50 states have statutes prohibiting 'inadequate, excessive, or unfairly discriminatory' insurance rates.[47] While the last restriction against 'unfair discrimination' could be read as a blanket prohibition against discrimination by insurers in pricing on grounds such as race, colour, national origin, and gender, etc., states do not construe the term that way. Instead, most states allow insurers to discriminate when setting rates so long as pricing differences are based on actuarial data that substantiate variations in risk.[48] Further, unfair discrimination laws in numerous states only bar unfair discrimination in rates, not in coverage.

This US approach to insurance rate regulation establishes a baseline that allows discrimination by insurers based on suspect classifications whenever a suspect category is actuarially correlated with heightened risk. Of course, state legislatures and state insurance departments are free to modify this baseline by enacting stronger anti-discrimination laws and regulations that prohibit discrimination by insurers based on suspect grounds, even when such discrimination may be justified actuarially on the basis of risk. While some states have adopted provisions along these lines, the coverage of those provisions is sporadic and varies according to the type of group and line of insurance.

The state anti-discrimination laws on point prohibit intentional discrimination by insurers.[49] Even these laws are of limited scope. A 2014 search for state laws banning discrimination in five major personal lines of insurance[50] only unearthed ten states that forbade discrimination based on race, national origin, and religion, six states that did so based on sexual orientation, and *none* that banned the use of gender.[51] It was more common for states to outlaw discrimination on certain grounds in one or more personal lines, but not in all five. For instance, a slight majority of states prohibited the use of race, national origin, and religion in auto insurance. The remainder of the states lacked that prohibition.[52]

State-sanctioned discrimination in insurance based on gender remained quite common, with the extent varying widely according to line. Nine states in 2014 banned the use of gender in auto insurance pricing; five affirmatively permitted it. In contrast, all states except for Montana allowed insurers to consider gender when setting life insurance rates; a

---

[47] *Corpus Juris Secundum (CJS) Insurance* (2021) vol 44, § 104.
[48] *Id.;* Daniel Schwarcz, 'Towards a Civil Rights Approach to Insurance Anti-Discrimination Law' [2020] 69 *DePaul L. Rev*. 657, 666.
[49] Schwarcz, *supra* note 47, at 669.
[50] These personal lines encompassed auto, disability, life, health, and property/casualty insurance. Ronen Avraham, Kyle D Logue and Daniel Schwarcz, 'Understanding Insurance Antidiscrimination Laws' [2014] 87 *So. Cal. L. Rev.* 195, 231 table 1.
[51] *Id.* at 239-240 and table 2.
[52] *Id.* at 235-239.

smaller but significant share of states permitted the use of gender in health insurance rates.[53] States were more likely to restrict the use of gender in property/casualty rates, although here again there was wide variation among the states.[54]

State laws on discrimination in insurance remain in much the same state today as they did in 2014.[55] This is notwithstanding the efforts of the National Association of Insurance Commissioners to convince the 50 states to enact a broad anti-discrimination prohibition in its Model Unfair Trade Practices Act.[56] The Model Act defines an 'unfair trade practice' to include: '[r]efusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex, marital status, race, religion or national origin of the individual …'[57]

As of this writing in late 2021, however, only one of the fifty states had adopted this Model Act in substantially the same form as its latest amendment in 2008.[58] The abject failure of the states to adopt this provision of the Model Act highlights the entrenched nature of insurance discrimination.

To recap, state laws have glaring gaps in prohibitions against intentional discrimination in insurance according to gender. To a somewhat lesser extent, there also are gaps in prohibitions against intentional discrimination based on race, national origin, religion, sexual orientation, and other suspect factors. As a result, insurers can often deny or terminate coverage or charge higher rates based on one or more suspect factors in many personal lines, depending on the state, so long their decisions find actuarial justification based on risk. In that way, statistical risk classification continues to trump safeguards against intentional discrimination in US insurance law.

The situation is even more extreme when it comes to facially neutral insurance underwriting and rate practices that adversely affect minorities and/or people based on gender. No state outlaws discrimination in insurance based on disparate impact.[59] To the contrary, risk classification overrides anti-discrimination norms whenever insurers unintentionally rely on facially neutral factors—such as credit scores or post codes (called 'zip codes' in the US) – that have an adverse disparate effect according to race, national origin, religion, gender, or sexual orientation. Put differently, under state law, when a facially neutral factor is correlated with risk, insurers are free to use that factor in underwriting and pricing even when the practice has an adverse effect on Blacks, other minorities, or members of a particular sex.

In sum, state law condones disparate impact discrimination in insurance in most instances and further often permits intentional discrimination, particularly by gender. The full extent of this state-sanctioned insurance discrimination against minorities and against individuals based on sex is hard to gauge because insurance companies guard their

[53] *Id.* at 244-251.
[54] *Id.* at 248, fig. 3d.
[55] Schwarcz, *supra* note 47, at 669.
[56] National Association of Insurance Commissioners, 'Model Unfair Trade Practices Act' (MO-880-13, 2008) <content.naic.org/sites/default/files/MO880.pdf>.
[57] *Id.* § 4(G)(5).
[58] *See id*.; National Association of Insurance Commissioners, 'Unfair Trade Practices Act' (ST-880-01, Summer 2021) < content.naic.org/sites/default/files/ST880_0.pdf>.
[59] Schwarcz, *supra* note 47, at 670 and n.66, 674.

statistical models as proprietary secrets and refuse to release data on their effects of their underwriting and pricing practices by race, national origin, gender, and other sensitive factors. Reinforcing this opacity, most states do not require public reporting of these data (except in limited cases for gender, marital status and gender) and the handful of states that do omit numerous data fields of importance.[60] Accordingly, the discriminatory effect of insurance underwriting and pricing practices is shrouded in obscurity.

Despite this paucity of publicly available data, statistical studies have repeatedly corroborated the adverse disparate effect of discrete insurance underwriting and rate practices on minority groups. It is well-established that insurers' use of credit scores to price auto and homeowners' insurance results in higher premiums for Blacks and Hispanic Americans compared to comparably situated Whites.[61] Similarly, when insurers base their underwriting decisions and rates for auto and homeowners' policies on zip codes, insureds who live in predominantly minority communities end up paying higher rates than those living in majority White areas.[62]

In conclusion, insurance remains a strong holdout against US anti-discrimination norms. The studies that do exist confirm that insurance underwriting and pricing practices result in higher rates for minority groups that have suffered historic discrimination. Given the substantiation of real discrimination, the question then is, why does insurance exceptionalism to US anti-discrimination norms exist?

4. Why does insurance exceptionalism persist in US anti-discrimination law?

Given the strong US norms against discrimination, the insurance discrimination that I have described is highly controversial. Intentional discrimination and disparate impact discrimination go unquestioned in insurance, despite Supreme Court case law subjecting race discrimination to strict scrutiny and sex discrimination to intermediate (but still heightened) scrutiny in other contexts. Nevertheless, the insurance industry has fought off most legal attacks on discriminatory practices.

Why has insurance succeeded in fending off anti-discrimination laws when other industries have not? There are several reasons why discrimination in insurance often is legally countenanced in the US.

The first bears on the remarkable persistence of intentional discrimination in US insurance. This intentional discrimination is not just *de facto*; in a striking number of circumstances, state law sanctions overt discrimination in insurance, particularly according to gender. Largely this is attributable to the greater US tolerance for sex

---

[60] Daniel Schwarcz, 'Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection' [2014] 61 *UCLA L. Rev.* 394, 428.

[61] Federal Trade Comm'n, 'Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance' (July 2007); Texas Dep't of Insurance, 'Use of Credit Information by Insurers in Texas' (2004); Texas Dep't of Insurance, 'Use of Credit Information by Insurers in Texas: The Multivariate Analysis' (2005); Brent Kabler, 'Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri' (Missouri Dep't of Insurance, 2004).

[62] Julia Angwin et al., 'Car Insurance Companies Charge Higher Rates in Some Minority Neighborhoods' *Consumer Reports* (21 April 2017); Douglas Heller and Michelle Styczynski, 'Major Auto Insurers Raise Rates Based on Economic Factors: Low- and Moderate-Income Drivers Charged Higher Premiums' (Consumer Fed'n of America, 2006) 2; Massachusetts Attorney General, 'Premium Disparities Affecting Minority and Low-Income Drivers' (2 February 2018); US Dep't of the Treasury, Federal Insurance Office, 'Study on the Affordability of Personal Automobile Insurance' (2017) 2.

discrimination. Observers generally agree that overt sex discrimination in insurance is much more common than intentional race discrimination in the US.[63] Social norms regarding gender discrimination are weaker in the US in part because biological differences between men and women seem to lend legitimacy to categorizing life expectancy and other biological outcomes according to sex. These norms have translated into more lenient legal treatment for gender discrimination than for race discrimination in the US.[64]

In the US insurance context, two further considerations reinforce the tolerance for *de jure* gender discrimination. To begin with, overt gender classifications have been imbedded in life and annuity mortality tables for over 150 years.[65] Outlawing sex classifications in life insurance would strike at the heart of actuarial stereotypes dating from the nineteenth century treating biology as outcome-determinative and would require an overhaul of the life actuarial model. Second, gender classifications in insurance sometimes benefit subgroups of women compared to comparable subgroups of men. We can see that in the price of life insurance for women, due to their average longer lives, and sometimes in the price of auto insurance for younger women as compared to younger men. Both considerations foster strong ambivalence when it comes to eliminating gender classifications in insurance business practices.

Even in the absence of intentional discrimination, neutral insurance business policies can perpetuate discrimination, particularly on grounds of race and ethnicity. In part this is due to the lingering effects of *de jure* segregation in the US after it was outlawed in the mid-twentieth century. Due to past segregation, certain insurance practices that are facially neutral continue to exert adverse disparate impacts on Blacks and numerous other people of colour.

One example mentioned above is the use of credit scores in insurance pricing.[66] The average credit score for Blacks is lower than for Whites,[67] partly due to the fact that Blacks earn lower incomes on average resulting from historic and continuing employment discrimination.[68] Black credit scores are also depressed due to government-sanctioned housing discrimination that historically excluded Blacks from mortgages and pushed them disproportionately into rental housing.[69] Because credit scores traditionally have counted timely home mortgage payments but not rental payments, housing discrimination continues to have effects in the form of lower average credit scores for Blacks.[70]

---

[63] *See*, e.g., Schwarcz, *supra* note 47, at 669.

[64] *Craig v Boren*, 429 U.S. 190 (1976) (subjecting sex discrimination to intermediate scrutiny instead of strict scrutiny).

[65] Timothy Alborn, *Regulated Lives: Life Insurance and British Society, 1800-1914* (University of Toronto Press, 2009) 102-135.

[66] *See* note 60 *supra* and accompanying text.

[67] *See*, e.g., National Consumer Law Center, 'Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination' (May 2016) 5-7 <www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf> (summarizing studies).

[68] *Id.* at 1.

[69] *See generally* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright 2018).

[70] Experian, 'Credit for Renting' (2017) 1-2 < www.experian.com/assets/rentbureau/white-papers/experian-rentbureau-credit-for-rent-analysis.pdf>.

The use of geography to price auto insurance is another instance of a facially neutral practice that disproportionately harms residents of so-called 'majority-minority' neighbourhoods and communities.[71] These predominantly minority areas are often the product of decades-old housing segregation. Insurers often charge residents of these areas more for auto and homeowners' insurance, ostensibly based on higher levels of risk due to greater population density and/or elevated crime. Due to these geographic pricing practices, Blacks and other minorities who are more likely to live in these areas often end up paying more for coverage.[72]

When it comes to continued insurance discrimination, there is something deeper at work, however, which is the American faith in statistical models. This blind acceptance of actuarial algorithms thrives in, and is the outgrowth of, an insurance regulatory system in which the federal government defers to states and state insurance commissioners. This deference and the reverse pre-emption that McCarran-Ferguson mandates has created a void in federal law prohibiting insurance discrimination.

Today, most debates about insurance discrimination occur in the context of risk-based algorithms. Some of these algorithms overtly price insurance based on suspect classifications, particularly with regard to gender. Life insurance and annuity algorithms incorporate mortality tables that expressly classify risk due to gender. Auto insurers in many states overtly base their pricing algorithms on sex. Other insurance algorithms are facially neutral, but result in disparate impact according to race, colour, or sex.

Too often, US courts and insurance regulators have been unable or unwilling to question those algorithms or their effects on minorities and women. They reason that these algorithms result in *actuarial fairness.* In other words, they assume that the algorithms calculate premiums that match a customer's expected loss and that people pay exactly the risk that they pose. This faith in statistical models goes hand in hand with an American belief in personal responsibility and is the main reason why discrimination in insurance persists.

Unfortunately, the American romance with actuarial models is misplaced. In many cases, this acceptance assumes that the outputs of discriminatory models are correlated with risk, without demanding proof. Proof is hard to come by because insurers refuse to disclose their algorithms publicly so that neutral researchers can evaluate their claims of actuarial fairness. State insurance departments have greater access to the algorithms by virtue of their examination powers, but most lack the expertise and staff hours to analyse those models comprehensively (particularly the newer, more sophisticated models that incorporate machine learning and analyse Big Data).[73]

---

[71] *See* note 61 *supra* and accompanying text.
[72] *See* note 61 *supra* and accompanying text.
[73] As Professor Schwarcz has pointed out, states lack the staff or expertise to meaningfully review the complex algorithmic models and Big Data that insurers use today for underwriting and for pricing. Schwarcz, *supra* note 47, at 672-673.

The blind US acceptance of insurers' statistical algorithms further assumes correlation without causation. As seen above, many US insurers charge people with poor credit scores more for auto insurance. Insurers claim that credit scores and claims propensity are negatively correlated. Even if that is correct, that doesn't mean that having trouble paying bills *causes* people to submit more insurance claims. The same lack of transparency that blocks the ability to ascertain correlation hampers the ability to determine whether an algorithm has established causation.

There is a larger problem with blind faith in statistical models, which is the hidden normative assumption that actuarial fairness is more important than eradicating discrimination against minorities and people based on sex. All too frequently, this normative assumption is unfounded because actuarial fairness has not been proven. But even when algorithms have statistical justification, that begs the question whether a relationship with risk warrants discrimination, particularly given the serious socioeconomic toll that discrimination exacts.

There are serious reasons why insurance discrimination in the US must be subject to the same strict scrutiny as racial discrimination generally. First, insurance discrimination often penalizes members of groups defined by gender, race, and ethnicity for accidents of birth that they cannot control. In the process, that discrimination can end up treating people who make the same risk-averse decisions differently. Second, insurance discrimination perpetuates past *de jure* discrimination by denying coverage or charging more to people of colour for factors that are infected by that past discrimination, such as where they live.

Finally, and most importantly, insurance discrimination hampers the ability of affected groups to advance economically and achieve financial stability. Discriminatory practices in homeowners' insurance can bar minorities and women from access to the single biggest driver of household wealth in the US, which is owning a home.[74] Discrimination in auto insurance can make auto ownership unaffordable, thereby limiting needed transportation to better-paid jobs. And regardless of the line of insurance, charging minorities or women more for identical coverage puts added and unwarranted pressure on their household budgets, which are often already pinched due to the lower average wages that women and many people of colour earn.[75]

Despite the gravity of these equity concerns, the hegemony of statistical models continues to side line the debate over insurance discrimination in the US. That means that the real battleground for combatting discrimination in US insurance lies in challenging actuarial models for lack of statistical fairness. An intriguing 2019 California insurance ruling banning risk classification based on gender shed light on the promise and limits of this line of attack.[76]

5. The California case

[74] Christopher E Herbert, Daniel T McCue and Rocio Sanchez-Moyano, 'Update on Homeownership Wealth Trajectories Through the Housing Boom and Bust' (Joint Center for Housing Studies of Harvard University, February 2016) <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/2013_wealth_update_mccue_02-18-16.pdf>.

[75] *See* National Consumer Law Center, *supra* note 66, at 2.

[76] State of California Department of Insurance, 'Initial Statement of Reasons: Gender Non-Discrimination in Automobile Insurance Rating' (REG-2018-00020, 19 October 2018) <consumerfed.org/wp-content/uploads/2019/01/california-department-of-insurance-research.pdf> (hereinafter "Initial Statement of Reasons").

Up through 2018, the State of California allowed auto insurers to use the gender of the rated driver as an optional rating factor. Over the prior three decades, however, auto risk classification based on sex had come under growing criticism in California. In the meantime, the California state legislature had enacted the Gender Recognition Act of 2017,[77] permitting California drivers' license applicants to list their genders as 'nonbinary' instead of as 'male' or 'female' on their drivers' licenses beginning on 1 January 2019. As a result, in 2018, the then California Insurance Commissioner, Dave Jones, convened a proceeding to eliminate the use of gender in private passenger automobile insurance ratings in that state.[78] Following that proceeding, the Department issued a rule effective 1 January 2019, prohibiting the use of gender when setting auto insurance rates.[79]

In the proceeding, the Department first found that the vaunted statistical fairness of rating according to gender no longer existed. According to the Department, 'gender's relationship to risk of loss [had] become suspect as company experience [had] come to vary widely'.[80] Some insurers reported that female drivers were higher risk, while other companies rated comparable males as riskier. Similarly, the predictive force of gender was muddy because insurers routinely combined gender with other, stronger predictors such as years of driving experience. The effect of gender on driving risk also diverged widely by location. Finally, male and female drivers were equally prone to distracted driving due to cell phone use, which had emerged in recent years as one of the principal reasons for higher accident rates and loss severity.[81] For these reasons, the Department ruled that the auto classification system based on sex was 'unfairly discriminatory', in violation of California statute, and therefore was prohibited.[82]

In support of proscribing sex as a rating factor, the Department also pointed to the 'Risk Classification Statement of Principles' of the American Academy of Actuaries, which stated that any risk classification system should be acceptable to the public and must recognise the values of the society in which it operates.[83] According to the

---

77 California Senate Bill 179 (2017).
78 Initial Statement of Reasons, *supra* note 75, at 1-2.
79 State of California Department of Insurance, 'Commissioner issues regulations prohibiting gender discrimination in automobile insurance rates' (Press Release, 3 January 2019) <http://www.insurance.ca.gov/0400-news/0100-press-releases/2019/release003-19.cfm>; *see* State of California Department of Insurance, 'Proposed Text of Regulation: Gender Non-Discrimination in Automobile Insurance Rating' (REG-2018-00020, 19 October 2018) <http://www.insurance.ca.gov/0250-insurers/0800-rate-filings/upload/nr003-18GenderNon-DiscriminatonAutoRating01-03-18-2.pdf>.
80 Initial Statement of Reasons, *supra* note 75, at 12, 23.
81 *Id.* at 2.
82 *Id.*; *see* Cal. Ins. Code § 1861.02(a)(4) (banning rates that are inadequate, excessive, or unfairly discriminatory).
83 Initial Statement of Reasons, *supra* note 75, at 2, 12; *see* American Academy of Actuaries, 'Risk Classification Statement of Principles' (2014) §§ I, IV.G-IV.H <http://www.actuarialstandardsboard.org/wp-content/uploads/2014/07/riskclassificationSOP.pdf>. The Academy's pronouncements on public acceptability are more mealy-mouthed than the California Department made them out to be. The Academy states that public acceptability 'is a particularly difficult principle to apply in practice, because social values' are 'difficult to ascertain; vary among segments of the society; and change over time'. The Academy goes on to frame 'public acceptability' in terms of whether it achieves actuarial fairness and exhorts legislators and regulators who restrict risk classification systems to 'balance a desire for increased public acceptability with potential economic side effects of adverse selection or market dislocation.' American Academy of Actuaries, *supra*, § IV.G.

Department, the new Gender Recognition Act and other state anti-discrimination laws including the Unruh Civil Rights Act reflected the importance society placed on gender equality.[84]

In a related vein, the Department rejected adding a category of nonbinary drivers and rating them separately. According to the Department, the population of nonbinary drivers was too small and too heterogeneous to allow a meaningful sample size within individual insurers.[85] Because the group of non-binary drivers was not a permissible rating category, the rating categories of male and female fell as well.[86]

In many respects, the California ruling adhered to the conventional paradigm of statistical fairness. It examined whether being male or female was predictive of loss and found that it was not. It asked whether being nonbinary was correlated with loss and answered no, because nonbinary drivers were too heterogeneous in their propensity for risk. The ruling scrutinized whether nonbinary drivers were sufficiently numerous to produce a meaningful sample size and, once again, determined no. Finally, the Department looked to the principles of the American Academy of Actuaries to harmonize risk classification with anti-discrimination norms. As this shows, much of California's basis for prohibiting gender in auto coverage ratings embraced the ethos of actuarial justification and hewed closely to it.

In another respect, however, the California ruling stepped out more boldly by deciding that California's strong social norms against gender discrimination outweighed the continued use of gender as a rating factor. No California statute expressly banned the use of gender as an auto insurance rating factor. That did not deter the California Department, however, from relying on two major pieces of California legislation outlawing gender discrimination in other contexts as proof of a strong state value favouring gender equality. As such, the California ruling bucked the conservative trend in many states of judging risk classification in insurance solely in actuarial terms.

Still, the California decision remained captive to orthodox thought in three important ways. For one thing, it is not clear whether the same result would have obtained if gender *had been* predictive of auto risk. For another, the ruling only addresses insurance pricing, not insurance coverage. Nothing in the ruling prevents insurers denying coverage according to gender. Finally, the ruling only strikes down intentional discrimination in pricing based on sex; it does not address disparate impact on the basis of gender (let alone race or ethnicity). Indeed, the Department, in the decision, sent discouraging signals about its willingness to address disparate impact by expressly declining to 'consider other rating variables that may be related to the use of gender in auto insurance rating, for example, location of the insured vehicle, multi-vehicle households or multiline policies'.[87] In all three respects, even this forward-looking ruling lags behind the prevailing anti-discrimination norms in the US outside of insurance.

6. A comprehensive approach to addressing discrimination in insurance in the US

As the preceding discussion explains, state insurance law in the US is badly out of step with prevailing federal and societal norms advancing equality based on race, national origin, religion, and gender. This disparity is structural in

---

[84] Initial Statement of Reasons, *supra* note 75, at 2, 17.
[85] *Id.* at 20-22.
[86] *Id.* at 20-23.
[87] *Id*. at 13.

nature. The current system of US insurance regulation impedes the full realization of anti-discrimination norms in US law in a number of important respects.

The first major hurdle is procedural. While the McCarran-Ferguson Act allows the federal government to ban insurance discrimination against protected groups across the board by statute,[88] there is no federal statute that does so. As a result, McCarran-Ferguson effectively decentralises the extension of anti-discrimination norms to insurance by relegating that decision to the 50 states. Because the states delegate insurance regulation to executive-branch officials in most instances, key decisions about the persistence of insurance discrimination are made by state insurance commissioners, and not by popularly elected state legislatures. Too often, state insurance commissioners are unduly beholden to insurers and defer to insurers' underwriting and pricing analyses when confronted with discrimination.

The second hurdle consists of perceived constraints in state rating statutes. The decades-long tradition of state laws banning 'unfair discrimination' in insurance rating has produced a hermetically sealed system of state insurance regulation. That system is resistant to racial and gender equality and equates actuarial justification (real or presumed) with the lack of unfair discrimination. Under this system, state insurance commissioners regularly deem discrimination in ratings 'fair', despite the blatant persistence of intentional discrimination and disregard for disparate impact in insurance based on race, national origin, religion, and gender. This anomaly shows how far state insurance law has strayed from the strong national anti-discrimination norms in the US.

Finally, the lack of transparency in underwriting and pricing algorithms, plus scant review of those algorithms by state insurance departments, has resulted in a system in which actuarial fairness is asserted but rarely proven. This results in the worst of both worlds: insurance regulation that regularly tolerates discrimination based on suspect factors with no demonstrable reduction in risk.

To address these problems, it is time for the federal government to adopt measures to combat continued discrimination in insurance. First and foremost, Congress should enact federal legislation prohibiting discrimination against protected groups in the coverage and pricing of insurance. In the fourteen years since the National Association of Insurance Commissioners (NAIC) last amended its Model Act to prohibit race and gender discrimination, only one state has adopted it.[89] Given state legislatures' continued resistance to this reform, it is futile to expect the states to adopt strong, uniform anti-discrimination laws in insurance. The persistence of insurance discrimination is a national problem, and it requires a national solution in the form of federal legislation. The proposed statute would be nationwide in effect because it would 'specifically relate to the business of insurance' and thereby pre-empt state insurance laws that conflicted under the McCarran-Ferguson Act.

The new federal statute against insurance discrimination would need to be carefully crafted. The statute should expressly prohibit both intentional discrimination and disparate impact discrimination in insurance. It should cover

[88] McCarran-Ferguson allows federal statutes to supersede state statutes in insurance so long as the federal statute 'specifically relates to the business of insurance . . .', 15 U.S.C. § 1012(b).
[89] *See* notes 55-57 *supra* and accompanying text.

members of all of the current protected classes, including race, colour, national origin, religion, gender, marital status, sexual preference, age, and disability, plus income and receipt of welfare benefits. The statute should expressly authorise all needed relief, including actual and punitive damages, restitution and disgorgement of profits, other equitable and declaratory relief, and attorneys' fees and costs.

The enforcement mechanisms for the new federal statute also need to be carefully thought out to avoid replicating weaknesses in some of the current federal anti-discrimination laws. Under existing federal anti-discrimination statutes, private plaintiffs face often insuperable legal obstacles to obtaining relief.[90] To begin with, often detecting discrimination is a challenge, especially in disparate impact cases. Retaining experts to conduct a statistical analysis of suspected discrimination is often prohibitively expensive. The class action mechanism can help finance those costs, but mandatory arbitration clauses in insurance policies can deny the availability of class actions in many states. Meanwhile, defendants who can prove a bona fide business reason have a defence to liability under existing federal anti-discrimination statutes.

These problems require a thoughtful response in the insurance context. In view of the litigation challenges facing consumers who suspect illegal discrimination, it is crucial for Congress to authorise a government right of action on top of private relief. Due to its powers of subpoena and examination, superior resources, and statistical expertise, the federal government is in a much better position than individuals to detect and successfully prosecute insurance discrimination.

To this end, the legislation should authorise the federal government to enforce the new insurance anti-discrimination provisions either in an agency action or in an Article III federal court. Congress should entrust government enforcement both to the Civil Rights Division of the US Department of Justice and to a federal market conduct regulator with robust examination and enforcement powers. Given the current absence of a federal insurance regulator (a by-product of McCarran-Ferguson), the Consumer Financial Protection Bureau (CFPB or the Bureau) would be best suited for the agency enforcement role. The CFPB already administers the anti-discrimination provisions of the Equal Credit Opportunity Act, it has strong examination and enforcement powers, and its sole mission is consumer protection. While the CFPB lacks jurisdiction over the insurance industry currently, the statute could confer the Bureau with jurisdiction for purposes of enforcing the insurance anti-discrimination provisions.

The new anti-discrimination statute should also confer a private right of action on injured consumers and policyholders. To preserve access to the courts, the legislation should prohibit contract provisions mandating arbitration of private claims for violations of the statute (both individual claims and through class actions).

[90] *See, e.g.,* Michael Selmi, 'Why are Employment Discrimination Cases So Hard to Win?' [2001] 61 *La. L. Rev.* 555.

In states that continue to allow insurers to use suspect classifications such as gender for purposes of underwriting or rating, injured consumers may find evidence of intentional discrimination on a prohibited basis publicly available[91] and thus easy to obtain.[92] However, in federal employment discrimination cases, the Supreme Court has ruled for defendants who could prove that disparate treatment was justified by business necessity.[93] Arguing by analogy, insurers sued for discrimination would likely argue that a prohibited factor such as gender is correlated with risk and therefore use of that factor is justified based on business necessity.

Congress, in enacting a new insurance discrimination law, would therefore need to expressly bar business necessity defences to claims of intentional discrimination in insurance based on statistical correlation with risk. This provision is critical because current law entrenches *de jure* intentional discrimination in insurance based on actuarial justification in a shocking number of instances. A flat ban on an actuarial defence would be consistent with the approach in states that have enacted statutes banning the use of race, ethnicity, national origin, or gender in coverage and/or rating regardless of actuarial justification[94] and would substantially strengthen the nation's commitment to racial and gender equality.

In disparate impact cases for insurance discrimination, in contrast, the wisdom of a business necessity defence is a thornier question. Recall that disparate impact claims involve facially neutral business practices that have an allegedly adverse disparate effect on members of a protected class. Under current federal anti-discrimination case law in the employment and credit discrimination areas, courts use a three-step 'burden-shifting' test. In the first prong of that test, the plaintiff must make a *prima facie* showing of disparate impact. Next, the burden shifts to the defendant to prove a business necessity for the contested practice. If the defendant musters its burden, then the burden shifts back to the plaintiff to show that a less discriminatory alternative would satisfy the defendant's business objective.[95]

---

[91] For example, in property and casualty coverage, independent companies called "statistical agents" collect voluminous data from insurers and report the data to state insurance departments. These data allow regulators and insurers to assess historic claims frequencies and severities across industry by line of insurance and policyholder class. Daniel Schwarcz, 'Ending Public Utility Style Rate Regulation in the United States' [2018] 35 *Yale J. Reg.* 941, 968-971. In the case of auto coverage and workers' compensation insurance, the data fields reported include classifications by the policyholder's age, marital status, and gender. *See* National Association of Insurance Commissioners, 'Statistical Handbook of Data Available to Insurance Regulators' (2012) 5-3 through 5-4, E-3 <www.commerce.alaska.gov/web/Portals/11/Pub/INS_OmnibusStatHandbook_2020.06.pdf>. Similarly, the standard US mortality tables for life insurance and annuities (known as the "Commissioners Standard Ordinary Mortality Tables" or CSO) are based explicitly on gender. *See, e.g.,* State of Iowa, 'Mortality Tables' <www.legis.iowa.gov/docs/publications/ICA/1023417.pdf>; American Academy of Actuaries and Society of Actuaries, 'Report on the 2017 CSO and 2017 CSO Preferred Structure Table Development' (2015) 3, 5-12 and Appendices A-E and G <www.soa.org/globalassets/assets/Files/Research/Exp-Study/research-2017-cso-report.pdf>.

[92] In existing federal anti-discrimination laws, plaintiffs can prove intentional discrimination either by direct or circumstantial evidence. Jeremiah Battle, Jr., *Credit Discrimination* (7th edn, National Consumer Law Ctr. 2018) § 4.2.2.

[93] *Texas Dep't of Community Affairs v Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[94] Schwarcz, *supra* note 47, at 669.

[95] Battle, *supra* note 91, § 4.3.2.1.

When it comes to insurance discrimination, the second and third prongs of this burden-shifting test are problematic for three reasons. First, some facially neutral underwriting and rating factors such as income, credit scores and zip codes serve as proxies for discrimination based on race, ethnicity, and national origin. Second, under the business necessity doctrine, insurers' ease in defeating disparate income claims would depend on the requisite level of proof of actuarial justification. Finally, if and when an insurer succeeded in showing business necessity, it would be formidably difficult for the plaintiff to establish a less discriminatory alternative without access to the insurer's statistical model and data.

Due to these problems, Congress, when drafting an anti-discrimination statute in insurance, should modify the burden-shifting test in three key respects to reflect the realities of insurance. The first modification involves the treatment of proxies for race or other suspect categories such as income, credit scores, and zip codes. Some states treat those factors as protected categories and outlaw their use in insurance decisions altogether.[96] Congress should emulate that approach.

The second modification concerns the level of proof needed to show business necessity. Descriptive statistics showing the disputed factor's correlation with risk should not suffice; rather, Congress should require multivariate regression analyses in order to rigorously analyse the existence of any correlation and its strength, compared to other factors. Congress should further require insurers who rely on machine learning algorithms as a business necessity to prove how the algorithm ascertained the correlation of the contested factor with risk.

Finally, when crafting an insurance anti-discrimination law, Congress should modify the burden-shifting test in insurance discrimination to require the defendant to rule out the existence of a less discriminatory alternative to underwriting and pricing risk. This places the twin burdens of coming forward with evidence and ultimate proof on the insurer, who is better able to adduce the necessary proof due to its control over its statistical models and datasets.

Beyond liability schemes, other reforms are necessary to combat insurance discrimination. Every liability system resides within an information ecosystem that determines its effectiveness in providing victim redress and halting future harm. This ecosystem is especially important in the discrimination context, where it is otherwise often hard for consumers to ascertain whether they were the victims of illegal discrimination to begin with.

Accordingly, one larger reform concerns improvements to the information ecosystem for insurance discrimination. Currently, there is no federal law that requires insurers offering personal lines to report publicly their outcomes by race, ethnicity, national origin, religion, gender and other suspect classifications. Indeed, it is highly doubtful that US insurers even collect that information in many instances. This dearth of data severely hampers the ability to detect insurance discrimination and would pose serious evidentiary problems if Congress enacted a liability scheme.

---

[96] Schwarcz, *supra* note 47, at 669.

It is time to adopt Professor Daniel Schwarcz's proposal to enact a federal law, patterned on the federal Home Mortgage Disclosure Act (HMDA),[97] that would require insurers offering personal lines to collect and publicly report data shedding light on potential discrimination to a federal regulator.[98] These data should disclose whether the insurer uses any suspect category for purposes of coverage, pricing, or termination for any personal line of insurance (and if so, which category and line). In addition, the data should include transaction-level data fields sufficient to analyse outcomes as to coverage, pricing, termination of coverage, and claim pay-outs by suspect categories such as gender and race, as well as by line of insurance and the policyholder's zip code, income, and credit score. As with HMDA, the dataset should be publicly available online (to the extent consistent with consumers' privacy) to permit analysis of the data by the public. Congress should require submission of the data to the CFPB, which already administers HMDA and is logically best situated to enforce a new federal insurance discrimination statute.

Mandatory data reporting would facilitate another needed reform, which involves clothing the CFPB with supervisorial power over insurers for compliance with a new federal statute prohibiting discrimination in insurance. An important part of that oversight would be mandatory examinations and reporting. In addition, the CFPB as supervisor should require companies to self-test their underwriting and pricing models and practices for discrimination and report the results to the Bureau. This industry policing would be especially helpful in cleaning up disparate impact harms and would afford the accountability needed to reinforce industry compliance.

Finally, as part of a new federal anti-discrimination law in insurance, Congress should require insurers to provide notice to individual consumers of adverse impact based on prohibited classifications and other factors such as zip codes that may serve as proxies for illegal discrimination. Already, the Fair Credit Reporting Act[99] requires insurers who deny coverage or charge higher prices based on a customer's credit standing to inform the customer of that fact through an 'Adverse Action Notification'.[100] Expanding the adverse action notification requirement to include adverse action in insurance based on suspect categories and other proxies would substantially boost consumers' ability to detect potential discrimination. Because the CFPB has jurisdiction over the Fair Credit Reporting Act, the agency would be the natural candidate to administer an expanded notification requirement based on its expertise.

7. Conclusion

Generally, in US law, race discrimination warrants strict scrutiny, while sex discrimination demands heightened review in the form of intermediate scrutiny. In insurance, however, discrimination based on race or sex too often undergoes little or no scrutiny at all. Even today, state laws regularly condone intentional insurance discrimination,

[97] 12 U.S.C. §§ 2801-2811.
[98] Schwarcz, *supra* note 47, at 662.
[99] 15 U.S.C. §§ 1681-1681x.
[100] 15 U.S.C. §§ 1681a(d)(1), 1681a(k)(1)(B)(i), 1681m(a)-(b).

particularly based on sex, and disparate impact bias is rampant in insurance. This resistance to anti-discrimination mandates in insurance is structural in nature, being the product of the decentralized US system of insurance regulation and blind faith in actuarial risk classification models.

This glaring oversight in US anti-discrimination law and the resistance of the states to reform necessitate a strong solution. In this article, I propose an overarching federal statute outlawing insurance discrimination in personal lines based on race, national origin, religion, gender, and like suspect classifications in order to bring insurance law in line with the strong anti-discrimination principles that currently otherwise prevail in the US.