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## Justifying Unisex Insurance: Another Perspective

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### Recommended Citation

Robert H. II Jerry; Kyle B. Mansfield, Justifying Unisex Insurance: Another Perspective, 34 Am. U. L. Rev. 329, 368 (1985)

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# JUSTIFYING UNISEX INSURANCE: ANOTHER PERSPECTIVE

ROBERT H. JERRY, II\*  
KYLE B. MANSFIELD\*\*

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### INTRODUCTION

The question of whether insurance companies should be allowed to use gender as a basis for calculating premiums and payments has received considerable attention in recent years. The United States Supreme Court has declared in two cases that title VII of the Civil Rights Act of 1964<sup>1</sup> prohibits employers or employer-sponsored pension plans from using gender to calculate pension contributions and payments.<sup>2</sup> Congress has considered proposals to enact legislation that would prohibit gender discrimination in the writing and selling of insurance policies.<sup>3</sup> The National Organization of Women has announced its intention to bring lawsuits challenging the legality of gender-based insurance rating.<sup>4</sup> The Supreme Court cases,<sup>5</sup> the lower court cases that preceded them,<sup>6</sup> the pending federal leg-

1. Title VII makes it an unlawful employment practice "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. . . ." 42 U.S.C. § 2000e-2(a)(1) (1982).

2. *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492, 3492 (1983) (employers may not retain retirement benefit companies that require equal contributions from men and women but pay lower benefits to women); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 702 (1978) (employers may not require female employees to contribute more money than male employees to pension fund).

3. S. 372, 98th Cong., 1st Sess., 129 CONG. REC. S795 (daily ed. Feb. 1, 1983) (Fair Insurance Practices Act) (prohibiting discrimination on basis of race, color, religion, sex, or national origin in writing or selling of insurance contracts); H.R. 100, 98th Cong., 1st Sess., 129 CONG. REC. H42 (daily ed. Jan. 3, 1983) (Nondiscrimination in Insurance Act) (prohibiting insurers from discriminating on basis of race, color, religion, sex, or national origin in connection with application or terms of insurance contracts).

4. See *Denver Post*, Aug. 16, 1984, at 15A, col. 1 (reporting announcement by National Organization of Women (NOW)). In its press release, NOW stated its intention to file a \$2 million anti-discrimination suit challenging Mutual of Omaha's practice of charging women higher rates than men for individual health and disability insurance. *Id.* Judy Goldsmith, president of NOW, remarked that the suit will be the first in a series of lawsuits intended to prevent insurers from charging women more than they charge men for the same product. *Id.*

5. See *supra* note 2 (citing cases prohibiting discrimination against women in retirement programs).

6. See *Sobel v. Yeshiva Univ.*, 566 F. Supp. 1166, 1189-92 (S.D.N.Y. 1983) (dismissing claims that employer engaged in pay discrimination by withholding more money for pension plan from salaries of female employees); *Norris v. Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans*, 486 F. Supp. 645, 649-52 (D. Ariz. 1980) (holding unlawful voluntary deferred compensation plan requiring equal contribution but paying unequal benefits to men and women), *aff'd*, 671 F.2d 330 (9th Cir. 1982), *aff'd in part, rev'd in part*, 103 S. Ct. 3492 (1983); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343, 1345-51 (E.D. Mich. 1979) (employer's lower retirement annuity payments to women than to similarly situated men violated title VII), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3566 (1983); *Spirit v. Teachers Ins. & Annuity Ass'n*, 475 F. Supp. 1298, 1306-07 (S.D.N.Y. 1979) (holding unlawful use by employee benefit plans of gender-based mortality tables to determine benefits), *aff'd in part, rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded*, 103 S. Ct. 3565 (1983), *reinstated with modification*, 735 F.2d 23 (2d Cir. 1984).

isolation,<sup>7</sup> and the increased public consciousness about equal rights generally have prompted considerable commentary, both scholarly<sup>8</sup> and popular,<sup>9</sup> on gender-based insurance rating.

7. See *supra* note 3 and accompanying text. For further discussion of proposed legislation that would ban gender-based discrimination in insurance rating, see *infra* notes 50-56 and accompanying text.

8. In *City of Los Angeles Dep't of Power & Water v. Manhart*, 435 U.S. 702 (1978), the Supreme Court held that employers could not use sexually segregated actuarial tables to determine employee contributions to employer-provided pension plans without violating title VII of the Civil Rights Act. *Id.* at 717. This decision sparked debate among commentators, who evaluated the underlying premises for the Court's conclusion that title VII precludes differential treatment of individuals of a class even though they might actually represent different classes of risk.

The debate began when one group of commentators defended the decision in *Manhart* by arguing that individuals are not treated differently as the Act requires because sexually distinct mortality tables in use cause men and women to bear unequal costs. Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 506 (1980). Another commentator attacked this premise as unsound, primarily because it fails to recognize that actuarial tables are efficient predictors of the actual cost of providing risk-based benefits, and, therefore, this form of discrimination ultimately leads to an equal effect for all individuals. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489, 496-501, 505-07 (1982). The supporters of *Manhart* contend, however, that the gender distinction in mortality tables nevertheless is spurious. Brilmayer, Hekeler, Laycock & Sullivan, *supra*, at 531-33. Although sex itself is an immutable characteristic, the mortality tables are highly unstable predictors because statistical life expectancy reflects a combination of shifting biological, environmental, and behavioral factors. *Id.* at 551-59. There is demographic evidence that shows, for example, that the life expectancy gap between men and women is narrowing. *Id.* According to the *Manhart* supporters, this implies that factors such as personality and job stress contribute significantly in determining life expectancy. Brilmayer, Laycock & Sullivan, *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222, 236-37 (1983). Professor Benston again responded to the *Manhart* supporters by claiming that if the use of sex-distinct mortality tables results in discrimination against females, such discrimination is either opportunistic or unintentional. Benston, *Discrimination and Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues and a Response to Professors Brilmayer, Laycock, and Sullivan*, 50 U. CHI. L. REV. 250, 265-67 (1983) [hereinafter cited as Benston, *Discrimination and Economic Efficiency*]. Professor Benston explained that if a company were to doubt the economic efficiency of sex-distinct tables, it would have a great incentive to use other predictors. *Id.* at 267. Benston also argued that disregarding gender in the calculation of statistical life expectancies, in addition to shifting the costs between men and women, might increase the total cost of providing fringe benefits. *Id.* at 274-75.

Other commentators have also evaluated gender-based insurance rating. See Bernstein & Williams, *Sex Discrimination in Pensions: Manhart's Holding v. Manhart's Dictum*, 78 COLUM. L. REV. 1241 (1978) (arguing that dictum in *Manhart* may undermine title VII); Freed & Polsby, *Privacy, Efficiency and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. BAR FOUND. RESEARCH J. 583 (discussing effects of gender discrimination in employment); Kimball, *Reverse Sex Discrimination: Manhart*, 1979 AM. BAR FOUND. RESEARCH J. 83 (examining the problems of gender discrimination in pension plans); Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199 (1979) (discussing recent Supreme Court cases and legislative proposals concerning sexual classification in employee benefit plans); Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. REV. 624 (1973) (examining consequences of use of gender-based mortality tables); Comment, *Gender Classification in the Insurance Industry*, 75 COLUM. L. REV. 1381 (1975) (discussing social implications of gender-based discrimination in insurance).

9. See Forbes, *Nonsense on Unisex*, FORBES, June 20, 1983, at 23 (discussing negative implications of Fair Insurance Practices Act); Gray, *The Unisex Debate: What are the Insurance Companies Afraid Of?*, MS., Apr. 1984, at 104 (discussing Fair Insurance Practices Act); Seligman, *Insurance and the Price of Sex*, FORTUNE, Feb. 21, 1983, at 84-85 (discussing legislative proposals and attendant confusion regarding gender-based discrimination in insurance);

This Article contends that gender is an impermissible basis for calculating insurance premiums and payments.<sup>10</sup> Although this Article agrees with the arguments of those who share this view,<sup>11</sup> it offers a different justification for eliminating gender discrimination in insurance.<sup>12</sup> Part I of this Article briefly reviews the status of existing restrictions on gender discrimination in insurance. Part II examines the issues involved in gender-based insurance rating from the perspective of both insurers and advocates of individual equality. Part III presents a new justification for unisex insurance.

This new justification begins with the premise that American society has reached a collective judgment<sup>13</sup> that discrimination<sup>14</sup> against individuals on the basis of innate human characteristics<sup>15</sup> is repugnant. Those who desire to discriminate on the basis of such characteristics must overcome society's collective judgment by presenting compelling reasons to justify the disparate treatment.<sup>16</sup> Thus, the

Simpson, *Washington: The Battle for Equal Insurance*, WORKING WOMAN, Sept. 1983, at 94-98 (discussing gender-based discrimination in health, life, automobile, and disability insurance plans).

10. The proposed Fair Insurance Practices Act, S. 372, 98th Cong., 1st Sess., 129 CONG. REC. S795 (daily ed. Feb. 1, 1983), commonly called the "Packwood Bill," would also prohibit discrimination in the selling of insurance. See *infra* notes 50-53 (discussing Packwood Bill).

11. See, e.g., Bernstein & Williams, *supra* note 8, at 1243 (classification of employees by gender creates disincentive for hiring class whose fringe benefit costs are higher); Brilmayer, Laycock & Sullivan, *supra* note 8, at 235 (gender-based mortality tables violate civil rights law by using gender as explicit criterion).

12. The justification advanced in this Article is not "different" in the sense that it involves the discovery of new evidence or a new line of argument that justifies unisex insurance. Rather, this Article organizes existing evidence and analyses to create a new perspective on the current debate concerning the desirability of gender equality in insurance.

13. This Article refers periodically to society's "collective judgment" or "collective wisdom." For purposes of this Article, these terms refer to the majoritarian or consensus values articulated or approved in the political process. Rules of law and identifiable customs, for example, provide evidence of majoritarian or consensus values. This Article does not analyze how these values emerge in the political process, and it assumes that articulated rules of law and identifiable customs are majoritarian or consensus values.

14. For purposes of this Article, the term "discrimination" refers to the act of treating two or more persons differently. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 648 (1967). Invidious motive is not a necessary element of "discrimination," as defined in this Article. In other settings, an improper motive must accompany unlawful discrimination. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 (1982) (neutral law unconstitutional under equal protection clause only if impact traceable to discriminatory purpose); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (evidence of racially discriminatory intent or purpose necessary to prove violation of equal protection clause).

15. For a discussion of what constitutes an innate human characteristic, see *infra* note 106 and accompanying text.

16. See *infra* notes 106-23 and accompanying text (discussing American views regarding desirability of discrimination).

Our justification also concedes the proposition that calculating insurance premiums and payments on the bases of race, sex, and age is actuarially sound. An actuarially sound insurance policy is one whose price closely approximates the amount of coverage and risk assumed. In an actuarially sound policy the price of an insurance product closely resembles its true cost. See E.K. MACKAAY, *ECONOMICS OF INFORMATION AND LAW* 176-79 (1982) (discussing econom-

argument in favor of unisex insurance proceeds by means of a cost-benefit analysis of various kinds of discrimination. First, American society has concluded that the actuarial advantages of racial discrimination do not justify different insurance ratings for blacks and whites. Society collectively has decided, therefore, that racial equality in insurance is both desirable and affordable.<sup>17</sup> Second, although discrimination against individuals on the basis of age is repugnant, the actuarial consequences of treating persons with different ages equally in most insurance settings are sufficiently serious to justify age discrimination in insurance.<sup>18</sup> Thus, although age equality in insurance is morally attractive, it is not affordable. Finally, unlike age equality, individual gender equality in insurance is affordable.<sup>19</sup> This Article concludes, therefore, that society should view gender as it now views race: although gender-based calculations for insurance premiums and payments are actuarially sound,<sup>20</sup> feasibility alone does not justify treating men and women differently for insurance purposes.

## I. RESTRICTIONS ON GENDER DISCRIMINATION IN INSURANCE

### A. *Current Restrictions*

#### 1. *Federal law*

Numerous federal statutes expressly prohibit gender discrimination in a variety of settings. The most far-reaching of these statutes is title VII of the Civil Rights Act of 1964,<sup>21</sup> which prohibits employers from discriminating in the workplace on the basis of gender.<sup>22</sup> The Equal Pay Act of 1963<sup>23</sup> and the Pregnancy Discrimination Act of 1978<sup>24</sup> supplement title VII's regulation of gender discrimination

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ics of insurance rating). For further discussion of economic considerations in insurance, see *infra* notes 57-63 and accompanying text.

17. See *infra* notes 125-47 and accompanying text (analyzing costs and benefits of racial discrimination in insurance rating).

18. For further discussion of age discrimination in insurance, see *infra* notes 148-85 and accompanying text.

19. In this Article, the phrase "individual gender equality" describes the equal treatment of individual persons without regard to their sex. "Individual gender equality" is distinct from "group gender equality," which only requires that women as a group receive treatment equal to that accorded men as a group. From an insurer's perspective, current insurance rating achieves group gender equality. See *infra* notes 59-63 (discussing debate on gender discrimination in insurance from insurance perspective).

20. See *supra* note 16 (discussing actuarial soundness in insurance practices).

21. 42 U.S.C. § 2000e (1982).

22. *Id.* § 2000e-2(a)(1); see *supra* note 1 (quoting title VII).

23. 29 U.S.C. § 206(d) (1982).

24. 42 U.S.C. § 2000e(k) (1982).

in employment.<sup>25</sup> Other federal statutes expressly prohibit gender discrimination in credit applications<sup>26</sup> and in some aspects of education.<sup>27</sup> Moreover, the Supreme Court has held that women enjoy equal status with men under certain federal laws that do not contain explicit prohibitions against gender discrimination.<sup>28</sup> No federal statute, however, expressly prohibits gender discrimination in insurance, nor is there any federal statute pertaining to insurance that could be broadly construed to prohibit such discrimination.

In two decisions the Supreme Court has construed title VII of the Civil Rights Act to prohibit gender discrimination in connection with employer-provided pension plans. In *City of Los Angeles Department of Water and Power v. Manhart*<sup>29</sup> the Court held that title VII prohibits an employer from requiring women to make larger contributions to pension plans in order to obtain the same monthly pension benefits as men.<sup>30</sup> The Court concluded that title VII's "focus on the individual is unambiguous,"<sup>31</sup> and that the statute prohibits an employer from treating some employees less favorably than others because of their sex.<sup>32</sup> The Court expanded this line of reasoning in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*,<sup>33</sup> and held that when contributions are equal, title VII also prohibits an employer from paying lower monthly pension benefits to female employees than to male employees.<sup>34</sup>

25. See 29 U.S.C. § 206(d) (1982) (prohibiting discrimination on basis of sex in payment of wages); 42 U.S.C. § 2000e(k) (prohibiting discrimination on basis of pregnancy).

26. The Equal Credit Opportunity Act § 503, 15 U.S.C. § 1691 (1982) (requiring forms used in providing credit to disregard gender and marital status).

27. 20 U.S.C. §§ 1681-1686 (1982) (prohibiting educational programs receiving federal financial assistance from discriminating on basis of sex).

28. See *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (Social Security Act provisions pertaining to Aid to Families with Dependent Children Program, in which gender classifications bear no substantial relationship to valid statutory goals, cannot withstand scrutiny under due process clause of fifth amendment); *Califano v. Goldfarb*, 430 U.S. 199, 204-17 (1977) (Social Security Act provision for differential treatment of widowers and widows constituted invidious discrimination); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-39 (1975) (Social Security Act provision granting compensation to widows but not to widowers constituted gender-based distinction that violated due process clause of fifth amendment); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (holding unconstitutional provisions of Career Compensation Act of 1949 and of Dependents' Medical Care Act of 1956 that accorded differential treatment to spouses of servicewomen and spouses of servicemen).

29. 435 U.S. 702 (1978).

30. *Id.* at 711. An employer-provided pension plan is both a condition or privilege of employment and a form of compensation. See *id.* at 706. Because of these attributes, an employer-provided pension plan is subject to title VII, which makes it an unlawful employment practice to discriminate against an individual with respect to "compensation, . . . conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1982).

31. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

32. *Id.*

33. 103 S. Ct. 3492 (1983).

34. *Id.* at 3499.

From the holdings of these cases, it follows that title VII prohibits employers from discriminating on the basis of gender by providing insurance plans for their employees that either entitle men and women to different benefits or require each group to contribute a different amount for the same benefits.<sup>35</sup> Nothing in these decisions, however, prohibits insurance companies from marketing pension plans or other insurance products that use gender as a factor in calculating premiums or payments.

## 2. *State law*

Few states have statutes that effectively restrict gender discrimination in insurance. Montana, for example, is the only state with a statute prohibiting the use of gender in establishing insurance premium or payment levels.<sup>36</sup> Although some states have statutes prohibiting the use of gender as a factor in setting automobile insurance premiums,<sup>37</sup> none of these states has extended the principle to other categories of insurance or to pension plans. A few states have laws prohibiting gender discrimination when insurers decide whether to renew policies,<sup>38</sup> but these statutes do not affect the use of gender in insurance rating. In addition, some states prohibit discrimination in insurance on the basis of race, color, creed, or national origin.<sup>39</sup> Although these prohibitions are broad enough to encompass rating practices, the statutes do not expressly mention gender discrimination.<sup>40</sup>

35. See *id.* at 3499; *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

36. See 1983 MONT. LAWS ch. 531, § 1 (prohibiting discrimination in insurance and retirement plans on the basis of gender or marital status). The legislation will take effect on October 1, 1985. *Id.* § 4; see also N.Y. Times, Feb. 17, 1985, at 33, col. 1 (discussing women's groups' opposition to insurance industry's efforts to repeal Montana's unisex insurance law).

37. See, e.g., HAWAII REV. STAT. § 294-33 (1976); MASS. ANN. LAWS ch. 175E, § 4(d) (Michie/Law. Co-op. Supp. 1984); MICH. COMP. LAWS ANN. § 500.2027(c) (West 1983); N.C. GEN. STAT. § 58-124.19(4) (1982).

38. See, e.g., ARK. STAT. ANN. § 66-3005(7g) (Supp. 1983); COLO. REV. STAT. § 10-3-11-04(1)(F) (III) (Supp. 1984); FLA. STAT. ANN. § 626.9541(x)(1) (West Supp. 1984); HAWAII REV. STAT. § 431-643(7)(E) (Supp. 1983); KY. REV. STAT. § 304.12-085 (Supp. 1978); MD. ANN. CODE art. 48A, § 234A (1979 & Supp. 1984); MASS. ANN. LAWS ch. 175, § 24A (Michie/Law. Co-op. 1977); MICH. COMP. LAWS ANN. § 500-2027 (West 1983); N.D. CENT. CODE § 26.1-04-03(11) (1981); WASH. REV. CODE § 49.60.178 (Supp. 1984).

39. See statutes cited *infra* note 40.

40. See, e.g., ARIZ. REV. STAT. ANN. § 20-384(2) (West 1980) (risk classifications shall not be based on race, color, creed, or national origin); CAL. INS. CODE § 10140 (West 1972) (insurers shall not refuse to accept applicants for insurance or refuse to renew policies because of race, creed, color, national origin, or ancestry); *id.* § 10141 (insurance application may not require identification of applicant's race, color, religion, ancestry, or national origin); CONN. GEN. STAT. ANN. § 38-61(10) (West Supp. 1984) (insurer may not deny reimbursement under insurance policy on account of race, color, or creed); ILL. REV. STAT. ch. 73, § 1031(3) (1979) (prohibiting unfair discrimination in insurance because of race, color, religion, or national origin); N.J. STAT. ANN. § 17:29B-4 (West Supp. 1984) (prohibiting discrimination in issuance,



All states, on the other hand, have statutes prohibiting "unfair insurance practices,"<sup>41</sup> a category theoretically broad enough to prohibit gender discrimination.<sup>42</sup> These statutes, however, generally are applied only to prohibit discrimination among persons already classified in the same "group" for the purpose of setting insurance premiums or payments.<sup>43</sup> Thus, they are not conducive to attacks on the standards by which individuals are classified into these groups.<sup>44</sup>

Finally, although the Supreme Court has held that men and women enjoy equal status under state statutes regulating such areas as the administration of estates,<sup>45</sup> workers' compensation,<sup>46</sup> jury duty,<sup>47</sup> the age of majority,<sup>48</sup> and domestic relations,<sup>49</sup> the Court

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withholding, extension and renewal of insurance policies because of race, creed, color, national origin, or ancestry).

41. A majority of states have adopted without amendment a model statute formulated by the All-Industry Committee of the National Association of Insurance Commissioners (NAIC). See MODEL INSURANCE LAWS, REGULATIONS, AND GUIDELINES (Nat'l Ass'n Ins. Comm'rs 1977) (providing text of model statute). Each state statute provides that discrimination in the setting of insurance rates or benefits among individuals of the same class and individual life expectancy or risk level constitutes an unfair business practice. See, e.g., KAN. STAT. ANN. § 40-2404(7) (1981); MASS. ANN. LAW ch. 176D, § 3(7) (Michie/Law. Co-op. 1977); MONT. CODE ANN. § 33-18-206 (1983).

42. If it would be plausible to assume that men and women belong to the same "class," and that mortality rates of men and women are not so dissimilar as to be unequal, then these statutes conceivably could encompass a prohibition against gender discrimination. See Flaherty, *The 'Unisex' Policy Uproar*, Nat'l L.J., Feb. 28, 1983, at 9, col. 3.

43. The plain language of such statutes seems only to prohibit discrimination among persons already deemed to fall within the same class. See KAN. STAT. ANN. § 40-2404(7) (1981) ("[A]ny unfair discrimination between individuals of the same class and equal expectation of life . . .") (emphasis added). On September 21, 1983, the National Association of Insurance Commissioners Executive Committee approved on an interim basis a model regulation providing that an insurer's practice of issuing the same kind of life insurance policy on both a sex-distinct and sex-neutral basis would not violate any applicable unfair insurance practices statute. NAIC *Procedure for Permitting Same Minimum Nonforfeiture Standards for Men and Women Insured Under 1980 CSO and 1980 CET Mortality Tables*, 1 NAIC PROCEEDINGS 416 (1984). An additional difficulty is that a substantial question exists regarding whether a private right of action is even available under these statutes. See generally Rokes, *Legislative Intent Under the State Unfair Claims Settlement Practices Statutes—Are Private Rights of Action Foreclosed?*, 2 J. INS. REG. 432 (1984) (discussing states' treatment of rights of private parties under unfair claims settlement practices acts).

44. See Flaherty, *The 'Unisex' Policy Uproar*, Nat'l L.J., Feb. 28, 1983, at 9, col. 3 (states generally accept classification based on gender as valid reflection of gender-based statistical differences).

45. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (Idaho statute granting men preference over women when both are equally qualified to administer estate violates equal protection clause).

46. See *Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142, 147-52 (1980) (Missouri workers' compensation laws denying widower benefits on wife's work-related death but granting widow benefits under similar circumstances violates due process clause).

47. See *Duren v. Missouri*, 439 U.S. 357, 367-70 (1979) (Missouri law exempting women from jury service upon request violates sixth amendment); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (Louisiana requirement that women not be selected for jury service without previous written declaration violates sixth amendment).

48. See *Stanton v. Stanton*, 421 U.S. 7, 13-17 (1975) (Utah child support statute provid-

has never ruled on the question of gender equality in the insurance field. Indeed, because insurance provisions do not involve state action, a Supreme Court decision concerning equality in insurance rating is unlikely.

### B. *Proposed Federal Legislation*

Because of the absence of effective federal and state prohibitions on gender-based discrimination in insurance, U.S. Senators Mark Hatfield, Ernest Hollings, and Robert Packwood have introduced the Fair Insurance Practices Act in the 98th Congress.<sup>50</sup> The bill prohibits discrimination, including gender discrimination, in the writing and sale of insurance policies.<sup>51</sup> The most controversial aspect of the proposed legislation is that it would prohibit insurance companies from using gender-based mortality tables, or any other form of gender-based grouping, in setting insurance premiums and payments.<sup>52</sup> Currently, the Senate bill remains in committee.<sup>53</sup>

In the U.S. House of Representatives, Representative Robert Dingel introduced a virtually identical bill entitled the Non-Discrimination in Insurance Act.<sup>54</sup> The House Commerce Committee, however, amended the bill to exempt any class of insurance that is not part of an employee benefit plan.<sup>55</sup> As approved by the House com-

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ing that females attain majority at age 18 and males at age 21 violates equal protection clause).

49. See *Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981) (Louisiana statute giving husband unilateral right to dispose of property jointly owned with wife without her consent violates equal protection clause); *Orr v. Orr*, 440 U.S. 268, 278-83 (1979) (Alabama statute requiring husbands but not wives to pay alimony violates equal protection clause).

50. S. 372, 98th Cong., 1st Sess., 129 CONG. REC. S795 (daily ed. Feb. 1, 1983).

51. See *id.* at S828-29 (statements of Sen. Hatfield and Sen. Packwood) (purpose of bill to prohibit discrimination in insurance on basis of race, color, religion, sex, or national origin of applicant).

52. *Id.* at S829 (statement of Sen. Hatfield) (noting unfairness and unreliability of gender-based mortality tables).

53. In April and May 1983, the Senate Commerce Committee held a series of hearings on the proposed bill. See *Fair Insurance Practices Act, Hearings on S. 372 before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. (1983) [hereinafter cited as *1983 Hearings on S. 372*].

54. H.R. 100, 98th Cong., 1st Sess., 129 CONG. REC. H42 (daily ed. Jan. 3, 1983).

55. HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., AMENDMENT OFFERED BY CONG. TAUZIN 1 (1984) (amending HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., SUBSTITUTE OFFERED BY CONG. DOWDY 7 (1984) as amending H.R. 100, 98th Cong., 1st Sess. § 4, 129 CONG. REC. H42 (daily ed. Jan. 3, 1983)); see *Wall St. J.*, Mar. 29, 1984, at 8, col. 1 (discussing amendment). The House Commerce Committee amendment also provides for the establishment of a commission to study the possibility of enacting federal legislation to regulate gender discrimination with respect to insurance that is not part of an employee benefit plan. HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., AMENDMENT OFFERED BY CONG. TAUZIN 1-4.

As a result of the committee's action, one conservative commentator announced that his "pint-sized wife, who drives less than 5,000 miles a year, can put down her shootin' irons. Her side finally won." Kilpatrick, *Unisex Insurance: Dead in the Water*, *The Indianapolis Star*, May 1,

mittee, the legislation would do no more than codify the Supreme Court's interpretation of the requirements of title VII.<sup>56</sup>

## II. THE CURRENT DEBATE ON GENDER-BASED INSURANCE RATING

### A. Overview

An insurance policy is a contract under which an insurer assumes someone's risk in exchange for a fee.<sup>57</sup> The amount of the fee should equal the present monetary value of the risk of the loss plus the insurer's administrative costs. A one in five risk of losing \$100, for example, has a present monetary value of \$20. Because of the expense involved in determining the precise monetary value of a particular individual's risk of loss, insurers group similar risks together and charge each individual in the group the same premium.<sup>58</sup> Insurers will continue to classify insured persons into distinct groups as long as the cost of measuring the differentiating factor is less than the premium reduction the insurer can offer the members of a differentiated, better-risk group.<sup>59</sup>

For the insurer, gender is a useful, low-cost measurement for differentiating between high and low risks.<sup>60</sup> Moreover, an insurer who fails to use an actuarially sound measurement of risk to calculate premiums will be competitively disadvantaged.<sup>61</sup> Suppose, for example, that Insurer A offers an automobile insurance policy to twenty-five-year-old men and women for the same premium. Men are higher risks than women because men, on the average, have

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1984, at 10, col. 2 (discussing amendment's effect of preventing higher premiums for safer women drivers by providing exemption to H.R. 100 for individually obtained insurance policies). Declarations that the battle over unisex insurance is over are probably premature. Mrs. Kilpatrick might temporarily put down her "shootin' irons," but she would be wise not to discard them.

56. See *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492, 3493 (1983); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 717 (1978). For a discussion of these cases, see *supra* notes 29-35 and accompanying text.

57. See J. GRIEDER & W. BEADLES, *LAW AND THE LIFE INSURANCE CONTRACT*, 3-4 (4th ed. 1979).

58. See *id.* at 4 (insurers are able to assess risks with high degree of certainty by grouping individuals together and applying science of probability).

59. See E.J. MACKAAY, *supra* note 16, at 176-79 (1982) (cross-subsidization of risk groups eliminated when insurers can differentiate on basis of feature that can be assessed economically); Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, *supra* note 8, at 494-501 (insurers look at group characteristics rather than individual distinctions because it is less costly and thus ultimately benefits individuals).

60. See Benston, *Discrimination and Economic Efficiency*, *supra* note 8, at 254 (employers use gender as a predictive variable to avoid cost of acquiring more specific information).

61. Cf. R. KEETON, *INSURANCE LAW* 557 (1971) (reliance on competition to produce rates that are neither excessive nor discriminatory has long been principle underlying insurance rating in United States).

more accidents than women.<sup>62</sup> Insurer B will recognize that it can offer the same policy only to women at a lower price. If Insurer B then offers such a policy, women will switch from Insurer A to Insurer B, leaving Insurer A with a greater proportion of high-risk men. As a result, the premium Insurer A charges for the insurance will eventually increase because of the greater proportion of high risks.

From the "insurance perspective," there is nothing wrong with the operation of these market forces. Indeed, insurance markets are able to function efficiently because insurers charge a price closely related to the insurance product's true cost.<sup>63</sup> Similarly, from the insurance perspective, there is nothing inequitable about using gender as a factor in insurance rating. Group equality exists so long as men as a group pay what is necessary to cover the losses experienced by men, and women as a group pay what is necessary to cover the losses experienced by women. Using gender to calculate insurance premiums and payments is a discriminatory practice, but that is the inherent nature of insurance. Viewed from this perspective, inequality occurs only if one group receives less in return for its payment than another.

Advocates of individual equality in insurance rating reject the argument that the current system achieves group equality and claim that the rating techniques in use treat women as a group less favorably than men.<sup>64</sup> More importantly, these advocates reject the notion that group equality is a proper measure of fairness.<sup>65</sup> Instead, they claim that for some purposes the individual is the proper measure of

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62. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 79 (104th ed. 1984) (table of mortality rates by age, gender, and selected causes).

63. See R. KEETON, *supra* note 60, at 558 (insurers' pricing below cost might cause some insurance companies to become insolvent; extreme caution in pricing might create excessive prices for consumers); see also *id.* at 566 (as insurers undertake more accurate risk measurement, expense of such measurement causes undesirable increased costs for consumers). For a discussion of the implications of inefficient insurance markets, see *infra* notes 184 & 213-23 and accompanying text.

64. See *infra* notes 66-67 and accompanying text.

65. See, e.g., 1983 Hearings on S. 372, *supra* note 53, at 33-35 (statement of Dr. Mary Gray, National President, Women's Equity Action League). Dr. Gray notes that the difference in mortality rates of men and women does not remain constant over time. *Id.* at 34. Dr. Gray pointed out, for example, that at age 65 there is an 84% overlap in the mortality rates of men and women. *Id.* Insurers nonetheless rely on a set difference in mortality rates in setting premiums for all age groups. *Id.* at 33. As a result, the system is not fair because women in age groups in which the mortality rate for men and women is similar nevertheless must continue to pay higher rates or to receive lower benefits for equal payment. *Id.* at 34; see also *id.* at 42-43 (statement of Judy Goldsmith, President, National Organization of Women) (men as a group qualify for more insurance discounts and for more "preferred" or "select" prices, thus indicating that the system is unfair even though it achieves group equality).

equality.<sup>66</sup> Insurers should remain free to classify persons into groups; they should not, however, group individuals on the basis of race, sex, religion, or national origin, even if these characteristics have predictive value and can be measured at low cost.<sup>67</sup>

Some who proceed from the insurance perspective argue that prohibiting the use of gender in classifying risks will have a domino effect. They contend that if gender becomes a prohibited factor, future legislatures might find discrimination on the basis of age, driving record, or medical history repugnant and prohibit insurers from using those rating factors as well.<sup>68</sup> If values of individual equality prohibit insurers from using a broad range of rating criteria, eventually insurers will lose the tools necessary to categorize individuals into groups for risk-spreading purposes.<sup>69</sup> These advocates of the insurance perspective argue that the result would be severe market dislocations that could threaten the viability of the entire industry.<sup>70</sup> Individual equality advocates, however, deny the existence of this threat.<sup>71</sup>

## *B. Application of the Debate to Major Categories of Insurance*

### *1. Life insurance and annuities*

Statistics show that, on the average, women live longer than men.<sup>72</sup> At every age, the incidence of death is higher for males than for females.<sup>73</sup> Given these statistics, the insurance industry contends that gender-based premiums and payments for life insurance and annuities are equitable because they reflect the anticipated dif-

66. See *id.* at 31 (statement of Dr. Mary Gray, National President, Women's Equity Action League) ("treating all women as the average woman is the essence of discrimination.").

67. See *Nondiscrimination in Insurance Act, Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation, and Tourism of the Comm. on Energy and Commerce, House of Representatives*, 98th Cong., 1st Sess. 549-50 (1983) (statement of Douglas Laycock, Ass'n of University Professors) (need to predict future losses is not unique to insurance industry and should not exempt it from civil rights law and policy).

68. 1983 *Hearings on S. 372, supra* note 53, at 311 (statement of George K. Bernstein, American Ins. Ass'n).

69. See *id.* at 244-45 (statement of James E. Bollin, President, National Ass'n of Life Insurance Companies). Bollin contends that gender, like age, is a critical factor in assessing risks for which no adequate substitute exists. *Id.* If gender is eliminated as an acceptable factor in calculating risks, insurers will be unable to categorize individuals accurately for risk-spreading purposes. *Id.*

70. See *id.* at 246-47. A unisex rating requirement would have its most serious effect on small insurance companies because they do not have sufficient assets to offset losses caused by inaccurate risk assessments. *Id.* Inability to assess risks adequately could strain the resources of these companies and could lead to insolvency for many. *Id.* at 246-47.

71. See, e.g., *id.* at 33 (statement of Dr. Mary Gray, National President, Women's Equity Action League) (many insurers have adopted unisex rating without economic dislocation).

72. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 73 (104th ed. 1984) (1982 preliminary data on life expectancy).

73. *Id.* at 74.

ferences in life expectancy of men and women.<sup>74</sup> Because of the difference in group mortality rates, women either pay less for life insurance than men pay, or contribute equally but receive greater benefits than men receive. Conversely, men either pay less for annuities than women, or contribute equally but receive greater benefits than women.<sup>75</sup>

Because gender aids in predicting the longevity of the average applicant for life insurance and annuities, and because gender is a factor that insurers can measure easily and inexpensively, it is actuarially sound to use gender as a factor in classifying life insurance and annuity risks.<sup>76</sup> Insurers argue, therefore, that forbidding them to use gender in setting rates and benefits would increase insurance costs for all life insurance customers by causing insurers to depend on other less cost-effective predictive factors.<sup>77</sup> Furthermore, the elimination of gender as a factor in the computation of life insurance premiums would result in men paying less for cover-

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74. See, e.g., *Fair Insurance Practices Act: Hearings on S. 2204 Before the Senate Comm. on Commerce, Science, and Technology*, 97th Cong., 2nd Sess. 136 (1982) (statement of Barbara J. Lautzenheiser, American Council of Life Insurance) [hereinafter cited as *1982 Hearings on S. 372*].

75. The provisions and benefit options of pension plans vary widely. Consequently, mandating individual equality will not result necessarily in women, as a class, paying less for annuities or receiving greater benefits. See Bernstein, *The Havoc in Retirement Benefits after Norris*, 70 A.B.A. J. 80, 81 (1984) (discussing implications of *Norris* for individual insurance subscribers). Employers provide approximately 95% of primary retirement coverage through defined benefit plans. *Id.* at 81. In these plans, the basic benefit is a single life annuity that is already paid on a unisex basis. Comptroller General of the United States, *Economic Implications of the Fair Insurance Practices Act* (Report to Sen. Orrin G. Hatch, et al.) (Apr. 6, 1984), app. I, at 6 [hereinafter cited as *GAO Report*]. When the annuitant selects a joint-and-survivor option, however, enabling the surviving spouse to receive monthly benefits should the annuitant die, insurers frequently use gender-distinct tables to convert the unisex annuity. *Id.* In these instances, men receive lower monthly benefits than women to compensate for the greater statistical likelihood that a male employee's wife will survive him than that a female employee's husband will survive her. *Id.* Under a plan providing for equalized benefits, men will receive greater overall increases in benefits than women. See *id.* The Comptroller General has estimated that, assuming no sharing of income between retired employees and their spouses, women would receive only 26-36% of the benefit increases in annuities under a plan mandating gender equality. *Id.* Assuming that benefits to married retirees are shared equally with spouses, however, women would receive about 57% of the benefit increases. *Id.*

76. A gender-neutral example illustrates the point: an individual deep-sea diver chosen at random might live longer than an individual college professor chosen at random, but on the average, deep-sea divers have a shorter life expectancy than college professors because of their hazardous occupations. See ASSOCIATION OF LIFE INSURANCE MEDICAL DIRECTORS OF AMERICA AND THE SOCIETY OF ACTUARIES, *MEDICAL RISKS: PATTERNS OF MORTALITY AND SURVIVAL* 36, tables § 20 (1976). Insurers can compare accurately and inexpensively these individuals' professions. Deep-sea divers, therefore, should pay more for life insurance than should college professors. See *id.* (insurers should allocate cost of insurance to individual who incurs it). The same is true with gender: an individual female chosen at random might have a shorter life than an individual male chosen at random, but the average difference in longevity of males and females validates the use of gender as a factor in calculating premiums and payments for life insurance and annuities.

77. *1982 Hearings on S. 372*, *supra* note 74, at 137-39 (statement of Barbara J. Lautzenheiser, American Council of Life Insurance).

age and women paying more.<sup>78</sup> Women, therefore, would subsidize life insurance for higher-risk men, and men would subsidize annuities for higher-risk women. From the insurance perspective, such group inequality would be as inequitable as a life insurance classification scheme in which low-risk college professors subsidize high-risk deep-sea divers.<sup>79</sup>

Advocates of individual equality in insurance claim that insurers have failed to achieve equality among groups because they offer better insurance products to men than to women.<sup>80</sup> These advocates note that insurers use mortality tables that minimize the expected longevity differential between men and women to determine life insurance risks, and use mortality tables that maximize the differential to calculate risks in annuities.<sup>81</sup> As a result, the price differential favoring women in life insurance is less than the price differential favoring men in annuities.<sup>82</sup> A man, therefore, often pays less for a life insurance-annuity package than does a woman of the same age who purchases identical coverage.<sup>83</sup>

Regardless of whether the use of identical mortality tables to calculate risks in life insurance and annuities would result in group equality, advocates of individual equality argue that the proper goal for insurance rating is not group equality, but individual equality.<sup>84</sup> The average woman may live longer than the average man, but there is no guarantee that an individual woman will live longer than

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78. Cantor, *Legislative and Judicial Developments in Pension Law*, 17 FORUM 166, 182 (1981) (females' premiums would increase when they no longer reflect cost based on life expectancy) (citing *ACLI Testimony Before the House Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, May 20, 1981, ACLI GEN. BULL., May 29, 1981, at 3070).

79. The insurers' argument might also be phrased this way: it cannot be discriminatory to charge the same premium for a life insurance policy or annuity to two people who have identical life expectancies. A 60-year-old male has roughly the same life expectancy as a 68-year-old female; both, on average, will live ten more years. Thus, both should pay the same amount for a life insurance policy or an annuity. This argument is simply another way of stating the insurers' basic thesis that the price of insurance products should be a function of the risk that the insurer assumes. See *id.* at 182-83 (differentiation of premiums charged on basis of amount of risk transferred to insurer is not unfairly discriminatory).

80. See *infra* notes 81-83 and accompanying text (discussing insurance practices that cause life insurance-annuity packages to be more expensive for women than men).

81. See 1982 *Hearings on S. 372*, *supra* note 74, at 75 (statement of Isabelle Katz Pinzler, Director, Women's Rights Project, American Civil Liberties Union). Ms. Pinzler notes that existing mortality tables are biased in favor of men: the life expectancies of men are set back six-to-nine years for annuity calculations, which justifies larger annual payments for men than for women. *Id.* For life insurance calculation, however, male life expectancies are only set back three years, resulting in male premiums that are more comparable to lower female premiums. *Id.*; see also Kimball, *Reverse Sex Discrimination*: Manhart, 1979 AM. B. FOUND. RES. J. 83, 109 (1979) (discussing different methods in use to create mortality tables).

82. See Kimball, *supra* note 81, at 110.

83. See *supra* note 81.

84. See Gray, *The Case For Non-discrimination in Insurance*, 2 J. INS. REG. 3 (1983) (analyzing effect of group equality concept on individual insurance applicants).

an individual man.<sup>85</sup> Moreover, the mere achievement of group equality ignores the fact that the individual who purchases an insurance policy or annuity does not receive treatment equal to that of a similarly situated person of the opposite sex.<sup>86</sup>

## 2. *Health and disability insurance*

Women often pay more than men pay for the same health and disability insurance coverage.<sup>87</sup> The cost of maternity coverage is a major factor underlying the increased cost of health and disability insurance for women.<sup>88</sup> From the insurer's perspective, because only women incur maternity expenses, women as a group should assume the cost of insuring these expenses.<sup>89</sup>

Advocates of individual equality argue that, as a matter of fairness, men should share in the costs of pregnancy and childbirth.<sup>90</sup> Indeed, fairness is not the only justification. These advocates believe that skewed health insurance rates impose an even higher cost on society in the form of increased infant mortality resulting from the inability of women to afford coverage for medical care during pregnancy and childbirth.<sup>91</sup> Additionally, they claim that the practice of charging women more for health and disability insurance encourages employers to discriminate against women in their hiring deci-

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85. *Id.* at 4. Gray notes that, in a sample including 1,000 men and 1,000 women, the actual longevity of 84% of the men and women coincided. *Id.* Only 16% of the sample, consisting of 8% of the men who died before reaching the average age of male death, and 8% of the women who died after reaching the average age of female death, possessed statistically unusual longevity. *Id.*

86. See Brilmayer, Hekeler, Laycock & Sullivan, *supra* note 8, at 508 (analyzing discriminatory impact of gender-integrated and gender-segregated mortality tables on individuals and groups).

87. See N.Y. Times, May 2, 1983, at D1, col. 3 (at age 22, women typically pay annual premium of \$300 for major medical coverage, and men of same age pay \$230); see also 1982 Hearings on S. 372, *supra* note 74, at 75 (statement of Isabelle Katz Pinzler, Director, Women's Rights Project, American Civil Liberties Union) (disability insurance, which became generally available to women only recently, remains routinely unavailable to homemakers).

88. See 1982 Hearings on S. 372, *supra* note 74, at 51-52 (statement of Judy Schub, Director of Legislation and Program Development, National Federation of Business and Professional Women's Clubs) (even when maternity coverage is available, benefit plans often cover only 38-44% of actual costs).

89. See *id.* at 169-70 (statement of S. Roy Woodall, Executive Vice President, National Ass'n of Life Insurance Companies) (risk classification insures fair allocation of cost); *id.* at 167 (statement of National Ass'n of Independent Insurers) (eliminating sex differential would result in unfair subsidies between groups with different risks).

90. See *id.* at 51 (statement of Isabelle Katz Pinzler, Director, Women's Rights Project, American Civil Liberties Union) (without equality in insurance, women unfairly receive maternity coverage that is limited in scope or no coverage at all); see also *id.* at 54 (statement of Dr. Quincalee Brown, Executive Director, American Ass'n of University Women) (disability insurance often covers payments for vasectomies and prostate operations, expenses that only men incur but that both men and women subsidize through insurance premiums).

91. See *id.* at 56 (statement of Dr. Quincalee Brown, Executive Director, American Ass'n of University Women) (over one half of health policies include maternity coverage).



sions, or to make up the cost by reducing benefits provided to their employees generally.<sup>92</sup>

### 3. *Auto insurance*

Young women generally pay less than young men pay for auto insurance.<sup>93</sup> The industry claims that if insurers were not able to use gender to calculate premiums, women would have to pay an additional seven hundred million dollars each year for auto insurance,<sup>94</sup> even though women cause fewer losses than men.<sup>95</sup> Insurers point to several compelling statistics. First, men have significantly more automobile accidents than women.<sup>96</sup> Second, the margin increases when men under age twenty-five are compared to women under age twenty-five.<sup>97</sup> Third, the average man commits more traffic violations and incurs more major traffic convictions than the average woman.<sup>98</sup> Finally, statistics show that men are involved in more than twice as many fatal automobile accidents as women.<sup>99</sup> Insurers argue that, because the average male is a higher risk than the average female, it is fairer to make men pay higher

92. *Id.* at 49 (statement of Judy Schub, Director of Legislation and Program Development, National Federation of Business and Professional Women's Clubs).

93. See N.Y. Times, May 2, 1983, at D1, col. 3 (average annual premium in 1982 for basic insurance coverage of 23-year-old driver of 1980 Chevy Malibu in Manhattan was \$1,017 for a woman and \$1,603 for a man).

94. See *The Battle that Needn't Be Fought: The Unisex Dilemma*, 60 J. AM. INS., 1, 2 (1984) (unisex rating policy would raise cost of automobile insurance to millions of women by \$100 to \$600 per year); cf. GAO Report, *supra* note 75, app. I, at 19 (finding that rate increase would apply only to single women, and typically only to young single women).

Commentators note that these increased rates would affect most significantly minority women and single women working to support themselves and their dependents. See Lautzenheiser, Roberts & Walters, *H.R. 100/S. 372: Are They Necessary?*, 2 J. INS. REG. 11, 13 (1983) (analyzing effects of proposed insurance legislation on individuals and groups). According to Department of Labor statistics, in 1978, 40% of the women in the labor force were single and 58% of the minority women in the labor force were single. See *id.* (citing UNITED STATES DEP'T OF LABOR, ECONOMIC RESPONSIBILITIES OF WORKING WOMEN (1979)).

95. See 1982 Hearings on S. 372, *supra* note 74, at 98 (statement of George K. Bernstein, American Ins. Ass'n) (discussing insurance risks associated with men and women).

96. See *id.* at 98 (statement of George K. Bernstein, American Ins. Ass'n) (quoting CALIFORNIA INS. DEP'T, STUDY OF CALIFORNIA DRIVING PERFORMANCE (1970)) (men have 143% more automobile accidents than women).

97. See *id.* at 99 (statement of George K. Bernstein, American Ins. Ass'n) (quoting *Effects of Exposure to Risk on Driving Record, 1973, U.S. Dep't of Transportation*, CALIFORNIA DEP'T OF TRANSPORTATION, CALIFORNIA DRIVER FACT BOOK 7 (1976)) (males under 25 years of age experience 157% more accidents than females of similar age).

98. *Id.* (statement of George K. Bernstein, American Ins. Ass'n) (quoting CALIFORNIA INS. DEP'T, STUDY OF CALIFORNIA DRIVING PERFORMANCE (1970) and MICHIGAN DEP'T OF STATE, MICHIGAN DRIVER STATISTICS (1980)).

99. *Id.* at 107 (statement of Sally Kirkpatrick, Gov't Affairs Representative, Alliance of American Insurers) (quoting *Effects of Exposure to Risk on Driving Record, 1973, U.S. Dep't of Transportation*, CALIFORNIA DEP'T OF TRANSPORTATION, CALIFORNIA DRIVER FACT BOOK 8 (1976)).

insurance premiums.<sup>100</sup>

Advocates of individual equality do not dispute the statistics. They claim, however, that insurers can use factors other than gender to measure accurately risk in automobile use.<sup>101</sup> Some of these factors include the length of the applicant's driving experience; the applicant's annual mileage; the quality of the applicant's driving record; the age, make, model, and safety devices of the applicant's vehicle; the applicant's completion of driver training courses; and the territory in which the applicant drives.<sup>102</sup>

In evaluating the effects of unisex automobile insurance policies in states that have prohibited the use of gender as a rating factor, commentators sharply diverge in their conclusions. One commentator claims that the markets in those states have been distorted by unisex rating.<sup>103</sup> Other commentators dismiss these claims and report few difficulties arising from the abandonment of gender as a rating factor.<sup>104</sup> At least one commentator attributes problems that have arisen in states mandating unisex automobile insurance to factors other than the use of gender to set premiums.<sup>105</sup>

### III. A JUSTIFICATION FOR UNISEX INSURANCE

#### A. *The Premise: Equality and the Presumptive Repugnance of Discrimination*

This Article premises its justification for eliminating gender-based

100. See *supra* note 94 and accompanying text (discussing increase in cost of auto insurance for women that could result from gender-neutral rating).

101. See 1982 *Hearings on S. 372*, *supra* note 74, at 123 (statement of Sanford R. Squires, Commercial Union Ins. Cos.) (although age, sex, and marital status are statistically valid predictors of loss experience, these differences can be recognized through use of other, more socially acceptable variables).

102. *Id.* at 123-24 (statement of Sanford R. Squires, Commercial Union Ins. Cos.) (listing factors currently in use at one company).

103. See *id.* at 113 (statement of Sally Kirkpatrick, Gov't Affairs Representative, Alliance of American Insurers) (price of family insurance always depends on individual family member with poorest risk).

104. *Id.* at 122 (statement of Sanford R. Squires, Commercial Union Ins. Cos.); see Wallace, *Unisex Automobile Rating: The Michigan Experience*, 3 J. OF INS. REG. 127, 139 (1984). An empirical analysis of the effects of unisex rating in automobile insurance in Michigan led Wallace to conclude that

[u]nisex rates for young drivers [the only group affected at all by unisex rating] caused moderate increases in average premium for young women and moderate decreases in average premium for young men. . . . Michigan's experience with unisex automobile rating, while unique in some respects, is evidence that gender can be successfully eliminated as a rating factor without the dire consequences that some have predicted.

*Id.* at 139.

105. See 1982 *Hearings on S. 372*, *supra* note 74, at 127-28. Squires attributes the problems in the Massachusetts automobile insurance industry to prohibitions on the use of rating factors such as age and marital status, in addition to gender, and to the existence of a "facility," a large involuntary market for high-risk drivers. *Id.*

discrimination in insurance on the proposition that society has made a collective judgment that discrimination against individuals on the basis of innate human characteristics<sup>106</sup> is repugnant. In addition, this Article is premised on the assumption that those who desire to draw distinctions among individuals on the basis of such characteristics must overcome the presumption of repugnance by presenting compelling reasons for the disparate treatment.

Society's presumption that discrimination is repugnant does not lead it to treat people equally in all respects.<sup>107</sup> Indeed, our society admits that each person is unique,<sup>108</sup> and it treats people differently based on some of the identifiable differences among them.<sup>109</sup> A theory based on the inherent validity of nondiscrimination is not, however, inconsistent with society's need to draw certain distinctions among its citizens. Equality is not an absolute or an effective precept to guide conduct;<sup>110</sup> instead, it is a *conviction* that persons should receive similar treatment to the fullest extent that they are

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106. Race, age, and national origin are innate human characteristics because they are unalterable. Gender is also innate; although sex-change operations now exist, they remain extraordinary procedures of questionable viability. It is possible to define intelligence and physical strength as quasi-innate characteristics, because although humans are born with certain capacities for these attributes, they are affected by environment and the initiative of the individual may alter these attributes. Religious preference is not innate, because it is subject to alteration at the will of the individual. American society, however, has chosen to afford heightened protection to an individual's freedom of religion. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

107. *See infra* notes 125-26 & 148-55 and accompanying text (discussing some situations in which society has chosen to treat individuals unequally). One commentator labels the principle "treat everyone alike, regardless of individual characteristics" as "radical egalitarianism." *See* J. ENGLISH, *SEX EQUALITY* 1-2 (1977) (introduction to collection of essays on equality of men and women). Such an extreme approach to equality is not desirable because it would require all to share equally, regardless of productivity or need. *Id.* at 1-3. Unacceptable consequences from equal treatment would include, for example, giving all students the same grade regardless of performance, or hiring brain surgeons regardless of skill. *Id.* at 1.

108. Presuming that people are alike and entitled to equal treatment does not presuppose that all individuals are identical. Each person is a combination of qualities and characteristics not found in the same proportions in any other person. Individuals can be (and are) grouped into categories within which they share certain attributes, even though they are dissimilar with respect to other attributes.

109. *See infra* notes 125-26 & 148-55 and accompanying text (discussing some situations in which society has chosen to treat individuals unequally).

110. *See* H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961) ("though 'Treat like cases alike and different cases differently' is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct"). Professor Westen asserts that the concept of equality has no substantive content at all absent a supplementary moral standard: "without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. Without such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know." Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982). Other commentators have not accepted Westen's contention that equality has no normative content of its own. *See* Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1175-78 (1983) (discussing normative force in theory of equality); Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-49 (1983) (once we recognize that substantive rules are necessary to measure equality, concept

alike.<sup>111</sup>

itself no longer necessary). *But see* Westen, *To Lure the Tarantula from its Hole: A Response*, 83 COLUM. L. REV. 1186, 1199-1204 (1983) (rhetoric of equality obscures political content).

111. Operationalizing equality requires choosing a standard to be "used in determining when, for any given purpose, cases are alike or different" and, therefore, subject to being treated alike (equally) or differently (unequally). Hart, *supra* note 110, at 156. In western civilization the analysis begins with the presumption, which dates to ancient times, that human beings are *prima facie* alike in all essential ways and are entitled to be treated alike. According to Aristotle, the concept of equality embraces the idea that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood." ARISTOTLE, *THE THE NICHOMACHEAN ETHICS*, E.6.1131a-1131b (M. Ostwald, trans. 1962); *see also* Westen, *The Empty Idea of Equality*, *supra* note 110, at 542-43 (discussing Greek origins of equality principle). The ancient Hebrews believed that all persons were equal under the law. *See* R. Palmer, *Equality*, in II DICTIONARY OF THE HISTORY OF IDEAS 138, 140 (P. Wiener, ed. 1973) (Hebrews saw both males and females as created in the image of God); *cf. Leviticus* 24:22 (King James) ("ye shall have one law for the stranger and citizen alike; for I the Lord am your God"). The Hebrews also stressed that equality derived from the divinity that God placed in all people, and from humanity's common descent from Adam. *See* F. WILHOIT, *THE QUEST FOR EQUALITY IN FREEDOM* 11-12 (1979) (surveying theories of equality).

The presumption ultimately became the cornerstone for the political theory of government by consent. John Locke's writing presupposed the validity of the concept of equality: "Men being . . . by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent." J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 95 (J. Gough, ed. 1976). Locke's argument that there is equality among individuals was influenced by and to a significant extent followed the work of Thomas Hobbes. *See* F. WILHOIT, *supra*, at 20-21 (noting that both Locke and Hobbes argued that there was undoubtedly human equality in the state of nature). *See generally* T. HOBBS, *LEVIATHAN* (London 1651); T. HOBBS, *DE CIVE* (Amsterdam 1647) (Hobbes' philosophical works on equality).

The concept of equality found a strong foothold within the American system of government. *See, e.g.*, U.S. CONST. amend. XIV, § 1 (referring to right of persons to equal protection of laws); 42 U.S.C. § 2000a(a) (1982) (granting all persons equal right of access to public accommodations without discrimination); A. Lincoln, Gettysburg Address (Nov. 19, 1863) ("[D]edicated to the proposition that all men are created equal").

If equality is defined as a belief or conviction that persons are alike and should receive similar treatment to the fullest extent they are alike, then equality can coexist easily with the recognition that human beings differ from each other. Indeed, Jefferson's recognition of the "self-evident" concept that all men are *created* equal, *see* The Declaration of Independence para. 2 (U.S. 1776), leaves open the possibility that not all men *remain* equal. The equality that Jefferson and Locke embraced, therefore, was an equality of opportunity and human will, not an equality that guarantees a right in all humans to equal treatment for all purposes. This definition of equality is evident in Locke's writing on the subject of equality of the sexes. Locke explained that the family existed prior to civil society and is formed by a mutual agreement between a man and a woman. *See* J. LOCKE, *supra*, at 82. Each party to the agreement thereby acquires equal rights and obligations. *Id.* The wife is an equal partner entitled to own property and to participate in family decisions. Yet when husband and wife disagree and one person's will must prevail, "the last determination—i.e., the rule—. . . naturally falls to the man's share, as the abler and the stronger." *Id.* For Locke, then, equality did not require ignoring the unique qualities of individual persons. Clarifying his definition of equality, he wrote:

Though I have said above . . . that all men by nature are equal, I cannot be supposed to understand all sorts of equality. Age or virtue may give men a just precedence. Excellence of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those whom nature, gratitude, or other respects may have made it due. And yet all this consists with the equality which all men are in, in respect of jurisdiction or dominion one over another; which was the equality I there spoke of as proper to the business in hand, being that equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man.

*Id.* at 28.

A policy favoring nondiscrimination ensures that the categorization of individuals that does occur emanates not only from evidence of dissimilarity, but also from compelling reasons for focusing on the dissimilarity rather than on existing similarities.<sup>112</sup> Society in its collective wisdom might decide, for example, that not all people should vote in public elections.<sup>113</sup> By recognizing a distinction among individuals based on age, and by finding the relevance of the distinction to the voting process more compelling than the need to afford similar treatment based on the similarities of the individuals involved, society can distribute the franchise.<sup>114</sup>

How, then, does society choose which distinctions among individuals are irrelevant or repugnant and which are worthy of recognition? Society's collective sense of whether a particular categorization is fair or repugnant largely depends on the purpose of the categorization and on the social atmosphere in which the issue is considered.<sup>115</sup> Although Americans view age as a reasonable proxy for maturity<sup>116</sup> and thus find it relevant to whether a person should be allowed to vote,<sup>117</sup> they currently view race as utterly irrelevant to the voting process.<sup>118</sup> Modern society is now embarrassed to acknowledge its not-so-recent practice of distributing the franchise according to a person's race, but what is now repugnant was once considered fair and just.<sup>119</sup> As society matured, it gradu-

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112. The choice to embrace a policy favoring nondiscrimination is not inevitable. Some political systems have opted for alternative presumptions. See Davis, Cason & Hovey, *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 LAW & POLICY IN INT'L BUS. 529, 536 (1983) (discussing the Republic of South Africa's policy favoring discrimination against and disfranchisement of blacks).

113. Our society has determined, for example, that individuals under a certain age are not eligible to vote. See, e.g., KAN. STAT. ANN. §§ 25-2305, 25-2306, 25-2508 (1981) (requiring statement at registration that individual will be 18 before next general election); PA. STAT. ANN. tit. 25, § 2811 (Purdon 1984) (persons under age 18 are incapable of voting). The United States Constitution, however, guarantees the right to vote to citizens above the age of 18. See U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

114. See *supra* note 113 (discussing distribution of voting franchise in United States).

115. Thomas Jefferson believed in the concept of equality, see *supra* note 111 (discussing Jefferson's views on equality), but apparently found the presumption of equality rebutted for reasons that modern American society rejects. For Jefferson, racial differences afforded a relevant and compelling reason to distinguish among individuals for purposes of treatment. See V. DABNEY, *THE JEFFERSON SCANDALS: A REBUTTAL* 111 (1981) (discussing implications of Jefferson's ownership of more than 200 slaves); cf. Hart, *supra* note 110, at 158 (discussing conflict between concept of slavery and concept of equality).

116. See *infra* note 150 and accompanying text (framers of U.S. Constitution believed that maturity accompanied age).

117. See *supra* note 113 (discussing relevance of age to right to vote in United States).

118. See U.S. CONST. amend. XV, § 1 (right to vote not contingent on race); Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1982) (right to vote may not be abridged on account of race).

119. See A. MEIER & E. RUDWICK, *FROM PLANTATION TO GHETTO* 157 (rev. ed. 1970) (dis-

ally reached a consensus that the use of race to determine an individual's entitlement to vote is unjust and indefensible.<sup>120</sup>

We presume, then, that humans are all alike in sharing the qualities of freedom, equality, and independence.<sup>121</sup> Those who wish to select certain individuals to receive treatment different from that accorded the rest of society must show that the purpose of the disparate treatment is morally sound<sup>122</sup> and that the characteristic on which the disparate treatment is based is relevant to the approved purpose.<sup>123</sup> If society cannot afford the costs of equal treatment of individuals under circumstances in which neither the purpose of the disparate treatment is immoral nor the relevance of the distinguishing characteristic is lacking, those who seek to discriminate will have carried their burden.<sup>124</sup>

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curring states that amended their constitutions to disenfranchise blacks between 1890 and 1915).

120. See *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (fourteenth amendment prohibits states from denying blacks right to vote in primary elections); see also 42 U.S.C. § 1971 (1982) (prohibits discrimination in voting on basis of race, color, or previous condition of servitude); *id.* § 1973 (prohibits use of voting qualifications or prerequisites in manner that results in abridgement of right to vote due to race).

121. See Locke, *supra* note 111, at 95 (discussing natural state of individuals free from government intervention).

122. See *supra* note 110 and accompanying text (discussing vital role of morality in shaping function of concept of equality).

123. See J. ENGLISH, *supra* note 107, at 2 (noting that defining equality as equal treatment of similarly situated people could cause unjust results when dissimilarity upon which unequal treatment is based is not relevant to purpose).

124. In some circumstances, an appraisal of the costs and benefits of a classification will affect the evaluation of the morality of the disparate treatment and the relevance of the distinction to the purpose of the classification. Because any method of measurement of the costs of equality will depend in part on the measurer's motive in urging or defending a particular classification, this cost-benefit analysis is inevitable. See A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 88 (1975) (social decisions permitting economic inequality are justifiable when they promote economic efficiency). Mr. Okun illustrates his proposition with "the leaky-bucket experiment": suppose that government decides to impose an additional tax on families earning \$50,000 and above, and to transfer the revenues from the tax to families earning \$10,000 or less. Suppose also that there are four times as many low-income families as high-income families. Some of the transfer will "leak out" on its way to the aid of the poor. These leakages will take the form of administrative costs and other costs more difficult to quantify, such as work disincentives, adverse effects on saving and investment patterns, and changes in socioeconomic attitudes. *Id.* at 91-96. How much leakage will society tolerate before opposing the added tax and the income supplement?

Mr. Okun would eagerly make the income transfer if the leakage were in the 10-15% range, but not if the leakage were 99%. *Id.* at 91-95. Another commentator on equality, however, probably would make the transfer so long as the leakage was not total. *Id.* at 92 (quoting J. RAWLS, *A THEORY OF JUSTICE* 62 (1971)) ("all social values . . . are to be distributed equally unless an unequal distribution of any . . . is to everyone's advantage"). Unlike Rawls, who gives high value to equality at the expense of efficiency, Milton Friedman gives high priority to efficiency at the expense of equality, and presumably would not make the transfer if leakage exceeded a relatively low percentage. *Id.* at 92 (citing M. FRIEDMAN, *CAPITALISM AND FREEDOM* 161-66 (1962)).

Society collectively decides to balance economic equality and efficiency somewhere on the continuum bounded by Rawls and Friedman. When society decides that it can no longer justify the transfer envisioned in the "leaky bucket experiment" because the leakage is exces-

Under this framework, our society currently tolerates many kinds of disparate treatment of individuals. Wealthy individuals, for example, pay taxes at higher rates than poor individuals.<sup>125</sup> Poor individuals are entitled to receive income supplements from the government, but wealthy people are not.<sup>126</sup> Those who demonstrate an aptitude for the practice of law are permitted to enroll in law schools, while those who are unable to demonstrate such an aptitude are not. In each of these instances, society has decided collectively—either through the legislative process or by custom—that all individuals should not receive equal treatment. To satisfy our notions of equality, it is sufficient that for certain purposes similarly situated individuals receive similar treatment. In concluding that those wishing to discriminate have presented an adequate justification for the disparate treatment, society decides which differences are irrelevant and which are to be acknowledged and used in organizing society.

### B. *Past Applications of the Premise*

#### 1. *Racial discrimination*

The fairness of eliminating all vestiges of racial discrimination is a widely shared value in our society. In the last forty years, American society has taken significant steps toward eradicating the persistent barriers to racial equality.<sup>127</sup> The Supreme Court has interpreted the Civil War Amendments to the Constitution<sup>128</sup> to prohibit a broad range of government practices that discriminate on the basis of race.<sup>129</sup> In addition, legislation supplements constitutional guar-

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sive, society decides that the costs associated with achieving economic equality are too high, and that allowing economic inequality to persist at a certain level is justifiable.

The proposition advanced in this Article represents an expansion of the argument that Okun makes in the economic equality/efficiency debate. Society presumes that distinctions among individuals based on innate human characteristics are repugnant. Achieving equality, however, involves some costs—"leakage"—both in economic terms and in terms of effects less easily quantifiable, such as adverse effects on social stability and disincentives to productive activities. At a certain point, society may decide that the costs are sufficiently great to justify dissimilar treatment of individuals with regard to the distinction under consideration.

125. See I.R.C. § 1 (1982) (federal income tax rates); *id.* § 2001 (federal wealth transfer tax rates).

126. See 42 U.S.C. § 603 (1982) (authorizing payment of grants to states for expenditures for needy families with children).

127. This process began in 1944 when the Supreme Court declared all racial classifications to be suspect. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). In 1954 the Court assumed the vanguard role in promoting racial equality by finding racial segregation in schools unconstitutional. See *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954) ("separate but equal" is inherently unequal). For further discussion of the Court's efforts to eradicate racial discrimination, see *infra* note 129 and accompanying text.

128. U.S. CONST. amend. XIII (prohibiting slavery); *id.* amend. XIV (guaranteeing all citizens full privileges under Constitution); *id.* amend. XV (granting right to vote to all citizens).

129. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968) (thirteenth

antees by prohibiting racial discrimination in employment,<sup>130</sup> voting,<sup>131</sup> government benefits,<sup>132</sup> and education.<sup>133</sup> When courts permit racially based disparate treatment of individuals, it is usually to provide a remedy for racial groups that have been the objects of past, pervasive, and systematic discrimination.<sup>134</sup>

For many years, insurers routinely charged blacks and whites different rates for life insurance and annuities.<sup>135</sup> From a pure actuarial

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amendment grants Congress power to identify "badges of slavery" and to pass legislation necessary to eliminate them); *Anderson v. Martin*, 375 U.S. 399, 406 (1964) (election system in which race of each candidate is indicated on ballot violates fifteenth amendment); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (state statute excluding blacks from juries violates equal protection clause of fourteenth amendment). For a historical review of the Court's efforts to remedy racial discrimination, see generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 611-82 (2d ed. 1983).

130. See, e.g., 42 U.S.C. § 2000e-2(a) (1982) (unlawful to fail to hire, to limit, to segregate, or to classify employees on basis of race); *id.* § 2000e-2(b) (unlawful for employment agency to fail to refer for employment any person because of race); *id.* § 2000e-2(h) (unlawful to discriminate in compensation or seniority system because of race).

131. See 20 U.S.C. § 1973 (1982) (unlawful to impose any qualification or standard that results in abridgement of franchise on racial grounds).

132. See 42 U.S.C. § 2000d (1982) (unlawful to deny any person federal assistance benefits on racial grounds).

133. See 20 U.S.C. § 1142 (1982) (unlawful for any institution of higher education receiving federal benefits to undertake racially discriminatory project).

134. Today, courts find repugnant almost all distinctions based on race. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 486 (1977) (underrepresentation of Mexican-American jurors is unconstitutional); *Louisiana v. United States*, 380 U.S. 145, 149 (1965) (requirement that voters understand every section of Constitution unlawful because it results in discrimination on bases of race and national origin). Existing examples of tolerable disparate treatment on racial grounds involve programs aimed at resetting an intolerable social balance. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 460 (1980) (upholding constitutionality of federal law requiring 10% of federal business assistance funds to be spent on minority-owned business); *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979) (upholding temporary disparate treatment by private employers attempting to eliminate racial imbalances in traditionally segregated job categories); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 318-19 (1978) (finding use of race constitutional because race may become a factor in medical school admissions decisions under some circumstances); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding illegal employment practice operating to exclude blacks but not shown to be related to job performance). Society presumably would permit the use of race as a factor in deciding, for example, who is eligible to play the role of Dr. Martin Luther King, Jr. in a dramatic production about Dr. King's life. Cf. U.S. Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2) (1984) (if necessary for "authenticity or genuineness," as in the case of an actor or an actress, EEOC will consider gender a bona fide occupational qualification). No unanimity of opinion exists, however, on even this use of racial classification. See *University Daily Kansan*, Nov. 4, 1983, at 1, col. 3 (reporting black students' objections to alleged decision of director of university production of musical *Hair* to cast black students in black roles).

135. See D. MCGILL, *LIFE INSURANCE* 393-94 (rev. ed. 1966) (discussing use of racial criteria in insurance rating); Shepherd, *Principles and Problems of Selection and Underwriting*, in *LIFE INSURANCE TRENDS AT MID-CENTURY* 62-63 (D. McCahan, ed. 1950) (discussing statistical differences in mortality among blacks, Caucasians, and Orientals influencing underwriting).

Around the turn of the century, racial discrimination and the general lack of interest of many whites in doing business with blacks prompted the creation of new enterprises, such as banks and insurance companies, that served only blacks. A few of these enterprises continue to do business today, still predominantly serving blacks. See A. MEIER & E. RUDWICK, *FROM PLANTATION TO GHETTO* 173-76 (rev. ed. 1970) (discussing rise of black insurance companies and businesses). See generally W. WEARE, *BLACK BUSINESS IN THE NEW SOUTH: A SOCIAL HIS-*



viewpoint, the discrimination was justifiable.<sup>136</sup> Throughout this century, the average nonwhite person has had a shorter lifespan than the average white person.<sup>137</sup> At most age levels, the incidence of death among nonwhites has been higher than the incidence of death among whites.<sup>138</sup> Moreover, race is a relatively easy characteristic to measure. 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.

Notwithstanding the actuarial soundness of using race in setting insurance rates and premiums, by the mid-1960's insurers had converted to race-neutral actuarial tables.<sup>139</sup> No major economic dislocations occurred in insurance markets following the introduction of race-neutral rating practices.<sup>140</sup> The conversion to race-neutral tables apparently was not retroactive; there is no evidence that insur-

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TORY OF THE NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY (1973) (tracing 60-year history of black-owned insurance company).

136. See R. MEHR & R. OSLER, *MODERN LIFE INSURANCE* 449-50 n.8 (3d ed. 1961) (social discrimination involved in setting different premium rate for one race which shows higher average mortality than second race is no greater than that involved in setting different rate for any other statistical reason).

137. See STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 72, at 73. Preliminary data for 1982 showed that nonwhite males had a life expectancy of 66.5 years (compared to 71.4 years for white males), and that nonwhite females had a life expectancy of 75.2 years (compared to 78.7 years for white females). *Id.*

138. See *id.* at 74 (comparing incidence of death at various age levels among whites and nonwhites). But see *infra* note 145 (discussing commentators' arguments that no causal connection exists between race and mortality).

139. Information regarding this transformation is sparse. A 1961 insurance text reported "a definite trend toward the elimination of special discriminatory treatment of certain races." R. MEHR & R. OSLER, *supra* note 136, at 471. The authors of the text attributed this change in part to state laws forbidding rate differences based on race. *Id.* at 471 n.8. A 1966 text, however, reported that insurers continued to use race-based tables in life insurance rating. D. MCGILL, *supra* note 135, at 393-94. 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. Historically, many state and industrial self-corrective measures have occurred when federal intervention has appeared imminent. See R. KEETON, *supra* note 60, at 537-42 (1971) (discussing allocation of regulatory responsibility between state and federal systems).

Some authority exists to support the proposition that refusal to enter into an insurance contract with a person because of that individual's race violates 42 U.S.C. § 1982 (1982), which provides that "all citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to . . . purchase . . . real and personal property." *Id.*; see *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199, 1203 (D. Colo. 1974) (allegation of insurers' conspiracy to cause Navajo Indians to purchase insurance through subsidiary that charged higher rates rather than through other subsidiary predominantly serving whites may be brought under statute); *Sims v. Order of United Commercial Travelers*, 343 F. Supp. 112, 115 (D. Mass. 1972) (plausible that racially motivated refusal to enter into insurance contract with black violates statute).

140. In 1950 American life insurance companies collected \$8,189,000,000 in total premium receipts. AMERICAN COUNCIL OF LIFE INSURANCE, 1984 LIFE INSURANCE FACT BOOK 55 (1984). In 1955 the total of premiums rose to \$12,546,000,000, in 1960 to \$17,365,000,000, and by 1970 to over \$36 billion. *Id.*

ers restructured existing individual contracts in which racial criteria had been used to calculate premiums and benefits.

Although discrimination against blacks in the *selling* of life insurance may have increased in connection with the introduction of race-neutral tables,<sup>141</sup> there is no evidence showing that racial discrimination in insurance markets is more widespread than discrimination in other areas of society. Although covert racially discriminatory insurance practices probably persist,<sup>142</sup> it is significant that society finds intolerable the overt practice of using race as a factor in calculating insurance premiums and benefits.<sup>143</sup> Insurers could measure race at very little expense and thus could make their products more attractive by pricing the product closer to its true cost. Less expensive annuities could be sold to blacks and higher-benefit life insurance could be sold to whites if race-based actuarial tables were used.<sup>144</sup> Nevertheless, insurers have been unwilling to use race to calculate insurance rates and premiums because society collectively considers such a practice repugnant.<sup>145</sup> Because insur-

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141. Insurers can circumvent race-neutral rating tables in property and liability insurance by "red-lining". See Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 530 (1983) (discussing unfair insurance practices). "Redlining" is the practice of excluding certain classes or areas from consideration in the sale of insurance. See Comment, *Redlining: Potential Civil Rights and Sherman Act Violations Raised by Lending Policies*, 8 IND. L. REV. 1045 n.1 (1975) (defining term); see also Badain, *Insurance Redlining and the Future of the Urban Core*, 16 COLUM. J.L. & SOC. PROBS. 1, 13-14 (1980) (examples of redlining include exclusion of certain zip code areas and exclusion of buildings over 40-years-old). To date, challenges to such practices on the ground that they are racially discriminatory generally have been unsuccessful. Austin, *supra*, at 530; see Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423-25 (4th Cir. 1984) (holding that Fair Housing Act, 42 U.S.C. § 3601 (1982), neither applies to nor prohibits redlining practice in hazard insurance). But see Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co., 472 F. Supp. 1106, 1108-1111 (S.D. Ohio 1979) (redlining violates Fair Housing Act). The court in Mackey criticized the opinion in Dunn, noting that it could not find support in the legislative history for the conclusion that the Act applies to hazard insurance. Mackey v. Nationwide Ins. Cos., 724 F.2d at 424.

142. See *Bias on Claims: Car Insurance Firm Settles with Black Accident Victims*, Nat'l L.J., July 23, 1984, at 8, col. 1 (reporting on settlement of class action against Texas insurance company charged with racial bias in paying claims); see also Badain, *supra* note 141, at 3 nn.11-14 (criticizing practice of redlining). For a discussion of redlining, see *supra* note 141.

143. See *supra* note 139 and accompanying text (discussing conversion to race-neutral actuarial tables that began in 1960's).

144. In such a scenario, insurers would not experience severe adverse economic effects. The benefit to a black insurance applicant, in terms of a decreased annuity premium, would exceed the insurer's cost of measuring the characteristic upon which the decrease would be based. Similarly, the cost of measuring the characteristic forming the basis for a decreased life insurance premium for a white applicant would be lower than the actual benefit received by the applicant.

145. Commentators also argue that race is not a meaningful classification device because, although there are connections between gender and mortality, there is no clear genetic or biological causal connection between race and mortality. See Kimball, *Reverse Sex Discrimination*: Manhart, 1979 AM. BAR FOUND. RES. J. 83, 112-13 (1979) (environmental factors influence racial mortality more than biological factors). cf. Lautzenheiser, Roberts & Walters, *supra* note 94, at 12-13 (1983) (scientifically proven genetic differences affecting mortality will make finding substitute for gender difficult). Other commentators vigorously dispute the connection

ance markets are less efficient when products are sold at a price not reflecting their true cost, the elimination of racial discrimination in insurance entails some costs for society.<sup>146</sup> Having decided that racial equality in insurance is desirable, affordable, and just, society willingly pays these costs.<sup>147</sup>

## 2. *Age discrimination*

Although society has reached a consensus that racial discrimination is without merit, it has not reached that same consensus with respect to discrimination based on age. Those wishing to use age as the basis for treating people differently have overcome society's presumption of equality in a number of instances.<sup>148</sup> The federal Constitution, which contains minimum age requirements for eligibility for public office,<sup>149</sup> provides evidence of successful rebuttal of the presumption; the framers apparently considered it so obvious that age brings the wisdom and maturity necessary for skilled and effective government that they deliberated little on the age requirements.<sup>150</sup> In numerous circumstances, minors do not enjoy the same

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between gender and mortality. See Brilmayer, Hekeler, Laycock & Sullivan, *supra* note 8, at 536-39 (association between gender and mortality is unstable); Brilmayer, Laycock & Sullivan, *supra* note 8, at 235-47 (studies do not support connection between gender and mortality); 1982 Hearings on S. 372, *supra* note 74, at 28-30 (statement of Douglas Laycock) (sex/mortality association not genetic, but product of lifestyle). Whether or not race or sex has a causal relationship to mortality is not a particularly useful inquiry in any event. Race and sex do *correlate* with mortality and, therefore, are actuarially valid tools of insurance rating. See H. Danenberg, R. Eilers, G. Hoffman, C. Kline, J. Melove & H. Snider, RISK AND INSURANCE 380-81 (1964) (explaining that ratemaking involves observing the number and extent of losses among a sample, and that this analysis can occur "even without a detailed knowledge of the underlying causes of the loss.").

146. See *supra* notes 57-63 and accompanying text (discussing interaction between market and insurers' practice of calculating risks in order to price insurance according to true cost). For a discussion of the implications of inefficient insurance markets, see *infra* notes 184 & 213-23 and accompanying text.

147. See Freed & Polsby, *supra* note 8, at 588 (although efficiency receives ample attention from courts, there may be good reasons to subordinate efficiency to equality; the adoption of a "color-blind norm" in both statutory and constitutional cases represents such a decision).

148. The Supreme Court has determined that no particular age group constitutes a discrete and insular minority requiring special constitutional protection. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (upholding mandatory state police retirement age); see also *Johnson v. Lefkowitz*, 566 F.2d 866, 869 (2d Cir. 1977) (upholding mandatory civil service retirement age), *cert. denied*, 440 U.S. 945 (1978); *Manson v. Edwards*, 482 F.2d 1076, 1077 (6th Cir. 1973) (court need only find rational basis for statute establishing minimum age requirement for city councilperson).

149. See U.S. CONST. art. I, § 2 (25 years of age for eligibility for House of Representatives); *id.* art. I, § 3 (30 years of age for eligibility for Senate); *id.* art. II, § 1 (35 years of age for eligibility for presidency); see also *id.* amend. XII (Vice-President must meet same standards as President). *But cf. id.* art. III, § 1 (implicitly rejecting concept of retirement age by granting life tenure to judges).

150. See Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 864-65 (1981) (framers believed that maturity and veneration accompanied age).

rights as adults.<sup>151</sup> Almost every state, for example, has established an age at which children must commence school.<sup>152</sup> The existence of compulsory retirement ages reflects society's judgment that, on the average, older individuals cannot work as efficiently as younger individuals and that tenure or seniority rights should evaporate at a particular age.<sup>153</sup> In addition, the existence of minimum age requirements governing eligibility for social security retirement benefits<sup>154</sup> and medical benefits<sup>155</sup> reflects society's judgment that the need for certain government benefits is greater among the elderly than among the young.

In each of these examples, age is used as a proxy to categorize individuals for certain purposes. Rather than calculating a child's intellectual and emotional maturity as the basis for deciding whether the child can enter school, the state establishes a minimum age. Rather than calculating the time at which a particular adolescent is ready to assume the responsibilities of an adult, the state establishes a general age of majority. Employers set compulsory retirement ages to obviate the necessity of evaluating each individual's productivity. Rather than assessing each citizen's health, the government establishes minimum age requirements for eligibility for social security and medical subsidies. Just as gender-based mortality data may not accurately predict the longevity of a particular male or female,<sup>156</sup> age may not accurately represent the maturity of a child, the responsibility of an adolescent, the productivity of a worker, or the quality of a person's health. In each of these instances, however,

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151. See, e.g., DEL. CODE ANN. tit. 6, § 2705 (1975) (declaring minors incompetent to contract); D.C. CODE ANN. § 25-121 (1981) (prohibiting sale of liquor to minors); KAN. STAT. ANN. § 41-715 (1981) (prohibiting purchase of liquor by minors); MD. [ALCOHOLIC BEVERAGES] § 118 (1981) (prohibiting possession of liquor by minors); MASS. ANN. LAWS ch. 231, § 85(o) (Michie/Law. Co-op 1974) (declaring minors incompetent to contract); PA. STAT. ANN. tit. 25, § 2811 (Purdon 1984) (deeming persons under age 18 incapable of voting).

152. Minimum state compulsory attendance ages vary between six and eight. Only Massachusetts and Mississippi do not have compulsory age requirements. See W. VALENTE, *LAW IN THE SCHOOLS* 24-25 (1980).

153. The Supreme Court has sustained compulsory retirement provisions. See *Vance v. Bradley*, 440 U.S. 93, 99 (1979) (upholding requirement that certain Foreign Service employees retire at age 60); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 310-11 (1976) (upholding mandatory state police retirement at age 50). In *Murgia* the Court noted that experts concede a general relationship between advancing age and decreasing physical ability to respond to the demands of a job. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 310-11 (accepting testimony establishing relationship between advancing age and decreasing physical ability to respond to demands of job); see also Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 384 & n.23 (1976) (experts believe that advanced age brings deterioration in physical ability).

154. 42 U.S.C. § 402(a)-(c) (1982) (age 65).

155. 42 U.S.C. § 1395(c) (1982) (age 65).

156. See *supra* notes 81-86 and accompanying text (discussing relationship between mortality tables and actual longevity).

society has determined that the cost of making separate calculations for each individual outweighs the potential unfairness inherent in the use of age as a proxy for other measurements.<sup>157</sup>

A comparison of federal statutes addressing age and racial discrimination provides further evidence of the successful rebuttal of the presumption of equality with regard to categorization based on age. Federal law contains many prohibitions against age discrimination, but these restrictions are less comprehensive than existing prohibitions against racial discrimination.<sup>158</sup> Congress enacted the Age Discrimination in Employment Act of 1967,<sup>159</sup> for example, to prevent arbitrary age discrimination in employment.<sup>160</sup> The Act, however, only applies to individuals between forty and seventy years of age.<sup>161</sup> In addition, the Act specifically exempts insurance plans.<sup>162</sup>

Another federal statute, the Age Discrimination Act of 1975,<sup>163</sup> purports to relieve age discrimination in federal assistance programs<sup>164</sup> and in programs receiving federal financial support.<sup>165</sup> This statute, however, expressly authorizes action that "reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity."<sup>166</sup> Similarly, federal statutes that prohibit racial, sexual, religious, and ethnic discrimination in access to public accommodations,<sup>167</sup> to public facilities,<sup>168</sup> and to public education<sup>169</sup> make no reference to discrimination based on age. Moreover, Congress expressly excluded age discrimination from the prohibitions of title VII because of fear that its inclusion would disrupt group insurance plans.<sup>170</sup>

In many instances, therefore, it appears that those who wish to

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157. See Neugarten, *Age Distinctions and their Social Functions*, 57 CHI.-KENT L. REV. 809, 822-23 (1981) (society will tolerate imperfect classifications if reasonable need exists for classification).

158. See *supra* notes 127-33 and accompanying text (discussing federal prohibitions against racial discrimination).

159. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)).

160. See 29 U.S.C. § 621(b) (1982) (purpose of Act).

161. *Id.* § 631(a).

162. See *id.* § 623(f)(2) (authorizing employers to observe terms of bona fide insurance plan if not evasive of Act's purposes).

163. 42 U.S.C. §§ 6101-6107 (1982).

164. *Id.* § 6101.

165. *Id.* § 6102.

166. *Id.* § 6103(b)(1)(A).

167. *Id.* § 2000a(a).

168. *Id.* § 2000b(a).

169. *Id.* § 2000c(b).

170. See 110 CONG. REC. S13490-92 (1964) (statement of Sen. Humphrey).

discriminate on the basis of age have succeeded in rebutting the presumption of equality. The Age Discrimination in Employment Act,<sup>171</sup> the principal federal age discrimination statute, covers an area in which proponents of age discrimination have failed; it provides that the presumption of equality remains applicable to employment decisions affecting individuals between the ages of forty and seventy.<sup>172</sup> Although it is reasonable to say that the average sixty-nine-year-old cannot lift as much weight as the average forty-year-old, the Act prohibits an employer seeking to hire an employee to lift boxes from choosing the younger applicant rather than the older one solely because of the age difference. Rather, the employer must look to other factors, such as the amount of weight that each individual can lift. The employer can justify a decision to hire the younger applicant if the younger applicant can lift more than the older individual, assuming strength is a necessary job qualification.<sup>173</sup> The basis for the hiring decision can be aptitude for the job, but cannot be age.

Employers could avoid the cost of measuring individual aptitude if they arbitrarily could restrict eligibility for jobs to those of particular ages. Society, however, has demonstrated its willingness to tolerate the costs associated with eliminating age discrimination in employment for persons between the ages of forty and seventy.<sup>174</sup> In other areas, society chooses to tolerate age discrimination<sup>175</sup> presumably because equal treatment of persons of all ages would create economic and social dislocations outweighing whatever justice is sacrificed in the process of age discrimination.<sup>176</sup>

Insurers often use age as a factor when calculating insurance rates and premiums. In automobile insurance, for example, young drivers usually pay higher premiums than middle-aged drivers.<sup>177</sup>

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171. 29 U.S.C. §§ 621-634 (1982).

172. *Id.* § 631.

173. See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 718 (7th Cir. 1969) (although refusal to hire women for jobs requiring lifting of heavy weights is illegal under title VII, employer may require applicants to pass weight-lifting test if business necessity for such requirement exists, despite potential disparate impact of test on women).

174. See *supra* notes 159-61 and accompanying text (discussing federal act that prohibits age discrimination in employment affecting individuals between ages of 40 and 70).

175. See *supra* notes 148-55 and accompanying text (discussing legal areas of age discrimination).

176. Granting 50-year-olds the right to retire and to receive retirement benefits, for example, presumably would induce many able-bodied individuals to leave the work force. The mass attrition of capable individuals could have a catastrophic effect on American industry.

177. Young drivers are involved in more accidents than older drivers. For example, more than one-third of all fatal car accidents involve drivers between ages 15 and 24. See *Young, Eager, and Dangerous*, 59 J. AM. INS., 23, 26 (1983-84) (discussing traffic fatalities among young male drivers); 1982 *Hearings on S. 372*, *supra* note 74, at 98 (statement of George K. Bernstein, American Ins. Ass'n) (younger drivers experience more accidents than older drivers). See *gen-*

Health insurance is typically more expensive for the elderly than for the young.<sup>178</sup> Because the average incidence of mortality increases with age,<sup>179</sup> a younger person typically pays a smaller premium for life insurance than an older person pays for the same coverage.<sup>180</sup> Society generally tolerates age-based distinctions in insurance because mandating age equality usually would cause intolerable dislocations.

Even in life insurance, where the relationship between age and risk is most obvious, it is possible to argue that age is an imperfect predictor of longevity insofar as the individual is concerned. Individuals do not reflect advancing age in the same ways.<sup>181</sup> Because of individual differences in physical and mental deterioration, the average life expectancy of forty-year-old persons as a group may differ substantially from the actual longevity of a particular forty-year-old.<sup>182</sup> Society, therefore, could choose to prohibit insurers from using age as a factor in calculating insurance rates and premiums, thus forcing them to rely on factors such as an individual's health experience and susceptibility to accidental injury. Measurement of these alternative predictive factors, however, would entail increased costs and decreased reliability.<sup>183</sup>

Although it would be morally attractive to disregard age as a factor in insurance rating, the problems that would accompany such a practice are so significant that it cannot be seriously argued that age equality in life insurance is desirable. If a sixty-five-year-old male and a twenty-five-year-old male could purchase life insurance policies with the same benefits at the same price (an average of the current higher price for elderly males and the lower price for young

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erally Austin, *supra* note 141, at 538-41 (discussing use of age as factor in calculating auto insurance ratings).

178. See S. HUEBNER & K. BLACK, *LIFE INSURANCE* 429 (10th ed. 1982) (discussing role of age factor in determination of health insurance premiums); J. Angle & J. McCuistion, *Risk Selection and Substandard Risks*, in *LIFE AND HEALTH INSURANCE HANDBOOK* 334 (3d ed. 1973) (discussing methods of risk selection and classification).

179. See STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 72, at 73 (data on life expectancy in 1982).

180. See R. MEHR & E. CAMMACK, *PRINCIPLES OF LIFE INSURANCE* 632-37 (7th ed. 1980) (discussing computation of life insurance ratings).

181. No exact definition of the aging process exists. Because the health of an individual depends in substantial part on the health of that person's vital organs, and because different individuals' organs deteriorate at dissimilar rates, it is difficult to achieve a precise correlation of age, health, and longevity. See Birren & Loucks, *Age Related Change and the Individual*, 57 CHI.-KENT L. REV. 833, 840-41 (1981) (aging process a product of multiple independent processes).

182. *Id.* at 849 ("[t]he diversity and individuality of aging patterns is the essential fact.").

183. See Benston, *Discrimination and Economic Efficiency*, *supra* note 8, at 257 (market pressures force insurers to use age as rating factor because it is inexpensive to use and more accurate than other factors).

males), elderly males as a group would purchase more life insurance policies, causing the insurers' costs to increase substantially. On the other hand, because the price of the product would far exceed the product's worth to a young male, fewer young males would buy life insurance, and eventually only elderly males would be left buying insurance at a price equal to that which elderly males paid before the price to elderly males was reduced. In short, the market for life insurance would be seriously disrupted.<sup>184</sup> This would be unfortunate because many young males would like to purchase life insurance if its price accurately reflected the cost of covering the risk of a young male's premature death. Mandating age equality in life insurance would inflict too great a burden on society.<sup>185</sup>

*C. An Application of the Premise to Gender-Based Discrimination in Insurance*

To summarize the earlier discussion in this Article, society has determined that discrimination against individuals on the basis of innate human characteristics is repugnant, and that those who desire to discriminate on the basis of such characteristics have the burden of justifying the disparate treatment.<sup>186</sup> Disparate treatment is justifiable when advocates of discrimination can rebut society's presumption of equality by demonstrating that equality is not worth the associated costs.<sup>187</sup> Society has decided that advocates of racially-based insurance rating have failed to rebut the presumption.<sup>188</sup> The costs associated with abandonment of this actuarially sound rating

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184. As long as life insurance remains a voluntary purchase and is not part of a national life insurance program that the government provides, it is not possible to maintain a life insurance pool without age discrimination. See Kimball, *Reverse Sex Discrimination*: Manhart, 1979 AM. B. FOUND. RES. J. 83, 108 (age discrimination necessary in life insurance pool). Some of the first life insurance companies were burial societies that paid their members' funeral expenses by distributing the cost of each death among the membership. As younger members realized that they frequently were contributing to the expenses of deceased members who rarely were their peers, younger members left the societies and few new members joined. See Key, *Sex-Based Pension Plans in Perspective*: City of Los Angeles Department of Water & Power v. Manhart, 2 HARV. WOMEN'S L.J. 1, 46 (1979) (discussing failure of early life insurance companies). The gradual attrition of the younger members caused expenses to increase until only elderly persons were left to make contributions, eventually causing the system to disintegrate. *Id.*

185. A few states have refused to extend the rationale justifying age discrimination in life insurance to encompass age discrimination in automobile insurance. See HAW. REV. STAT. § 294-33 (1976) (insurers may not use age as factor in calculating auto insurance rates); MASS. GEN. LAWS ANN., ch. 175E, § 4(d) (West 1983) (insurers may not charge different rates for auto insurance on basis of age); MICH. COMP. LAWS ANN. § 500.2027(c) (West 1979) (insurers may not discriminate on basis of age in setting auto insurance rates).

186. See *supra* notes 106-26 and accompanying text (discussing society's consensus regarding discrimination).

187. See *supra* notes 106-26 and accompanying text (discussing presumption of equality).

188. For a discussion of the elimination of racially based insurance rating, see *supra* notes 139-47 and accompanying text.



factor<sup>189</sup> are insufficient to persuade society to tolerate race discrimination in insurance. A different attitude, however, operates with respect to age. Society has decided that it cannot tolerate the market dislocations that would occur if insurers could not consider the factor of age in most insurance rating procedures.<sup>190</sup>

The current debate over the use of gender as a factor in insurance rating<sup>191</sup> demonstrates that society has not yet reached a consensus on whether the presumption of individual gender equality in insurance has been successfully rebutted. This Article contends both that the presumption of equality has not been successfully rebutted with respect to gender discrimination in insurance, and that the costs of disregarding this actuarially sound rating factor are affordable.

### 1. *Gender, race, and age discrimination compared*

Gender more closely resembles race than it resembles age.<sup>192</sup> Individuals are born with a certain sex and race; absent extraordinary measures, an individual has only one race and one sex per lifetime. Although at any given moment individuals have different ages and can be categorized accordingly, age is a trait shared by all, and all individuals move equally through time.

Just as society has placed a higher value on racial equality than on age equality,<sup>193</sup> society has placed more emphasis on the need to achieve gender equality than it has on the need to achieve age equality. Federal statutes commonly prohibit discrimination based on race, national origin, religion, and gender, while omitting any reference to discrimination based on age.<sup>194</sup> These statutes presumably reflect society's judgment that eliminating gender and race discrimination in various settings is desirable and affordable, but that eliminating age discrimination, while perhaps desirable, is not affordable.

Despite the number of statutes prohibiting gender discrimination, current national policies do not value gender equality as highly as

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189. See *supra* notes 136-38 and accompanying text (mortality statistics among whites and nonwhites demonstrate actuarial soundness of factor of race).

190. For a discussion of society's tolerance of age discrimination in insurance, see *supra* notes 177-85 and accompanying text.

191. See *supra* notes 63-71 and accompanying text (discussing debate between advocates of individual equality in insurance and advocates of group equality in insurance).

192. See Brilmayer, Hekeler, Laycock & Sullivan, *supra* note 8, at 536-39 (Civil Rights Act prohibits sex and racial discrimination in identical terms in same clause).

193. Compare *supra* notes 127-34 and accompanying text (discussing society's efforts to eliminate racial discrimination) with *supra* notes 148-76 and accompanying text (discussing society's tolerance of age discrimination in many situations).

194. See, e.g., 42 U.S.C. § 2000e (1982) (prohibiting discrimination in employment); 29 U.S.C. § 206(d) (1982) (prohibiting discrimination in wages); 15 U.S.C. § 1691 (1982) (prohibiting discrimination in credit).

racial equality. Gender discrimination is easier to justify under an equal protection analysis than racial discrimination.<sup>195</sup> The federal constitutional prohibitions against race discrimination have no counterpart in the area of gender discrimination, and the Equal Rights Amendment (ERA), which would have elevated gender equality to a right of constitutional stature, recently failed to attain passage.<sup>196</sup> Despite the failure of the ERA to attain the supramajority enactment requirements, evidence suggests that the majority viewpoint in this country places a high value on the ideal of gender equality.<sup>197</sup> Because federal statutes already require gender equality in many contexts,<sup>198</sup> it is reasonable to assume that the failure of the ERA reflects society's judgment that gender equality in *some* areas of our society is not desirable.<sup>199</sup> Thus, the ERA's nonenactment is not determinative on the question of whether gender equality in insurance is desirable. Society still presumes that discrimination on the basis of innate human characteristics is repug-

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195. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (invalidating preference for males in Idaho statutory scheme for selecting administrators of intestate decedents' estates). In *Reed* the Court reached its holding without declaring gender to be a suspect classification. *Id.* at 70-77. *Reed* requires only that a gender-based classification be reasonable and bear a substantial relationship to a government objective. *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). In a later case, the Court articulated an intermediate level of review for the examination of gender-based classifications. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (finding unconstitutional Oklahoma law prohibiting sale of 3.2 beer to males, but not to females under age 21). Under *Craig* gender-based classifications can withstand constitutional challenge only if they serve important governmental objectives and are substantially related to achievement of those objectives. *Id.* This level of constitutional scrutiny is less searching than the "suspect classification/compelling-government-interest" test applied to classifications based upon race. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (racial classifications subject to strict scrutiny); see also Rutherglen, *supra* note 8, at 204-05 (observing that cases involving gender and cases involving race receive different constitutional treatment, in terms of both results and rationale).

196. After Congress passed the Equal Rights Amendment in 1972, 35 states ratified it. The Amendment needed the ratification of three more states but failed to obtain such ratification before the June 30, 1982 deadline. Wash. Post, June 25, 1982, at A2, col. 4. Shortly thereafter, the Amendment was reintroduced in Congress. See Wash. Post, July 15, 1982, at A5, col. 2 (describing rally by congressional sponsors to introduce new drive for passage). In November 1983 the Amendment fell six votes short of a two-thirds majority in the House of Representatives. To protest the Democratic leadership's use of an expedited procedure to bring the Amendment to a vote without permitting amendments and with only 40 minutes of debate, 12 of the Amendment's sponsors voted against it. Wash. Post, Nov. 16, 1983, at A1, col. 4.

197. See G. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1981 171 (1982) (reporting that 63% of people polled favor Equal Rights Amendment; 32% are opposed).

198. See *supra* notes 22-28 and accompanying text (discussing statutory prohibitions against gender discrimination).

199. See Freed & Polsby, *supra* note 8, at 589 (arguing that strong efficiency interests or broadly based social norms requiring different treatment of men and women may justify explicit gender classifications which otherwise are presumptively invalid). Freed and Polsby note that society collectively has decided to place a greater value on the social norm regarding intersexual privacy than on the need to abolish gender discrimination. *Id.* at 597. In contrast, society has not chosen to value social norms more highly than the need to abolish race discrimination. *Id.* at 594-95.

nant.<sup>200</sup> The following question, therefore, remains to be answered, notwithstanding the fact that our society does not yet value gender equality as highly as racial equality: have those who wish to discriminate on the basis of gender demonstrated that treating individuals equally in insurance without regard to their gender entails costs that society cannot reasonably afford? The nature and magnitude of the costs of prohibiting use of gender-based tables in insurance rating largely depend on whether the prohibition extends retroactively or only prospectively.

## 2. *Prospective prohibitions on gender-based rating*

Apart from furthering the ideal of individual equality, a requirement that insurers employ unisex rating in all prospectively issued insurance policies would, to some extent, redistribute wealth and impair market efficiency.<sup>201</sup> Although both effects entail some costs, this Article contends that society can afford these costs.

Except where unisex insurance is already in force,<sup>202</sup> a requirement of unisex rating in all prospectively issued insurance policies would redistribute wealth. Men would pay less in the future for automobile and life insurance, and women would pay more.<sup>203</sup> Conversely, women would pay less in the future for annuities, health insurance, and disability insurance, and men would pay more.<sup>204</sup> Because health insurance premiums for all persons would reflect the costs of pregnancy benefits, a net cost would be imposed on those who do not bear children, whether male or female, to the benefit of those who do.<sup>205</sup> Some of these redistributive effects might be tempered—or perhaps even reversed—if insurers deprived of the use of the gender factor in insurance rating substitute other rating factors.<sup>206</sup>

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200. See *supra* notes 106-26 and accompanying text (discussing social and ideological bases of perceptions regarding discrimination).

201. See *infra* notes 202-23 and accompanying text (discussing consequences of unisex rating).

202. Four states have mandated unisex automobile insurance. See *supra* note 37 (citing North Carolina, Massachusetts, Hawaii, and Michigan statutes). Most auto insurance is already unisex for single drivers over 29 and married drivers over 25. *GAO Report, supra* note 75, app. I, at 19. Some annuities have unisex options. See *supra* note 75 (discussing unisex annuities). Group insurance, which includes about half of the life insurance policies and 87% of the health insurance policies currently in force, typically is calculated on a unisex basis. See *GAO Report, supra* note 75, app. I, at 19.

203. *GAO Report, supra* note 75, app. I, at 19.

204. *Id.*

205. *Id.*

206. *Id.* For example, automobile rates may be based on such factors as mileage, safety record, and make and model of the car. Life, health, and disability rates may derive from the insured's smoking habits and occupation.*Id.*

Except for the administrative costs of converting to unisex rating, the redistribution of wealth that would accompany such a conversion would not reduce society's resources and thus would not impose a net cost on society.<sup>207</sup> The Comptroller General has estimated that the administrative costs of converting to unisex rating would be approximately \$465 million,<sup>208</sup> a sum that can easily be absorbed within existing rate structures. The figure is somewhat less than four percent of the insurance industry's normal administrative costs for one year.<sup>209</sup> Society as a whole, therefore, can afford the redistributive effects of individual gender equality in insurance.

Despite the minimal costs to society collectively, gender equality in insurance would adversely affect some individuals. Under a gender-based rating system, automobile insurance rates for young men are higher than the rates for young women.<sup>210</sup> Under a unisex rating system, rates for young men would decline while rates for young women would rise. Although this result might enable more lower-income men to buy insurance, it would make it more difficult for lower-income women to afford automobile insurance. Similarly, if individual gender equality in health insurance entailed raising rates for men and reducing rates for women, some individual women would benefit, while some individual men would suffer.<sup>211</sup> The extent of these individual burdens and benefits would depend on the extent to which members of each sex and income level buy particular kinds of insurance.<sup>212</sup>

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207. See *infra* notes 208-09 and accompanying text (discussing net cost to society of conversion to unisex insurance).

208. The Comptroller General agreed with the rough estimate of the American Academy of Actuaries that the costs of both developing new unisex policies and revising existing policies would be approximately \$1.3 billion. *GAO Report, supra* note 75, app. I, at 27. This figure does not, however, include any estimate for the costs of state insurance departments to approve the new policies or the possibly higher continuing costs of administering the new policies. *Id.* In any event, about \$880 million of the \$1.3 billion figure would be spent on revising existing policies. *Id.* at 28. If sex equality were mandated only prospectively, administrative costs would decline to approximately \$465 million. See *infra* notes 224-25 and accompanying text (arguing that unisex rating requirement should not apply retroactively).

209. *GAO Report, supra* note 75, at 5.

210. See *supra* note 93 (comparing average annual auto insurance premiums for men and women in 1983).

211. See *supra* notes 87-92 and accompanying text (noting that the average woman currently pays more than the average man for health insurance).

212. A single female head-of-household in a lower income bracket, for example, might find the purchase of health insurance more of a necessity than the purchase of auto insurance. Under a unisex insurance scheme, the individual might benefit from a reduction in the cost of health insurance without suffering the burden of increased costs for auto insurance.

If unisex rating does result in men paying more for certain types of insurance and women paying more for others, it is conceivable that these higher costs would weigh more heavily on persons in lower income brackets. The possibility that this result might ensue does not justify abandoning the concept of unisex rating. If in practice the redistributive impact of unisex

In addition to causing a redistribution of wealth, a prospective requirement of unisex insurance would impair market efficiency to some extent.<sup>213</sup> Insurers charge prices for insurance coverage based on the amount of risk they assume.<sup>214</sup> Gender, an actuarially sound predictive device, does correlate with risk.<sup>215</sup> Insurers currently use gender to calculate premiums and payments because it is cost-effective to do so.<sup>216</sup> If other factors could predict risk as accurately as gender at a lower cost, or more accurately than gender at the same cost, insurers would use those other devices.<sup>217</sup> To the extent gender is cheaper to measure than other factors having equal or even lower predictive value,<sup>218</sup> forcing insurers to rely on these other factors that are more expensive to measure would cause the expenses of insurers to increase, which ultimately would be reflected in the prices charged for insurance products.

With insurers using less accurate predictors of loss, rates charged for insurance would reflect less accurately the true cost of insurance. This would have two consequences. First, overall consumer satisfaction would decline. When prices reflect the true costs of the insurance product, consumers are induced to purchase the optimal amount of insurance worthwhile to them. If prices do not reflect true costs accurately, consumers are induced either to purchase more insurance than they need (if costs are too low) or too little insurance (if costs are too high). Distorting demand redirects society's resources to less productive uses and prevents consumer welfare from being maximized.<sup>219</sup> Second, the discrepancy between

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rating does place lower-income insurance applicants at a disadvantage, then society could compensate for this effect by retrieving a portion of the benefits received by higher-income insureds and by redistributing these benefits. Society could accomplish this by means of a revision of the tax laws, which currently exclude from taxation life insurance benefits and benefits received from health and accident plans. See I.R.C. §§ 101, 104-105 (1985).

213. See *GAO Report*, *supra* note 75, app. I, at 4 (suggesting that gender-neutral insurance may reduce efficiency of market).

214. See *supra* note 59 and accompanying text (discussing methods of calculating insurance premiums).

215. See *supra* notes 59-62 (discussing correlation of gender and risk).

216. See Benston, *Discrimination and Economic Efficiency*, *supra* note 8, at 254 (employers use gender as a predictive variable to avoid cost of acquiring more specific information).

217. See *GAO Report*, *supra* note 75, app. I, at 19-24 (discussing current views regarding predictive value of rating factors).

218. See Benston, *Discrimination and Economic Efficiency*, *supra* note 8, at 254 (employers use gender as a predictive variable to avoid cost of acquiring more specific information).

219. An example from the automobile insurance market illustrates the point. Under unisex rating, the cost of automobile insurance for men would decline. The availability of insurance at a price below the true cost of the risk involved would induce men to purchase more insurance, or to obtain better coverage and lower deductibles, than they would if they were charged a more accurate price. Simultaneously, the higher cost of auto insurance for women would discourage purchase of otherwise desirable coverage by women. Overall consumer satisfaction is not maximized, and, therefore, society as a whole is worse off. See *GAO Report*, *supra* note 75, app. I, at 24 (recognizing that purchase of underpriced insurance leads

price and actual cost also would cause insurance prices in general to increase. Because insurers would have to rely on less accurate predictive devices, they would need to maintain greater financial reserves to compensate for the increased uncertainty.<sup>220</sup> To increase reserves, insurers would have to increase their revenue by raising prices. The operation of the “adverse selection principle”<sup>221</sup> would create additional pressure on prices.<sup>222</sup>

It is difficult to predict precisely the impact that unisex rating would have on market efficiency. The Comptroller General has concluded that the adverse effects of unisex rating on market efficiency would not be as large as the administrative costs of implementing gender-neutral insurance.<sup>223</sup> If the Comptroller General’s estimate is correct, then society can afford the market impairment that individual gender equality in insurance would entail.

### 3. *Retroactive prohibitions on gender-based rating*

Although the costs associated with prospective individual gender equality in insurance are affordable, it is less clear that society can afford the costs of retroactively mandating equality. The Comptroller General has concluded that revising existing insurance policies to reflect unisex rating would cause serious disruptions, including insolvencies of some life insurance companies.<sup>224</sup> Additionally, con-

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to wasteful spending and that refusal to purchase overpriced insurance leaves consumer demand unsatisfied). In addition, if men as a class purchase more automobile insurance than women prior to unisex rating, then the excess purchases men would be induced to make after the imposition of unisex rating would not be offset in total by the reduced purchases women would make. Society as a whole, then, would purchase too much insurance, spending resources that could have been spent on other necessary goods and services.

220. See *id.* at 17. Life insurance companies immediately would need to increase their financial reserves. The laws of most states require life insurers to maintain reserves adequate to cover the actuarial present value of their liabilities. *Id.* If unisex rating caused liabilities to increase, life insurers would have to bolster their reserves immediately or face legal insolvency. *Id.*

221. The “adverse selection principle” contends that, when insurance companies underprice or overprice their products, consumers modify their insurance requirements. See *id.* at 25; see also *supra* note 219 and accompanying text (discussing likely effects of unisex rating on consumer demand for insurance).

222. An example from automobile insurance again illustrates the point. If men are induced to purchase excess insurance because the price of the product is below true cost, the average risk that insurers undertake increases. When the average risk increases, the insurers’ cost increases. This translates into higher rates for all consumers or, if insurers cannot increase revenues to the necessary levels, fewer insurers in the marketplace. See *GAO Report, supra* note 75, app. I, at 25. Adverse selection would operate most dramatically in the health insurance market. *Id.* According to one estimate, unisex rating could increase health insurance premiums for young males by 56%. *Id.* As a result, young men would refrain from buying health insurance, and insurers would charge higher rates to remaining customers to regain lost revenues. *Id.*

223. *Id.* at 26-27; see also *supra* notes 208-09 and accompanying text (discussing administrative costs of conversion).

224. See *GAO Report, supra* note 75, app. I, at 34 (views of Comptroller General); see also S.

sumers who have entered into insurance contracts in reliance on premium and benefit levels calculated under a gender-based rating scheme would suffer from their reliance. In view of its potential adverse impact on the viability of existing insurance contracts, retroactive unisex rating is not affordable.<sup>225</sup>

Society should decide, therefore, to abolish gender-based distinctions in prospective insurance rating, but to avoid paying the price of remedying past gender discrimination in insurance. Although the distinctions made in the past are unfortunate, the costs to society of remedying past discrimination outweigh the obtainable benefits. Society has opted for affirmative action to rectify past racial injustice, but at least insofar as gender discrimination in insurance is

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372, 98th Cong., 1st Sess., 129 CONG. REC. S795 (daily ed. Feb. 1, 1983); H.R. 100, 98th Cong., 1st Sess., 129 CONG. REC. H42 (daily ed. Jan. 3, 1983). This legislation would require the revision of existing pension and insurance contracts to reflect unisex rating either by equalizing premiums on contracts with equal benefits or by equalizing benefits on contracts with equal premiums. S. 372, 98th Cong., 1st Sess., 129 CONG. REC. S795 (daily ed. Feb. 1, 1983); H.R. 100, 98th Cong., 1st Sess., 129 CONG. REC. H42 (daily ed. Jan. 3, 1983). An increase in premium payments during the term of a policy would no doubt prompt policyholder lawsuits, a significant short-term disruption. The GAO, therefore, suggests that most companies would equalize insurance contracts by increasing benefits or by reducing premiums for the disadvantaged sex. See *GAO Report*, *supra* note 75, at 4. Whether companies increase benefits or reduce premiums, the average level of an insurer's liabilities would increase without corresponding increases in assets. This would create unfunded liabilities for insurers. *Id.* Because state law requires life insurance companies to carry full reserves to back up the actuarial present value of their liabilities, *id.* app. I, at 17, failure to increase premiums could result in insolvencies in the short run. *Id.* app. I, at 18. See *supra* note 222 (discussing effects of unisex insurance rating requirement on life insurers). In the Comptroller's opinion, the industry can avoid these adverse effects only by applying unisex rating prospectively, and exempting existing individual insurance contracts from its scope. See *GAO Report*, *supra* note 75, app. I, at 18; see also 1982 *Hearings on S. 372*, *supra* note 74, at 72 (statement of Edward I. Koch, Mayor of New York City) ("enormous financial costs" of retroactive provisions of S. 372 for city's employee pension program would seriously harm city's financial health).

225. In recent confrontations with this issue, the Supreme Court and the Second Circuit have reached essentially the same conclusion. See *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983) (employer retirement plans paying lower benefits to female retirees than to male retirees violate title VII). The district court in *Norris* had approved a remedy requiring the employer—the State of Arizona—to make all future annuity payments equal for similarly situated women and men. See *Norris* 486 F. Supp. at 652. The Supreme Court found the district court's remedy retroactive because it required the state to fund deficiencies in past contributions of female retirees to the insurance plan. See *Norris*, 103 S. Ct. at 3510 n.10. Concluding that retroactivity would be catastrophic for the insurer, *id.* at 3510, the Court held that liability should be prospective only. *Id.* For further discussion of *Norris*, see *supra* notes 33-35 and accompanying text.

In light of *Norris*, the United States Court of Appeals for the Second Circuit reconsidered its decision in *Spirit v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054, 1068 (2d Cir. 1982) (granting retroactive relief to remedy use of gender-distinct mortality tables in university employees' annuity plan), *vacated and remanded*, 103 S. Ct. 3566 (1983). On remand, the Second Circuit interpreted that *Norris* proscription against retroactive remedies to be inapplicable in a case in which retroactivity places no added financial burden on the insurer. See *Spirit v. Teachers Ins. and Annuity Ass'n*, 735 F.2d 23, 29 (2d Cir.), *cert. denied*, 105 S. Ct. 247 (1984). Because the insurer in *Spirit* did not guarantee a minimum level of benefits to retirees, and therefore could decrease benefits to male retirees to compensate for increased benefits to females without incurring liability, the court reaffirmed its retroactive remedy. *Id.*

concerned, the balancing of costs and benefits merits a different response to past sexual injustice.

#### CONCLUSION

Few ideals are more fundamental to the American collective consciousness than the proposition that all persons should receive equal treatment to the extent they are alike. Pursuant to this ideal, American society presumes discrimination on the basis of innate characteristics to be repugnant and places on those wishing to discriminate the burden of justifying disparate treatment of individuals. This burden is a heavy one; even in situations in which the costs of equal treatment are high, society often concludes that the inherent fairness of a policy favoring nondiscrimination outweighs those costs.

Society's preference for sexual equality is reflected in legislative and judicial support for prohibitions on gender-based discrimination in such areas as employment, public accommodations, and education. It is now time to prohibit gender-based discrimination in insurance. Although a national requirement of unisex insurance rating would entail certain costs, proponents of gender-based discrimination in insurance have not demonstrated that these costs are significant enough to override the presumption that people should not be subjected to discrimination on the basis of innate human characteristics.



