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THE INSURANCE CLASSIFICATION CONTROVERSY

REGINA AUSTIN†

This Article explores the controversy that has arisen concerning the classification criteria used in the marketing, underwriting, and pricing of personal automobile and property insurance. Classification criteria are the factors insurance companies use to assign individual applicants to groups differing in riskiness for the purpose of determining whether insurance will be sold to them, and, if so, at what cost and on what terms. Age, sex, marital status, occupation, and place of residence are typical of the factors considered by insurance companies in distributing their product and its costs. As the use of such criteria exemplifies, the insurance classification process is tied to social stratification, the hierarchical grouping of individuals by status and role that is prevalent throughout American society. Social stratification provides a mechanism for allocating power, prestige, and material wealth among groups of individuals united by common values and behavior patterns.

The classification of insureds by insurance companies is as vulnerable to attack as the hierarchical status grouping it parallels. The class-

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ification controversy is the product of the efforts of individuals and groups seeking to avoid the consequences of social stratification as applied not only to the distribution of a particular good or service, but also across a broad spectrum of society's activities. Thus, the controversy has included challenges to the use of sex as a criterion on which to price automobile insurance.¹ Similarly, attacks have been launched against the practice of denying property insurance to the residents of racial or ethnic urban neighborhoods through a process of territorial discrimination known as "redlining."²

The classification controversy has primarily been the concern of legislatures (including the United States Congress) and insurance regulatory authorities. The courts have acted in an ancillary role limited largely to reviewing legislative or administrative reforms. Given this context, it is understandable that arguments advanced in the controversy reflect the general regulatory debate about the extent to which the law should structure the economic sphere so as to promote either free competition, on the one hand, or social welfare on the other.

Although the arguments attacking and supporting the use of the classification criteria are advanced in legal forums, they are not couched in formalistic jargon. Common law and constitutional doctrinal rubrics, and the terms of civil rights laws and insurance regulatory measures are not of major significance. The rhetoric of the controversy has not been filtered through and purified into legal discourse. Although the principal arguments appear in the regulatory pronouncements of insurance commissioners, in the opinions of courts reviewing legislative and regulatory actions, and in the reports of federal administrative bodies, they are akin to the positions advanced by ordinary folks at congressional hearings or by community organizers in tracts written for citizens' groups attacking alleged discriminatory insurance practices. Insurance agents and company executives have offered competing arguments possessing a similar nonlegalistic quality.

Perhaps because they are constructed of common language, the arguments rather clearly reflect the tensions and contradictions in the ideology that underlies them.³ Most significantly, they reveal the strain produced by the opposition of individual autonomy and intragroup solidarity. Moreover, the arguments inconsistently suggest that the classifi-

¹ See, e.g., *infra* notes 56-69 and accompanying text.

² See *infra* text accompanying note 42; note 71 and accompanying text.

³ The analysis used in this Article relies predominantly upon R. UNGER, *LAW IN MODERN SOCIETY* (1976) [hereinafter cited as R. UNGER I]; R. UNGER, *KNOWLEDGE & POLITICS* (1975) [hereinafter cited as R. UNGER II]. Two other works that are essential to the reasoning are Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 105 (1980), and Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

cation controversy can be solved either by an appeal to neutral principles supported by an apolitical consensus of values, or by the use of the tactics and stratagems of political conflict and resolution. Because these tensions doom them to incoherence and disunity, no premise or argument presently being advanced provides a basis for resolving the controversy.

Part I of this Article explores the origins of the controversy and its legal context. Part II describes a few of the criteria insurance companies employ in classifying insureds and explains why classification and social stratification generate controversy. Part III dissects the arguments advanced by those seeking relief from the effects of the classification practices of insurance companies and explains their inadequacy. Part IV suggests that the classification controversy may be resolved and the strictures of social stratification eased through the creation of communities capable of democratically generating a real consensus concerning the distribution of insurance protection and its cost.

I. THE LEGAL CONTEXT

A. *Insurance Company Practices*

In preindustrial societies, a person viewed his family, neighbors, voluntary associations, and traditional elites as sources of security against the risk of fortuitous losses.⁴ In capitalistic industrialized societies a person need not rely on such traditional, custom-bound attachments; he can purchase security in the form of a product called insurance.⁵ Insurance is sold by corporate concerns that claim to employ statistical techniques by which they turn the risk of individually unpredictable events into fixed premiums, assured benefits, and profits for the concern's shareholders or employees.⁶ Insurance companies have replaced traditional sources of security because the companies supposedly perform more rationally and efficiently. Moreover, with industrialization, "[m]en no longer [have] personal relationships comprehensive . . . or dependable enough, to provide . . . security."⁷

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⁴ See Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 479-80 (1961); see also M. WEBER, *ECONOMY AND SOCIETY* 360-62 (G. Roth & C. Wittich eds. 1978).

⁵ See Kimball, *supra* note 4, at 480; see also M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 226-37 (1977).

⁶ See R. KEETON, *BASIC TEXT ON INSURANCE LAW* § 1.2(b)(2), (5) (1971).

⁷ Kimball, *supra* note 4, at 480. See also *id.* at 513. The destruction of the extended family or kinship group has been laid to "industrial growth": "Mobile isolated units are more functional in a capitalist economy, thus the ascendancy of the nuclear family and the destruction of the social framework of intra-familial 'social security.'" Offe, *Advanced Capitalism and the Welfare State*, 2 POL. & SOC'Y 479, 482-83 (1972). In addition to replacing the family, insurance companies per-

Personal automobile and property insurance provide a form of security that most ordinary people wish to purchase.⁸ Such coverage protects the insured, his family, his friends, and in the case of liability insurance, strangers whom he may harm. Furthermore, an individual may be required to procure coverage in order to obtain a car registration that will permit his automobile on the road⁹ or a government-backed mortgage that will finance the purchase of his home.¹⁰

Insurance companies, however, are unable or unwilling to meet the full demand for personal automobile and property insurance. The chief explanation for this is that company profitability is tied to the selective acceptance and rejection of applicants for coverage.¹¹ For example, automobile insurance premiums are assessed on the basis of characteristics the insured shares with a class or group of insureds.¹² The class will generally consist of people of like age, sex, and marital status who live or garage their cars in the same geographic territory and make the same sort of use (pleasure, commuter, business, or farm) of their vehicles.¹³ Assume that the premium is fixed at the future average cost of insuring the class, as estimated according to suppositions based on its past experience.¹⁴ To assure a profit and to keep its expo-

form what Theodore Lowi calls a "most unappreciated service": "we rely upon them to administer our conflicts, with each other or with nature, rather than leave these to spontaneous confrontation or traditional litigation." T. LOWI, *THE END OF LIBERALISM* 29 (2d ed. 1979).

⁸ In 1981, consumers spent \$24,395,174,000 in premiums for automobile liability insurance and \$16,747,789,000 for automobile physical damage insurance. See INSURANCE INFORMATION INSTITUTE, *INSURANCE FACTS* 22 (1982-83 ed.). Premium volume for multiple peril homeowners insurance was \$10,779,626,000. *Id.* at 23.

⁹ Automobile insurance may be required by either compulsory insurance statutes or financial responsibility laws. Twenty-one states have mandatory insurance laws. Abramoff, *Rating the Rating Schemes: Application of Constitutional Equal Protection Principles to Automobile Insurance Practices*, 9 CAP. U.L. REV. 683, 685 & n.11 (1980). Twenty-six states and the District of Columbia require that a driver furnish adequate proof of present security and future financial responsibility in the event of an automobile accident. Failure to provide such proof typically leads to the loss of driving privileges. See Sheldon & Sarason, *Auto Insurance Availability Issues—A Role for Legal Services*, 15 CLEARINGHOUSE REV. 825, 826, 838-39 (1982).

¹⁰ The Veterans Administration loan guaranty program requires property insurance, 38 C.F.R. § 36.4222 (1983), as does the low-cost and moderate-income mortgage insurance program, 24 C.F.R. § 221.521 (1982). See generally FEDERAL INS. ADMIN., U.S. DEP'T OF HOUS. & URBAN DEV., *INSURANCE CRISIS IN URBAN AMERICA* 3 (1978) [hereinafter cited as *INSURANCE CRISIS*]; Carter, *The Limits of Regulatory Powers of Insurance Commissioners—An Industry Viewpoint*, 13 FORUM 403, 408 (1978).

¹¹ Fierce competition through selectivity and classification refinement began in the 1950's, when insurers who employed bureau rates and sold their product through independent agents were faced with competition from companies that calculate their premiums independently and sell their insurance directly and more cheaply through employees. The bureau companies adopted elaborate classification systems in order to offer lower rates to the preferred risks. COMPTROLLER GEN. U.S. GEN. ACCOUNTING OFFICE, *ISSUES AND NEEDED IMPROVEMENTS IN STATE REGULATION OF THE INSURANCE BUSINESS* 102-04 (1979) [hereinafter cited as *GAO REPORT*].

¹² See STANFORD RESEARCH INSTITUTE, *THE ROLE OF RISK CLASSIFICATIONS IN PROPERTY AND CASUALTY INSURANCE* 28-44 (1976) (Supplement) [hereinafter cited as *SRI SUPP.*].

¹³ See *infra* notes 125-60 & 163-84 and accompanying text.

¹⁴ There are two methods for calculating auto insurance rates: the loss ratio method and the

sure within the confines of the assumptions on which the premium is based, an insurer will not accept all comers who fall into the class.¹⁵ Instead it will seek to identify the above-average risks and reject some or all of them through a process of risk assessment known as underwriting.¹⁶ Moreover, it will compete for the chance to insure as many below-average risks as possible. Marketing strategies will be directed at the better risks. Actuaries who formulate the premium categories and the rates charged will do so in a way that gives more desirable risks an attractive advantage.¹⁷ If the insurer succeeds in its efforts, the average cost of insuring the class will decline. The insurer will then be even more attractive to other below-average risks falling in the same category,¹⁸ and its profits will increase. Thus, within every rate class there are some risks that are unacceptable because of competitive selectivity.

To meet the demand that is therefore not satisfied by the private or voluntary market, both automobile and property insurance are sold in a public or residual market.¹⁹ The public market for each is a statutorily created mechanism conceived in response to political pressures generated by the unavailability of coverage. These pressures were fueled, in the case of automobile insurance, by the enactment of financial responsibility laws and compulsory insurance requirements²⁰ and, in the case of property insurance, by the insurance companies' near abandonment of urban markets (in favor of suburban markets) following the introduction of the package of coverages known as homeowners insurance.²¹ Fearing restrictions on their profit-maximizing practices or competition from rival state-run schemes subsidized by tax revenues, insurance companies²² cooperated with regulatory officials in creating

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pure premium method. The latter is closest to the illustration in the text. For a discussion of both, see U.S. DEP'T OF JUSTICE, *THE PRICING AND MARKETING OF INSURANCE* 152-66 (1977). See also H. DENENBERG, R. EILERS, J. MELONE, & R. ZELTEN, *RISK AND INSURANCE* 528-31 (2d ed. 1974) [hereinafter cited as H. DENENBERG].

¹⁵ See Works, *Whatever's FAIR—Adequacy, Equity and the Underwriting Prerogative in Property Insurance Markets*, 56 NEB. L. REV. 445, 455-69 (1977).

¹⁶ *Id.* at 464. The underwriting function includes more than acceptance or rejection of a risk. See Head, *Underwriting—in Five Easy Lessons?*, 35 J. RISK & INS. 307 (1968). For inferior risks, insurers can raise premiums, restrict policy provisions, require hazard controls, and reinsure. For superior risks, insurers can lower premiums, broaden coverage, remove policy restrictions, and retain a larger share of the risk. *Id.* at 308.

¹⁷ See *infra* text accompanying notes 101-04.

¹⁸ See Works, *supra* note 15, at 464.

¹⁹ See FEDERAL INS. ADMIN., U.S. DEP'T OF HOUS. & URBAN DEV., *FULL INSURANCE AVAILABILITY* 19-49 (1974) [hereinafter cited as *FULL INSURANCE*].

²⁰ D. REINMUTH & G. STONE, *A STUDY OF ASSIGNED RISK PLANS* 1-2 (1970).

²¹ Works, *supra* note 15, at 484-85; *INSURANCE CRISIS*, *supra* note 10, at 3-5.

²² Works, *supra* note 15, at 480-84. Not all plans have met with the acquiescence of the insurance industry. See, e.g., *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951) (rejecting constitutional attack on California law compelling participation in an assigned risk plan); *State Farm Mut. Auto Ins. Co. v. Whaland*, 121 N.H. 400, 430 A.2d 174 (1981) (rejecting constitutional and statutory challenge to reinsurance facility implemented by in-

what are now known as assigned risk plans and reinsurance facilities for the undesirable automobile insurance risks²³ and FAIR plans for the undesirable property risks.²⁴

Insurance companies operate these public market mechanisms in that they supply the personnel and expertise that run them.²⁵ Because they retain their right selectively to underwrite and reject risks presented in the private market, insurance companies determine which applicants will be required to purchase from the public mechanisms.²⁶

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insurance commissioner). *Cf.* Prudential Property & Casualty Co. v. Insurance Comm'n of S.C. Dep't of Ins., 534 F. Supp. 571 (D.S.C. 1982) (upholding loss-apportionment scheme for automobile reinsurance facility); American Ins. Ass'n v. Lewis, 50 N.Y.2d 617, 409 N.E.2d 828, 431 N.Y.S.2d 350 (1980) (successful constitutional attack on amended formula for allocating losses of FAIR plan). In general, however, the industry accepts that it may be required to participate in public-market insurance mechanisms, at least insofar as it has previously written voluntary-market policies for the same or similar coverages. *See* Carter, *supra* note 10, at 413.

²³ Automobile insurance residual mechanisms generally take one of three forms: an assigned risk pool, a reinsurance facility, or a joint underwriting association. The first assigned risk plan was begun in New Hampshire in 1938, and eventually every state had such a plan. D. REINMUTH & G. STONE, *supra* note 20, at 2. Under the assigned risk plans or automobile insurance plans, as they are now known, undesirable rejected risks are randomly allocated among insurers in proportion to the amount of voluntary business each does in the state. G. GLENDENNING & R. HOLTOM, *PERSONAL LINES UNDERWRITING* 224-25 (1977). The individual insurer is totally responsible for the losses of the risks assigned to it. Sheldon & Sarason, *supra* note 9, at 826-28.

In the early 1970's, a few states shifted to a mechanism known as a reinsurance facility. *See, e.g.,* N.C. GEN. STAT. §§ 58-248.26 to .39 (1982). Under the facility approach, each insurer accepts all applicants that request coverage and then cedes those risks it does not wish to retain to a reinsurance pool, where the losses or profits attributable to the ceded risks are shared proportionately by all insurers. Lee & Formisano, *Automobile Insurance Markets: Developments in the Reinsurance Facility Technique*, 624 INS. L.J. 9 (1975). The insured whose risk is ceded is treated in every way like the insured whose risk is retained.

Other jurisdictions have chosen to create joint underwriting associations pursuant to which a small number of insurers perform the marketing and servicing functions for all residual business, while the losses of the association are shared proportionately by all insurers. Lee & Formisano, *Residual Markets in Automobile Insurance: The Service Center and the Joint Underwriting Association Approaches*, 625 INS. L.J. 92 (1975). *See generally* Lee & Formisano, *Residual Markets in Automobile Insurance: A Comparative Analysis*, 626 INS. L.J. 143 (1975). The state of Maryland is alone in employing a state insurance fund as its residual market mechanism. MD. ANN. CODE art. 48A, §§ 243-243L (Supp. 1982).

²⁴ For property insurance, the statutory scheme is referred to as a "FAIR plan." "FAIR" is an acronym for "Fair Access to Insurance Requirements." The FAIR plan program was created under the Urban Property Protection and Reinsurance Act of 1968. Pub. L. No. 90-448, 82 Stat. 555 (codified as amended in scattered sections of 5, 12, 15, & 42 U.S.C. (1976 & Supp. V 1981)). States that enact FAIR plans meeting federal requirements are entitled to federal riot reinsurance. *See, e.g.,* PA. STAT. ANN. tit. 40, § 1600.101 to .502 (Purdon 1971 & Supp. 1982-83); 31 PA. ADMIN. CODE § 111.1 (Shepard's 1982). Only 26 states, the District of Columbia, and Puerto Rico presently maintain FAIR plans. *See infra* note 50; *see also* Comment, *FAIR Plans: History, Holtzman and the Arson-for-Profit Hazard*, 7 FORDHAM URB. L.J. 616 (1979).

²⁵ *See* Sheldon & Sarason, *supra* note 9, at 826; Comment, *supra* note 24, at 623-25. Consumer participants must comprise one-third of the members of the governing body of a FAIR plan. *Id.* at 628-29.

²⁶ *See* British & Foreign Marine Ins. Co. v. Stewart, 30 N.Y.2d 53, 281 N.E.2d 149, 330 N.Y.S.2d 340 (1972). In *Stewart*, the New York Superintendent of Insurance challenged the systematic program of seven insurance companies, comprising a single enterprise known as Royal Globe Insurance Company, that reduced their voluntary-market exposure and thereby their proportionate share of the losses of the property insurance joint underwriting association. Royal Globe had responded to the institution of the underwriting association by cancelling fire insurance

The public markets provide less coverage at higher premiums and on worse terms than is generally provided by the private markets.³⁷

on commercial properties in Harlem and Bedford-Stuyvesant, and thereby requiring the cancelled insureds to turn to the association for coverage. The Superintendent issued a formal complaint charging that, while the state insurance code did not prohibit underwriting based on legitimate business reasons, the pattern pursued by Royal Globe violated the code's racial discrimination proscriptions. The Court of Appeals rejected the Superintendent's argument and upheld the defendants' asserted prerogative to commit to the association any risks they chose, since the Superintendent had found that Royal Globe did not intend to discriminate against blacks. Requiring that insureds resort to the association was not unlawful since the very purpose of the association was to provide insurance for those to whom the industry was unwilling to issue policies on a voluntary basis.

A similar concern about untrammelled discretion in ceding risks to an automobile reinsurance facility prompted North Carolina's Insurance Commissioner to reject a 1971 rate filing that would have permitted facility insureds to be charged 10% more than insureds retained in the voluntary market. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 422-23, 269 S.E.2d 547, 574 (1980). The Commissioner's primary objections to the filing arose from the fact that the insurers' wholly unrestrained exercise of subjective judgment with respect to cessions had resulted in a facility population of which 86.9% of the ceded exposures had not caused a claim payment to be made, 71% had never been assessed driving code violation points, and 62.3% had neither produced a claim nor been assessed points. *Id.* at 423, 269 S.E.2d at 574. The court, in rejecting the Commissioner's findings as not being supported by substantial evidence, concluded that under the legislative scheme establishing the reinsurance facility, insurance companies are allowed "to cede any insured they elect not to retain without [regard to] any [objective] criteria established by law." *Id.* at 434, 269 S.E.2d at 581. In the court's view, the fact that insurers are not allowed to make a profit on facility business should sufficiently prevent abuse of the ceding privilege. *Id.*

³⁷ In the case of residual market automobile insurance, almost all state plans limit coverage in both dollar amount and type of coverage, although less so now than in the past. Typically, the coverage was limited to the minimum requirements of compulsory insurance and financial responsibility laws. At present 43 states and the District of Columbia offer optional liability coverage of at least \$25,000 per person, \$50,000 per accident and \$10,000 for property damage. GAO REPORT, *supra* note 11, at 150-54. All but six states also offer comprehensive and collision coverage through their insurance plans. *Id.* Residual market plans commonly charge higher rates than the voluntary markets. *Id.* at 155. Indeed, at least one court has steadfastly ruled that residual market insureds are supposed to pay higher rates. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 434, 269 S.E.2d 547, 580 (1980).

Property insurance coverage provided under FAIR plans is limited generally to fire and extended coverage, and vandalism and malicious mischief coverage. 44 C.F.R. § 55.3 (1982). States may expand the coverage as they see fit. See, e.g., *District of Columbia Ins. Placement Facility v. Washington*, 269 A.2d 45 (D.C. 1970) (superintendent empowered to require inclusion of crime insurance in FAIR plan coverage though not specifically provided for in federal regulations). Illinois, Massachusetts, Rhode Island, and Wisconsin offer full coverage through a homeowners-type policy. DeWolfe, Squires, & DeWolfe, *Civil Rights Implications of Insurance Redlining*, 29 DEPAUL L. REV. 315, 318 n.26 (1980) [hereinafter cited as DeWolfe]. Upper limits on lines of coverage exist in order to spare the FAIR program single large losses; it is also assumed that owners of property of large values have sufficient market power to obtain other insurance. Works, *supra* note 15, at 525 n.198. FAIR plan insureds also generally pay higher premiums than do voluntary market insureds. Badain, *Insurance Redlining and the Future of the Urban Core*, 16 COLUM. J.L. & SOC. PROBS. 1, 9 (1980). After the Holtzman Amendment, Pub. L. No. 95-557, 92 Stat. 2097 (1978) (amending 12 U.S.C. § 1749bbb-3 (Supp. V-1981)), prohibited this practice, several states with FAIR plans chose to forego federal riot reinsurance rather than comply. Badain, *supra*, at 32. See also *infra* note 50. FAIR plan insureds also receive slower claims service and are usually denied a premium payment plan. *Rights and Remedies of Insurance Policyholders—Discrimination by Property and Casualty Insurance Companies: Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 91, 650-51 (1978) (statement of James Katz, Research Director, Mass. Fair Share) [hereinafter cited as *Rights and Remedies*].

FAIR plan applicants, for example, can be subjected to inspections that may result in premium surcharges; voluntary market applicants whose properties pose similar risks are generally not surcharged, because their properties are not inspected.²⁸ FAIR plan insureds are sometimes subjected to special procedural burdens,²⁹ such as a condition that payment must be by certified check or coverage will become effective only after the check has cleared.³⁰ Moreover, agency outlets are not conveniently located in areas where public market insureds are concentrated.³¹ Because of these disparities, some insureds prefer to procure coverage through nonstandard carriers rather than through a public market mechanism.³² Others forego coverage entirely.

The creation of the public markets did not solve the problem of competitive selectivity; rather, their existence exacerbated it,³³ in that insurance companies became better able to resort to underwriting³⁴ as a defense against the political uncertainties of the rate approval process.³⁵

²⁸ See *INSURANCE CRISIS*, *supra* note 10, at 20-21.

²⁹ See Badain, *supra* note 27, at 9-10; see also J. Sheldon & E. Sarason, Automobile Insurance "Subsidies," Related Current Legislative Issues 68-70 (May 1981) (available through Research Institute on Legal Assistance, Legal Services Corp.).

³⁰ Badain, *supra* note 27, at 9 n.45.

³¹ Abramoff, *supra* note 9, at 703-04 n.86 (citing L.A. Times, Mar. 9, 1979, at 1, col. 8); See R. SCHACHTER, *INSURANCE REDLINING—ORGANIZING TO WIN* 12 (1981) (published by National Training and Information Center, Chicago, Ill.). Several states have enacted laws restricting a company's ability to withdraw from territories through the cancellation of agency agreements. See, e.g., S.C. CODE ANN. § 38-37-940(2) (Law. Co-op. 1977); see also Rowell v. Harleysville Mut. Ins. Co., 272 S.C. 108, 250 S.E.2d 111 (1978) (upholding constitutionality of South Carolina provision in an injunction action); G-H Ins. Agency, Inc. v. Travelers Ins. Cos., 270 S.C. 147, 241 S.E.2d 534 (1978) (private cause of action brought by agent permitted). But see *Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980) (retroactive application of South Carolina statute in wrongful termination action violates the contract clause, U.S. CONST. art. I, § 10, cl. 1). Insurance agents have a strong incentive to select risks conservatively because companies rely on loss ratios in deciding whether agents are "unprofitable" and should be terminated. See *Andrew J. Corsa & Son, Inc. v. Harnett*, 92 Misc. 2d 569, 400 N.Y.S.2d 1009 (Sup. Ct. 1977) (agent unsuccessfully sues to establish right to reject risks in order to avoid company termination); see also G. KEENAN, *INSURANCE REDLINING: PROFITS VS. POLICYHOLDERS* 10 (1978) (published by National Training and Information Center, Chicago, Ill.).

³² *FULL INSURANCE*, *supra* note 19, at 48. Unfortunately, some of these insureds procure insurance from companies that become insolvent. *Id.*

³³ See *FULL INSURANCE*, *supra* note 19, at 26; GAO REPORT, *supra* note 11, at 96; G. KEENAN, *supra* note 31, at 37.

³⁴ As one commentator notes: "Obviously, the bottom line of any business is profit. It is inevitable that as rates prove inadequate . . . underwriting restrictions will be increased [and] . . . insureds will encounter [more difficulty] in obtaining suitable coverages." Carter, *supra* note 10, at 409. See also Works, *supra* note 15, at 458. The industry acknowledges the attractiveness of underwriting as a means to combat regulatory restrictions. See GAO REPORT, *supra* note 11, at 96.

³⁵ An alternative to "dumping" risks in the residual markets is avoiding any business within a state by withdrawing entirely. Carter, *supra* note 10, at 409. See also *Maryland Casualty Co. v. Commissioner of Ins.*, 372 Mass. 554, 363 N.E.2d 1087 (1977) (license suspension proceeding based on statutory amendment barring withdrawal except when solvency is jeopardized); *Sheeran v. Nationwide Mut. Ins. Co.*, 80 N.J. 548, 404 A.2d 625 (1979) (automobile insurers withdrawing by cancelling all policies must surrender license to do business in state); *People ex rel. Lewis*

In jurisdictions that regulate rates,³⁶ insurance commissioners have examined requests for rate increases more closely in the wake of public outcry against the rising cost of essential personal insurance. Increases have been denied,³⁷ delayed,³⁸ and reduced.³⁹ The result is that insurers have "dumped" the least desirable risks into the public market.⁴⁰ Young males are especially likely to wind up in the automobile assigned risk pools,⁴¹ and the private market has been entirely foreclosed

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v. Safeco Ins. Co., 98 Misc. 2d 856, 414 N.Y.S.2d 823 (Sup. Ct. 1978) (insurer may not be denied right to terminate business by surrendering license).

³⁶ Although all states except Illinois currently exercise some regulatory control over rates, one-third permit free competition among insurers to determine the rates, so long as the resulting rates are not "excessive," "inadequate," or "unfairly discriminatory." GAO REPORT, *supra* note 11, at 60. Approximately two-thirds of the states, plus the District of Columbia, require insurers to use state-made rates or to obtain prior approval of their rate changes before using them. *Id.* at 59-68.

³⁷ Appeal of Nationwide Ins. Co., 120 N.H. 90, 411 A.2d 1107 (1980) (affirming the denial of a request for a 14% increase when a 15% increase had been approved only three weeks before request was made); Insurance Servs. Office v. Whaland, 117 N.H. 712, 378 A.2d 743 (1977) (dismissing appeal from denial of a 14.4% rate increase for homeowners insurance); Pack v. Royal-Globe Ins. Cos., 224 Tenn. 452, 457 S.W.2d 19 (1970) (reversing order of trial court approving a 25% increase denied by the commissioner). *Cf. In re Allstate Ins. Co.*, 179 N.J. Super. 581, 432 A.2d 1366 (1981) (insurer with independently filed rates who subsequently subscribed to rating bureau barred from using higher bureau rates without commissioner's approval). *But see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 474, 269 S.E.2d 595 (1980) (vacating order denying a 9.1% increase in homeowners insurance rates); *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 460, 269 S.E.2d 538 (1980) (nullifying commissioner's denial of requested 5.6% increase in automobile insurance rates); *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980) (overturning commissioner's denial of an increase of 6%, the maximum allowed by statute); *Allstate Ins. Co. v. Knutson*, 278 N.W.2d 383 (N.D. 1979) (commissioner's denial of requested 18.9% automobile insurance rate increase reversed).

For a response to the industry's claim that there has been substantial disapproval of rates, see G. KEENAN, *supra* note 31, at 52-53, arguing that the number of applications and the limited resources of the insurance regulatory body lead to rubber stamping. See also GAO REPORT, *supra* note 11, at 65-66 (noting that most rate filings are approved with no modifications). The GAO found, however, that the majority of private passenger automobile insurance rate requests were modified, with the reductions averaging 3.7%. *Id.*

³⁸ GAO REPORT, *supra* note 11, at 68; Carter, *supra* note 10, at 406-07.

³⁹ See, e.g., *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Admin. Office*, 287 N.C. 192, 214 S.E.2d 98 (1975) (insurance commissioner reduced automobile insurance rates because of the effect of "energy crisis" on amount of driving; court reversed on grounds commissioner had no authority to enter order); *Department of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735 (Fla. 1981) (upholding retroactive application of 1980 amendment mandating return of excess profits realized by automobile insurers in violation of 1977 statute); *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 372 N.E.2d 520 (1978) (statute ordering retroactive reduction and rebate of automobile premiums held constitutional).

⁴⁰ See *supra* note 26. The statistic most frequently cited by critics to support their claim of "dumping" is the large number of risks found in the public mechanisms who have caused no claims to be made. FAIR plans are also alleged to be replete with "clean risks." Badain, *supra* note 27, at 11 (only 4.8% of FAIR insureds have suffered any losses).

⁴¹ According to an industry study examining over three million insurance policies written by participating insurers in 12 states (including California, Michigan, New Jersey, New York, and Pennsylvania) during the second quarter of 1978, "[s]ingle male principal operators under age 25 accounted for 16 percent of the shared market policies, versus 5 percent of their regular market policies. . . . Young male non-principal operators . . . represented 6 percent of the shared market policies, compared with 4 percent of the regular market policies." ALL-INDUSTRY RESOURCE

to the residents of certain geographic areas. (The latter practice is known as "redlining" because insurers commonly used red markings on maps to delimit territories whose residents were not considered desirable risks.)⁴²

Nonetheless, forcing large numbers of risks into the public markets has not sheltered company profits.⁴³ Year after year the premiums charged public market insureds are insufficient to cover their losses,⁴⁴ which are absorbed by insurers.⁴⁵ Subsequent rates for public market insureds do not fully reflect the adverse experience; part of the cost is passed along to private market insureds in order to keep public market rates affordable. Insurance companies contend that this subsidization produces overinsurance by poor residual market risks and underinsurance by good voluntary market risks.⁴⁶

B. *Efforts at Reform*

The dual system of distribution and the expanded role of competitive selectivity have provoked a legal and political controversy. Because the conflict is being waged in the legislative, regulatory, and judicial bodies of so many jurisdictions, it is impossible to catalogue the constantly fluctuating successes and failures of those who are challenging insurance company competitive classification practices. The reforms the challengers seek are of two sorts: they either mitigate the effects of company selection practices, or they directly limit the ability of insurance companies to differentiate among insureds in underwriting and rating. Despite a great deal of argumentation and analysis, the legislative and regulatory changes have been limited in effect and court victories have been few in number.

Residual market insureds complain about the limited coverage

ADVISORY COUNCIL, THE COST OF AUTO INSURANCE 12 (1980).

⁴² INSURANCE CRISIS, *supra* note 10, at 27. See also ILLINOIS, IND., MICH., MINN., OHIO, AND WIS. ADVISORY COMMS. TO THE U.S. COMM'N ON CIVIL RIGHTS, INSURANCE REDLINING: FACT NOT FICTION 4-5 (1979) (defining redlining as "cancelling, refusing to insure or to renew, or varying the terms under which insurance is available to individuals because of the geographic location of a risk") [hereinafter cited as CIVIL RIGHTS REPORT].

⁴³ Under FAIR plans, limited reinsurance is available to cover some of the insurers' losses. Comment, *supra* note 24, at 631-32.

⁴⁴ For the first quarter of 1982, FAIR plan underwriting losses nationwide totalled \$19.4 million. NAT'L UNDERWRITER (Prop. & Casualty Ins. ed.), Nov. 19, 1982, at 1, col. 2.

⁴⁵ Comment, *supra* note 24, at 632-33. In most states, the FAIR plan is an association of companies writing insurance. All profits, losses, and expenses are divided based on market share in a particular line of insurance. For example, a company writing 10% of fire insurance in the voluntary market would pay 10% of the losses and expenses accrued through fire insurance in the residual market and receive 10% of any profits. G. KEENAN, *supra* note 31, at 36.

⁴⁶ See Pauly, *The Welfare Economics of Community Rating*, 37 J. RISK & INS. 407, 408-11 (1970).

they receive and the higher rates they are charged relative to the coverage and rates available in the voluntary market.⁴⁷ One response to such complaints has been expanded coverage and caps on premiums. Special policies have been created to cover older residential properties that are uninsurable because their repair or replacement costs, the usual basis on which losses are assessed, far exceed their fair market values.⁴⁸ The Holtzman Amendment⁴⁹ provides for the equalization of FAIR plan and private market premiums, but it has had a limited effect because eleven jurisdictions have opted to forego the benefit of the federal crime reinsurance that is available when FAIR plans conform to federal requirements rather than permit the subsidization of FAIR plan insureds.⁵⁰

A few jurisdictions have enacted laws that limit the differential between private and public market premiums for automobile insurance.⁵¹ Legislators have also statutorily restricted total automobile premium charges.⁵² In some jurisdictions insurers' income from investments—a source of revenue that is not traditionally considered in premium calculations—is explicitly treated as a cushion protecting insurers from actual loss in the face of adverse underwriting experience.⁵³

⁴⁷ See *supra* note 27.

⁴⁸ See, e.g., MICH. COMP. LAWS ANN. § 500.2104(2) (West Supp. 1980-81) (repair cost policy); *id.* § 500.2104(3) (replacement cost policy); see also *Ninety Day Report of the Advisory Committee to the NAIC Redlining Task Force*, 2 NAT'L ASS'N INS. COMM'RS PROC. 515, 522-23 (1978) [hereinafter cited as *Ninety Day Report*].

⁴⁹ Pub. L. No. 95-557, 92 Stat. 2097 (1978) (amending 12 U.S.C. § 1749bbb-3) (Supp. V. 1981).

⁵⁰ California, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, New York, Oregon, Puerto Rico, and Virginia elected to forego federal riot reinsurance rather than comply with the Holtzman Amendment. Badain, *supra* note 27, at 32. See also FEBRUARY 1980 SEMINAR ON INSURANCE REGULATION AND PUBLIC CONCERNS, 1980 CONF. INS. LEGISLATORS PROC.] 25-31 (discussion of the merits of foregoing federal riot reinsurance) [hereinafter cited as COIL PROC.]. The only jurisdictions that remained in the program after the Amendment's enactment were those that had prohibited higher premiums on policies written through the FAIR plan prior to its passage. Comment, *supra* note 24, at 634. See also Works, *supra* note 15, at 507-12. The Amendment's potential impact was further restricted when two major insurers—Allstate and the Continental Insurance Group—chose not to participate in FAIR plans in any state where participation was not required. *Id.* at 511 & n.60. As voluntary participation among other insurers also began to decline, participation became mandatory in all but two of the states where the programs were operating. *Id.* at 511-12.

⁵¹ See, e.g., MASS. ANN. LAWS ch. 175, § 113H (Michie/Law Coop. Supp. 1983); MICH. COMP. LAWS ANN. § 500.2930 (West Supp. 1980-81); N.C. GEN. STAT. § 58-124.26 (1982) (rate increase tied to Consumer Price Index).

⁵² See, e.g., MASS. ANN. LAWS ch. 175, § 113H (Michie/Law. Coop. Supp. 1983).

⁵³ See Massachusetts Auto Rating & Accident Prevention Bureau v. Commissioner of Ins., 1981 Mass. Adv. Sh. 1893, 424 N.E.2d 1127; Massachusetts Auto Rating & Accident Prevention Bureau v. Commissioner of Ins., 381 Mass. 592, 411 N.E.2d 762 (1980) (remanding for use of realistic income data in calculation of negative underwriting profit); Attorney Gen. v. Commissioner of Ins., 370 Mass. 791, 353 N.E.2d 745 (1976); see also Oklahoma State AFL-CIO v. State Bd. for Property & Casualty Rates, 463 P.2d 693 (Okla. 1970) (ordering that consideration be given to investment income); Virginia State AFL-CIO v. Commonwealth, 209 Va. 776, 167 S.E.2d 322 (1969) (ordering consideration of investment income earned on loss reserves as well as

These measures limit somewhat the burden that would otherwise be heaped on the victims of competitive selectivity.

Public market insureds and those unable to afford any coverage are also demanding restrictions on the practices that have denied them access to the voluntary market. The result is a direct assault upon competitive selectivity. Joining in the attack are private market insureds who pay higher rates because of the use of the same or similar grouping criteria and practices.⁵⁴

A few of the efforts at direct reform will be discussed in detail because they supply many of the arguments that are analyzed in the third part of this Article.⁵⁵ In several jurisdictions, legislation prohibits automobile insurance rating based on categories such as sex, age, or marital status.⁵⁶ In a few states, regulators have attempted to achieve the same result by exercising their general authority, but these efforts have not been uniformly successful.⁵⁷ In Pennsylvania, the Commissioner issued an order disapproving a rating plan that charged men higher premiums than similarly situated women.⁵⁸ The company whose rating plan was rejected appealed the order on the ground that the Commissioner had exceeded his authority, but the challenge was rejected by the Commonwealth Court which concluded that the Commissioner had justifiably relied on "nonactuarial" considerations such as

on earned premium reserves). *But see* State *ex rel.* Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980) (finding error in commissioner's consideration of income from invested capital and use of Massachusetts "capital asset" pricing model for calculating underwriting profit); State *ex rel.* Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980) (same holding as to 1977 automobile rate filing); State *ex rel.* Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980) (same holding as to 1978 homeowner's rate filing). For criticism of the limited consideration given investment income in automobile and property insurance rating, see R. HUNTER, INVESTMENT INCOME IN RATEMAKING (National Insurance Consumer Organization Study No. 1, 1980).

⁵⁴ For example, the California Action League (CAL) has devised a platform to increase consumer awareness of industry practices. The platform advocates the public disclosure of rating manuals, the advertising of premiums, and the adoption of consumer "fair hearing" procedures. Ultimately, CAL wants auto insurance rating to be assessed on driving record only. See Fisher, *Insurance Consumer Watchdog Group Formed NAT'L UNDERWRITER* (Prop. & Casualty Ins. ed.), Oct. 10, 1980, at 35, col. 1; Haggerty, *California Citizens' Group Focuses on Auto Redlining*, *id.*, Aug. 22, 1980, at 5, col. 1.

⁵⁵ See *infra* text accompanying notes 207-370.

⁵⁶ See, e.g., MASS. ANN. LAWS ch. 175, § 113B (Michie/Law Co-op. Supp. 1982); Act of Apr. 19, 1983, ch. 531, 1983 MONT. ADV. SESS. LAWS 2,319 (CCH); N.C. GEN. STAT. § 58-30.3 (1982). See also GAO REPORT, *supra* note 11, at 131-33. There has been legislative activity at the federal level, but it has not yet resulted in a change in the law. Similar bills now before Congress, however, would prohibit discrimination based on race, color, religion, sex or national origin in the writing and selling of insurance contracts. Fair Insurance Practices Act, S. 372, 98th Cong., 1st Sess. (1983); Nondiscrimination in Insurance Act, H.R. 100, 98th Cong., 1st Sess. (1983).

⁵⁷ Regulators in Florida, Louisiana, New Jersey, and Wyoming have failed in their attempt to ban sex as a rating criterion. N.Y. Times, Mar. 23, 1982, at D2, col. 1.

⁵⁸ See *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 65 Pa. Commw. 249, 442 A.2d 382 (1982).

the fact that "men were not inherently worse drivers than women" and that the male gender criterion was a proxy for driving while under the influence of alcohol or during rush hour.⁵⁹ Implementation of the ban on the use of sex as a rating criterion has been suspended pending the outcome of a further appeal of the case.⁶⁰

Similar arguments failed to impress the courts of Louisiana.⁶¹ The Commissioner in that state ordered a group of insurers to abandon an automobile insurance rating plan using age and sex as criteria. Claiming authority under the Insurance Code of Louisiana,⁶² the Commissioner alleged violations of the statutory requirement that insurance rates not be excessive, inadequate, or unfairly discriminatory.⁶³ The Commissioner argued "that a rate structure based on age and sex, factors over which the driver has no control, unfairly discriminates against those individuals with good driving records who are forced to pay higher premiums because of membership in a class with a poor driving record."⁶⁴ The court disagreed; because the evidence indicated a "sound statistical basis" for the scheme, it did not discriminate unfairly.⁶⁵ The court relied on uncontradicted proof that "drivers under age 25 constitute 26% of the driver population and have 38% of the accidents; that women drivers have fewer accidents than male drivers; and that drivers over 65 have a smaller incidence of accident than do other drivers."⁶⁶

In New Jersey, the setback occurred quite differently. The Department of Insurance, under the direction of former Commissioner James J. Sheeran, held hearings on the subject of automobile classifications and rendered a huge report.⁶⁷ The Commissioner ordered modifications in company practices that included the elimination of age, sex, and marital status as rating criteria. The insurance companies appealed the order, however, and a stay was granted pending a decision by the superior court. The order has not gone into effect⁶⁸ and probably never

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⁵⁹ *Id.* at 256, 442 A.2d at 386.

⁶⁰ 11 Pa. Admin. Bull. 452 (1981).

⁶¹ See *Insurance Servs. Office v. Commissioner of Ins.*, 381 So. 2d 515 (La. Ct. App. 1979).

⁶² LA. REV. STAT. ANN. § 22:1215 (West 1950).

⁶³ *Id.* §§ 22:1402, 22:1404(2).

⁶⁴ 381 So. 2d at 516-17.

⁶⁵ *Id.* at 517.

⁶⁶ *Id.* at 516.

⁶⁷ NEW JERSEY DEP'T OF INS., HEARING ON AUTOMOBILE INSURANCE CLASSIFICATIONS AND RELATED METHODOLOGIES: FINAL DETERMINATION—ANALYSES AND REPORT (1981) [hereinafter cited as N. J. REPORT].

⁶⁸ Letter from John J. Hayden to Regina Austin (Nov. 16, 1982) (discussing appeal). The New Jersey legislature recently enacted a law providing that every senior citizen will receive the benefit of at least a five percent reduction in automobile insurance rates. See New Jersey Automobile Insurance Reform Act, ch. 65, 1982 N.J. Sess. Law Serv. 386 (West) (to be codified at N.J. STAT. ANN. § 17:29A).

will because of the position of the present state administration.⁶⁹

Direct attacks on insurance classifications have occasionally been pressed in the courts, although the available doctrinal rubrics are somewhat anemic. Automobile rating territorial boundaries⁷⁰ and property insurance redlining practices⁷¹ have been challenged under the United States Constitution and under various federal civil rights laws on the grounds that they are racially discriminatory; these challenges have yet to produce a favorable ruling on the merits. Equal protection and equal rights provisions might be useful in challenging the use of age, sex, or marital status as automobile rating criteria, were it not for the impediment of the state action doctrine.⁷² Claimants who are the victims of conspiracies that restrict the availability of insurance may possibly have a cause of action under the boycott prohibitions of the Sherman Act⁷³ which are expressly excepted from the exemption of the insurance business from federal regulation found in the McCarran-Ferguson Act of 1945.⁷⁴

⁶⁹ See *N.Y. Times*, Aug. 29, 1982, § 1, at 49, col. 1-2.

⁷⁰ See *County of Los Angeles v. Farmers Ins. Exch.*, 132 Cal. App. 3d 77, 182 Cal. Rptr. 879 (1982) (challenge to use of territory rating in automobile insurance dismissed for failure to exhaust administrative remedies).

⁷¹ Among the civil rights laws upon which insurance redlining claims have been asserted is the Fair Housing Act of 1968 (Title VIII), 42 U.S.C. §§ 3601-3631 (1976 & Supp. II 1978). See generally Comment, *Application of Title VIII to Insurance Redlining*, 75 NW. U.L. REV. 472 (1980). Title VIII prohibits practices that make unavailable or deny housing to persons because of race, color, religion, sex, or national origin, and has been held to reach "every practice which has the effect of making housing more difficult to obtain on prohibited grounds," *United States v. City of Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), including insurance redlining. *Dunn v. Midwestern Indem. Mid-Am. Fire & Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979). See also *Dunn v. Midwestern Indem.*, 88 F.R.D. 191 (S.D. Ohio 1980) (granting plaintiff's motion for discovery of insurer's computer programs, system, and tapes).

Sections 1981, 1982, 1983, and 1985 of the Civil Rights Acts of 1866 and 1871 might also be invoked. 42 U.S.C. §§ 1981, 1982, 1983, 1985 (1976). See *Badain*, *supra* note 27, at 37-38 n.205; *DeWolfe*, *supra* note 27, at 327-35; see also *Prospect Area Hous. Dev. Fund Co. v. Schenck*, 71 Misc. 2d 931, 337 N.Y.S.2d 662 (Sup. Ct. 1972) (unsuccessful equal protection challenge to geographic exclusion produced by the property insurance residual market mechanism).

⁷² See, e.g., *Murphy v. Harleysville Mut. Ins. Co.*, 282 Pa. Super. 244, 422 A.2d 1097 (1980) (suit against automobile insurers alleging unlawful discrimination against males under the Pennsylvania equal rights amendment fails for lack of state action). But see *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 65 Pa. Commw. 249, 255, 442 A.2d 382, 384 (1982) (distinguishing *Murphy* on grounds that in that case the Commissioner had not "positive[ly] exercise[d] his authority under the statute . . . to disapprove rating schemes").

For commentary on equal protection challenges and the problems encountered when invoking the clause, see generally *DeWolfe*, *supra* note 27, at 340-49. The obstacle presented by the state action doctrine arises primarily from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which holds that even extensive regulation of a business's activities does not convert its conduct into state action. Some commentators argue that *Jackson* should not bar suits against insurance carriers. See, e.g., *Kesner, Auto Insurance Rating: A Question of Equal Protection*, 32 FED'N INS. COUNCIL Q. 165, 168-69 (1982); Comment, *Gender Classifications in the Insurance Industry*, 75 COLUM. L. REV. 1381, 1394-95 (1975).

⁷³ 15 U.S.C. §§ 1-7 (1976).

⁷⁴ 15 U.S.C. §§ 1011-1015 (1976). See, e.g., *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978) (insurers unlawfully conspired to reduce the availability of medical malpractice

Procedural due process did, however, provide one notable court victory for claimants attacking the automobile insurance classification process in general. In *Shavers v. Kelley*,⁷⁶ the Michigan Supreme Court ruled that the state's No-Fault Automobile Insurance Act was "unconstitutionally deficient in its mechanisms for assuring that compulsory no-fault insurance is available to Michigan motorists at fair and equitable rates."⁷⁶ State action was not a problem for the *Shavers* court: because the Act requires all registrants and operators of motor vehicles to maintain personal injury, property damage, and residual liability insurance, "[i]n effect, insurance companies are the instruments through which the Legislature carries out a scheme of general welfare."⁷⁷ The court went on to find a constitutional entitlement to the availability of no-fault insurance on a fair and equitable basis. A driver's license represents constitutionally protected property.⁷⁸ Because use of that property is dependent upon the registration of an automobile, which is in turn dependent upon the availability of state-mandated insurance, the court concluded that a motorist has a protected property interest in the availability of insurance "at fair and equitable rates."⁷⁹

The deficiencies that the court identified in the Michigan scheme included several aspects of the statutory assigned risk mechanism:

[A]lthough no-fault insurance may be available, motorists can be refused no-fault insurance or have their insurance cancelled without effective legal redress for challenging refusal or discriminatory cancellation. Furthermore, motorists can be placed into the "Automobile Placement Facility" without an assurance of fair and equitable rates, without an opportunity to obtain the same variety of coverage options,

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insurance). The McCarran-Ferguson Act provides that federal antitrust law does not generally apply to insurance activity that is regulated by state law, but it leaves federal law applicable to "boycotts, coercion or intimidation." 15 U.S.C. §§ 1012, 1013(b) (1976). See generally Gregory & Levin, *Boycotts and the McCarran-Ferguson Act: Some Observations About Barry*, 46 ANTI-TRUST L.J. 1087 (1977); Note, *Developing a Consumer Right to Invoke the Boycott Exception to the Insurance Company Exemption from Federal Antitrust Laws*, 6 FORDHAM URB. L.J. 353 (1978); *Antitrust Law—Insurance—Policyholders May Maintain Sherman Act Antitrust Suit Against Insurer Under Boycott Exception of McCarran-Ferguson Act*, 63 CORNELL L. REV. 490 (1978).

⁷⁶ 402 Mich. 554, 267 N.W.2d 72 (1978) (reported as *Shavers v. Attorney General* in official reporter, but commonly referred to as *Shavers v. Kelley*). See also Epstein, *Automobile No Fault Plans: A Second Look at First Principles*, 13 CREIGHTON L. REV. 769, 790 (1980); *Insurance—No Fault—Michigan Supreme Court Finds No Fault Automobile Insurance Act Violative of Due Process*, 9 CUM. L. REV. 909 (1979).

⁷⁷ 402 Mich. at 581, 267 N.W.2d at 78.

⁷⁸ *Id.* at 597, 267 N.W.2d at 86.

⁷⁹ *Id.* at 599, 267 N.W.2d at 87. See also *Bell v. Burson*, 402 U.S. 535, 539 (1971).

⁸⁰ 402 Mich. at 600, 267 N.W.2d at 87. The court relied on both the federal and state constitutions. *Id.*

and without a right to challenge such placement.⁸⁰

Shavers did not involve an appeal from a regulatory order, but the court had available and quoted from a comprehensive report by the state Commissioner of Insurance entitled *Essential Insurance in Michigan: An Avoidable Crisis*.⁸¹ Significantly, the Commissioner had taken the position that the “‘present system of regulation and the mechanisms for guaranteeing availability are seriously deficient.’”⁸² The minimum that due process required, in the view of the *Shavers* court, was:

- (a) legislative or administrative elaboration of the statutory rating standard that “rates shall not be excessive, inadequate or unfairly discriminatory”;
- (b) rate filings that specify a base rate for the coverage, criteria properly considered by the insurer in differentiating premiums charged individual insureds, and the increment to the base rate associated with each appropriate rating criterion;
- (c) publication of rates so that individuals can calculate their premiums; and
- (d) mechanisms for the prompt administrative review of individual premium calculation, declination, and cancellation decisions.⁸³

Perhaps because the decision is inventive in its doctrinal manipulations and because it was rendered at a unique time and place, in which the political climate was ripe for reform, it has not been duplicated in any other jurisdiction. The court created a constitutional right that a service or product supplied by a private concern be made available at fair and equitable rates. In doing so, it treated the private insurance mechanism as an arm of the state, and ignored the legislative intent to permit the private mechanism to function on a competitively selective basis while the socialized mechanism of the facility assured the availability of limited coverage. Rejecting competition as a sufficient explanation, the court required that individuals be given reasons for premium charges and unfavorable actions. There was, however, no finding that competition was not working and no facts on the record apart from

⁸⁰ *Id.* at 604-05, 267 N.W.2d at 89-90.

⁸¹ INSURANCE BUREAU, MICH. DEPT OF COMMERCE, *ESSENTIAL INSURANCE IN MICHIGAN: AN AVOIDABLE CRISIS* (1977) [hereinafter cited as *ESSENTIAL INSURANCE*].

⁸² 402 Mich. at 605 n.28, 267 N.W.2d at 90 n.28 (quoting Commissioner's letter to the Governor).

⁸³ *Id.* at 607-08, 267 N.W.2d at 91.

the Commissioner's report to support the conclusion that regulation was ineffective.

The Commissioner's report, which was directed toward legislative reform, identified a guaranteed right to insurance and the assurance of fair and competitive prices as two regulatory objectives.⁸⁴ The *Shavers* court turned these objectives into a constitutional right. The first objective had a statutory basis; the second, which would restrict competitive selectivity, collided with the statutory endorsement of the use of any classification criteria which, in the court's paraphrasing of the language, "may measure any differences among risks that *may* have a probable effect upon losses or expenses."⁸⁵ The court cleverly took a regulatory problem and elevated it to the status of a constitutional violation. Similarly, a regulatory solution became a constitutional mandate.

The Michigan Supreme Court delayed the effectiveness of its ruling in order to give the legislature time to remedy the constitutional deficiencies in the no-fault law. The legislature responded with the passage of the Essential Insurance Law of 1980,⁸⁶ which enacted reforms for both personal automobile and property insurance, including specified underwriting criteria,⁸⁷ limitations on the numbers of territories into which the state may be divided and on the differential in premium charges among them,⁸⁸ and requirements for explanations of declinations⁸⁹ and terminations.⁹⁰

The efforts at reform, briefly outlined above, and the controversy that produced them are not made of whole cloth. The problems with which the insurance claimants, companies, regulators, and legislators are wrestling have their origins in the process by which insurance companies create and apply classifications and thereby determine who is a desirable insured and who is not. That process is linked to social stratification. Part II of this Article explores this linkage by discussing a few of the most controversial criteria insurance companies use in classifying applicants for insurance. Part III analyzes the weaknesses of the arguments advanced in support of the reforms.

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⁸⁴ ESSENTIAL INSURANCE, *supra* note 81, at 25.

⁸⁵ 402 Mich. at 602, 267 N.W.2d at 88 (emphasis in original).

⁸⁶ MICH. COMP. LAWS ANN. §§ 500.2109-.3385 (Supp. 1982-83).

⁸⁷ *Id.* §§ 2111, 2117, 2118, 2119.

⁸⁸ *Id.* § 2111(13).

⁸⁹ *Id.* § 2122.

⁹⁰ *Id.* § 2123.

II. INSURANCE CLASSIFICATION AND SOCIAL STRATIFICATION

Insurance companies classify or group individual applicants ostensibly according to assumptions concerning their riskiness, that is, the likelihood that they will incur future loss. In the companies' view, differentiating between high-risk groups who should pay more and low-risk groups who should pay less is essential to profitability.⁹¹ The companies' assumptions concerning how individuals should be grouped in terms of variations in risk and how these groups should be underwritten and rated are tied to assumptions that are generally held and invoked in other situations where distribution decisions must be made or justified.⁹² However much the companies plead happenstance, insurance "risk" classifications correlate with a fairly simplistic and static notion of social stratification that is familiar to everyone.⁹³

In order to assess risk it is necessary to focus upon the behavior of some existing group of individuals possessing a common trait. The companies utilize commonly recognized social status groups.⁹⁴

A status group is a community of individuals who are united by a distinctive common life style that provides the basis on which they are socially evaluated and hierarchically ranked.⁹⁵ Social status "is normally expressed by the fact that above all else a specific *style of life* is expected from all those who wish to belong to the circle."⁹⁶ As a result, every status group requires that its members fulfill a number of roles⁹⁷ in accord with a shared set of values and norms that dictate and obligate a common pattern of role behavior.⁹⁸ Group members are gener-

⁹¹ NEW JERSEY DEPT' OF INS., AUTOMOBILE INSURANCE RATE CLASSIFICATION: AN OVERVIEW OF FINDINGS, CONCLUSIONS AND REMEDIES 7-8 (1981) [hereinafter cited as N.J. OVERVIEW]; STANFORD RESEARCH INSTITUTE, THE ROLE OF RISK CLASSIFICATIONS IN PROPERTY AND CASUALTY INSURANCE 3 (1976) (Executive Summary Report) [hereinafter cited as SRI EXEC. SUMMARY]. See also *supra* text accompanying notes 11-18.

⁹² For example, it has been argued that "bias" plays a role in the classification process:

Although the core concern of the underwriter is the human characteristics of the risk, cheap screening indicators are adopted as surrogates for solid information about the attitudes and values of the prospective insured. . . . The invitations to underwriters to introduce prejudgments and biases and to indulge amateur psychological stereotypes are apparent. Even generalized underwriting texts include occupational, ethnic, racial, geographic, and cultural characterizations certain to give offense if publicly stated.

Works, *supra* note 15, at 471 (footnote omitted).

⁹³ Recognition of the correlation between the classification practices of insurance companies and the status grouping in which society at large engages is the significant contribution of the analysis of automobile insurance classifications conducted by the New Jersey Department of Insurance under former Commissioner James J. Sheeran. See N.J. REPORT, *supra* note 67.

⁹⁴ *Id.* at 46.

⁹⁵ M. WEBER, *supra* note 4, at 305-06.

⁹⁶ *Id.* at 932 (emphasis in original).

⁹⁷ R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 423 (1968 ed.).

⁹⁸ R. NISBET & R. PERRIN, THE SOCIAL BOND 139-42 (2d ed. 1977).

ally socialized to emulate a normative model or ideal type that also provides a reference point for self-evaluation. It should be noted that every person belongs to several status groups at the same time, each status group involving its own roles, norms, values, and ideal types.⁹⁹

The correlation between status group membership and behavior patterns mandated by a scheme of values makes status-group membership a useful factor in predicting the likelihood that an applicant for insurance, be it automobile or property insurance, will engage in certain kinds of conduct that relate to the risk of accidents or loss.

Social status also carries with it access to (or the denial of) honor, prestige, power, privilege, and economic goods and opportunities.¹⁰⁰ Insurance companies' (and their bureaucratic decisionmakers') perceptions of a group's riskiness mirror society's perceptions of a group's possession of and entitlement to shares of the rewards and benefits available for distribution. For example, marketing analysts, charged with deciding what sort of customers would be most profitably insured by their companies, are particularly interested in people with multiple insurance needs.¹⁰¹ People who have boats as well as cars, or several cars, or summer homes in addition to permanent residences, are attractive customers. Because status groups generate and reflect these consumption patterns, they are important to marketing analysts and actuaries.¹⁰² The company's sales force, whether in-house solicitors or independent agents, will be located in areas populated by or accessible to the more desirable customers.¹⁰³ Marketing analysts promulgate guidelines describing the desirable groups in order to aid underwriters who have the primary task of accepting or rejecting applicants. Moreover, the competition also influences the allocation of the total cost of automobile insurance among the various rating groups.¹⁰⁴ Thus, the customers who are the most desirable from a competitive marketing standpoint are more likely to be underwritten and rated as good risks.

These links between insurance classifications and social stratification are supported by an analysis of three grouping criteria employed in personal automobile and property insurance risk assessment: occupation; age, sex, and marital status; and territory.

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⁹⁹ R. MERTON, *supra* note 97, at 423-24.

¹⁰⁰ M. WEBER, *supra* note 4, at 935.

¹⁰¹ See N.J. OVERVIEW, *supra* note 91, at 8-9; see also *infra* note 108 and accompanying text.

¹⁰² Consumption patterns are an aspect of the lifestyle that members of a status group share. M. WEBER, *supra* note 4, at 937.

¹⁰³ See *infra* notes 180-81 and accompanying text.

¹⁰⁴ See N.J. REPORT, *supra* note 67, at 18, 186.

A. Occupation

In the view of some social theorists, occupation is the chief determinant of social status; it has been asserted that "[w]hatever criterion of social stratification one prefers, prestige or income, spending habits or styles of life, education or independence, they all lead back to occupation."¹⁰⁵ As described below, insurance companies draw upon the associations between occupation and the determinants and trappings of social status in making underwriting decisions.¹⁰⁶

Occupation provides a clue to the income of an applicant.¹⁰⁷ People with steady incomes are desirable because they can pay premiums and maintain their property. Moreover, affluent people are especially favored customers because their consumption patterns generate multiple insurance needs that, from a marketing standpoint, make them prospects for different kinds of coverages.¹⁰⁸

Occupation is also thought to reflect the value orientation of an applicant for insurance.¹⁰⁹ The companies start with a normative ideal insured.¹¹⁰ He is achievement-oriented and interested in the acquisition and preservation of wealth and property, whether or not he owns it. He is sufficiently apprehensive about the future to need insurance, but he believes that he is primarily responsible for fulfilling his needs and accountable if he fails to control his actions. He is also charitable enough

¹⁰⁵ R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* 70 (1959).

¹⁰⁶ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 73.

¹⁰⁷ *Id.* at 74. Another indicator of income used by insurers is prior policy cancellation for nonpayment of premiums. Sheldon & Sarason, *supra* note 9, at 829.

¹⁰⁸ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 74. *See also supra* text accompanying notes 101-03.

¹⁰⁹ The correlation between occupation and values is likely to be greater if occupational attainment and achievement depend upon compliance with the norms and life style of a particular social status group rather than if the latter are the product of the former. Claus Offe offers a "critical analysis" of the achievement principle that is supposed to reward superior individual functional performance with occupational status and, through occupational status, social status. C. OFFE, *INDUSTRY AND INEQUALITY* 42 (1977). Offe argues that the achievement principle has become "perverted and repressive" because work conditions are technically and organizationally determined in such a way that production is beyond the control of the individual worker. *Id.* at 98-99. The ranking of occupational roles is no longer dependent upon functional content, but upon a culturally determined normative hierarchy of values associated with occupational roles. *Id.* at 53. The system of differential wages rests on a normative basis as well. *Id.* at 116. Consistent with a restriction of the opportunity to demonstrate "individual goal conforming performance ability," improving one's status is linked to demonstrating "the needs and life styles which suit the normative system which claims validity in the work situation." *Id.* at 73-74 (emphasis in original). The achievement principle has been "a disciplinary technique which rewards loyalty to the dominant interests and forms of life. It perpetuates cultural divisions and creates and stabilizes the appearance of an objective or 'technical' legitimacy of organizational hierarchies." *Id.* at 138.

¹¹⁰ *See* J. LONG, *ETHICS, MORALITY AND INSURANCE* 26-40 (1971). The ideal insured possesses those attributes associated with what Long describes as the "ethical pillars" of a "sustained and healthy execution of the insuring process." *Id.* at 26. Long, however, denies that the attributes are related to the underwriter's short-term aims. *Id.* at 26 n.9.

to tolerate the limited redistribution of wealth that is an unavoidable aspect of loss spreading through insurance. Honesty and obedience to the law are hallmarks of his character. He is committed to an orderly existence conforming to tradition. He pursues change, if at all, in a cautious and predictable manner.¹¹¹

Automobile insurance underwriting guidelines associate certain occupations with shoddy values and risky behavior patterns as compared with the ideal.¹¹² According to underwriters, bartenders tend to have drinking problems,¹¹³ while entertainers, musicians, and race track employees occupy jobs linked with looseness, dishonesty, and instability.¹¹⁴ Vigorous physical occupations like mining, law enforcement, and military service are presumed to attract persons with violent personalities, aggressive driving habits, and a minimum of self-restraint.¹¹⁵ The clergyman's lack of concern for worldly affairs and materialistic goods weighs against him.¹¹⁶ Included on lists of undesirable applicants are taxi drivers, who may be thought to be contemptuous of auto safety even when driving their own cars, and automobile salesmen and mechanics, who may be considered too claims-conscious and too likely to submit extravagant or fraudulent claims.¹¹⁷

Insurance companies even assume that occupation provides clues to a person's life style and behavior patterns.¹¹⁸ Occupation sheds light on where the insured automobile will be parked, who the insured's associates might be, whether the insured is subject to stress at work, and how far and under what circumstances the automobile will be used.¹¹⁹ For example, underwriters believe salesmen often must drive in bad weather when others, driving for pleasure, might stay home;¹²⁰ they may also make sales calls in "rough" neighborhoods or heavily traveled urban areas.

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¹¹¹ Cf. *Rights and Remedies*, *supra* note 27, at 91 (attributes of model insured for homeowners coverage as summarized in Continental Insurance Company's underwriting manual).

¹¹² The Travelers Insurance Group has ranked occupation in descending order of desirability. Editors, reporters and photographers are listed 30th; their own insurance agents, 62d; members of the legal profession, 66th; and churchworkers, 83d. *Rights and Remedies*, *supra* note 27, at 84.

¹¹³ See *id.* at 729 (quoting Hartford Personal Lines Underwriting Manual).

¹¹⁴ SRI SUPP., *supra* note 12, at 23.

¹¹⁵ *Id.* See also *Rights and Remedies*, *supra* note 27, at 26-30 (testimony of service personnel).

¹¹⁶ R. HOLTOM, *RESTRAINTS ON UNDERWRITING* 34 (1979).

¹¹⁷ See SRI SUPP., *supra* note 12, at 24.

¹¹⁸ See *Rights and Remedies*, *supra* note 27, at 729 (excerpts from the Hartford Personal Lines Underwriting Manual).

¹¹⁹ *Rights and Remedies*, *supra* note 27, at 211 (testimony of Anton A. Lubimir); G. GLENDENNING & R. HOLTOM, *supra* note 23, at 74.

¹²⁰ SRI SUPP., *supra* note 12, at 23.

Property insurance underwriting similarly considers occupation.¹²¹ An insurer concerned with rejecting applicants who are irresponsible, unstable, and immature can allegedly rely on occupation in assessing risks.¹²² Insurers assume that "[s]ome occupations require considerable travel, which increases the exposure to theft. Other occupations call for a life style which is not conducive to a stable home life. Still other occupations are notorious for instability and job-jumping."¹²³ Among the occupations associated with higher homeowner policy losses are antique dealer, automobile dealer, advertising executive, hairdresser, fashion designer, loan shark, painter, and waitress.¹²⁴

B. Age, Sex, and Marital Status

Age, sex, and marital status are traditional ascriptive status criteria¹²⁵ that are significant to insurance companies primarily because they determine an individual's role in a nuclear family, which is a status group bound by kinship and comprising a household. The family gives its members a normative and economic orientation. Insurance companies assume that risky behavior is negatively correlated with responsibility for or dependence on a stable familial unit. Moreover, family members who share a household generally share the economic advantages and disadvantages of the household head or breadwinners.¹²⁶

Age, sex, and marital status have combined significance in automobile insurance rating.¹²⁷ After a limited use in 1939, age was reintroduced as a rating criterion (with ample statistical support) in 1950 when insurance companies began to charge drivers under 25 higher premiums.¹²⁸ Beginning in 1953, marital status and parenthood were

¹²¹ *Rights and Remedies*, *supra* note 27, at 82-84.

¹²² See G. GLENDENNING & R. HOLTOM, *supra* note 23, at 258.

¹²³ *Id.* at 260.

¹²⁴ *Rights and Remedies*, *supra* note 27, at 91 (excerpts from Continental Insurance Company's underwriting manual).

¹²⁵ Status may be achieved by virtue of one's accomplishments or ascribed by virtue of the happenstance of one's birth. R. NISBET & R. PERRIN, *supra* note 98, at 145-47.

¹²⁶ T. PARSONS, *THE SOCIAL SYSTEM* 160-61 (1951). See also M. WEBER, *supra* note 4, at 359.

¹²⁷ The General Accounting Office states that "[w]hat is at issue here is a question of public acceptability, not a question of fact." GAO REPORT, *supra* note 11, at 113. At least one company has moved away from the use of age, sex, and marital status as automobile insurance rating criteria. *Id.* at 111. In 1977, Commercial Union Assurance announced its intent to replace these traditional criteria with the insured's driving experience, driving record, claims history, and driver training. *Id.* Also to be weighed are "vehicle use," taking into consideration territory, type of driving, and annual mileage. *Id.* See also NAT'L UNDERWRITER (Prop. & Casualty Ins. ed.), May 14, 1982, at 85, col. 1.

¹²⁸ H. ZOFFER, *THE HISTORY OF AUTOMOBILE LIABILITY INSURANCE RATING* 111-16 (1959).

used to differentiate among the under-25 drivers.¹²⁹ Single drivers were charged more than married ones. Young people who drove only occasionally and were subject to parental supervision and young marrieds who were burdened by parenthood were charged lower rates because insurers assumed that they drove less and were more stable and responsible than their peers. Sex was added as a criterion in 1955.¹³⁰ Young males were charged more than females because females made less frequent use of the family car.¹³¹ Moreover, it was assumed that the female who did drive was "frequently a business or professional woman with a sense of responsibility or [was subject to] the restraining influence of family responsibility or parental supervision."¹³²

At the present time the youthful driver categories generally include the following subgroups: single females under twenty-five who are occasional operators of the insured vehicle; single female principal operators under twenty-five; married males under twenty-five; single male occasional operators under twenty-five; and single male principal operators under twenty-nine.¹³³ Whether a driver is deemed an occasional or a principal operator depends upon the underwriting rules of the insurer, the judgment of the underwriter, and the veracity of the applicant.¹³⁴

Some youthful drivers are the beneficiaries of discounts that reduce their premiums. Full-time students in academic programs whose grades place them in the top 20% of their classes may be eligible for good student discounts; part-time and vocational students may be excluded.¹³⁵ Under the resident student pricing formula, single females and single males who reside at school a specified distance from home and use the family car during school vacations and holidays are generally rated as if they were "married."¹³⁶ In those jurisdictions where newly licensed drivers are surcharged (the surcharge falling unavoidably on the young),¹³⁷ youths eligible for the resident student discount escape the added cost.¹³⁸ Finally, youthful operators who have taken driver training may be eligible for a discount.¹³⁹ In his report on auto-

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¹²⁹ *Id.* at 143, 146-47.

¹³⁰ *Id.* at 158.

¹³¹ *Id.* at 158, 159. See also N.J. REPORT, *supra* note 67, at 91-92.

¹³² H. ZOFFER, *supra* note 128, at 159.

¹³³ SRI SUPP., *supra* note 12, at 35-36. Married females of any age are usually classified as adults. *Id.* at 30.

¹³⁴ N.J. REPORT, *supra* note 67, at 95-96, 122, 124-26.

¹³⁵ See, e.g., *id.* at 94; see also G. GLENDENNING & R. HOLTOM, *supra* note 23, at 168.

¹³⁶ See, e.g., N.J. REPORT, *supra* note 67, at 95, 123.

¹³⁷ See, e.g., *id.* at 96-97; G. GLENDENNING & R. HOLTOM, *supra* note 23, at 168-69.

¹³⁸ See, e.g., N.J. REPORT, *supra* note 67, at 95.

¹³⁹ See, e.g., N.J. REPORT, *supra* note 67, at 97-98; see also G. GLENDENNING & R. HOLTOM, *supra* note 23, at 168.

mobile insurance classifications, New Jersey Insurance Commissioner Sheeran examined those rating discounts for youthful drivers from "a socioeconomic perspective."¹⁴⁰ He concluded that the pricing criteria favor the family with the resources to sustain its young in a state of economic dependency through a program of full-time academic education.¹⁴¹ Not surprisingly, pricing advantages were granted to a higher percentage of youth from wealthy suburban communities than were granted to their urban counterparts.¹⁴²

Age, sex, and marital status are also relevant to the assessment of the premiums of adult drivers. Senior citizens over sixty-five pay less than adult females who, in turn, pay less than others classified as "nonyouthful."¹⁴³ Marital status, if not a direct rating criterion for adults, is indirectly relevant. The premium covering an automobile driven by either one or both partners of a married couple will be assessed on the basis of the characteristics of the higher-rated partner, generally the male.¹⁴⁴

Reduced premiums for senior citizens are of fairly recent origin.¹⁴⁵ Insurers traditionally rejected older persons on the assumption that they suffer from physical and mental infirmities that affect their driving.¹⁴⁶ When different assumptions became prevalent, favorable underwriting decisions and rate discounts developed.¹⁴⁷ Now it is thought that "the elderly use their cars less than other drivers, lead a leisurely retirement and have childless households, permitting greater discretion as to when, how much and in what circumstances they drive."¹⁴⁸

Underwriters use similar criteria in evaluating applicants for automobile insurance.¹⁴⁹ Despite the higher premiums they are generally charged, young males are not preferred risks.¹⁵⁰ The stability of the young driver is thought to be related to the amount of control his parents have over him.¹⁵¹ Thus, a teenager living in a traditional family is considered a good risk, particularly if his parents' driving record is good (the driving habits of the parents being presumed to affect those of

¹⁴⁰ N.J. REPORT, *supra* note 67, at 102-12.

¹⁴¹ *Id.* at 105.

¹⁴² *Id.*

¹⁴³ SRI SUPP., *supra* note 12, at 30-34.

¹⁴⁴ See N.J. REPORT, *supra* note 67, at 273-74; see also *Lanigan v. State Farm Ins. Co.*, No. C81-719, (N.D. Ohio Aug. 26, 1981) (unsuccessful civil rights challenge to insurer's refusal to renew coverage of insured after she married a man with a poor driving record).

¹⁴⁵ N.J. REPORT, *supra* note 67, at 230-32.

¹⁴⁶ See, e.g., *Rights and Remedies*, *supra* note 27, at 728-29.

¹⁴⁷ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 71, 164-66.

¹⁴⁸ N.J. REPORT, *supra* note 67, at 232-33.

¹⁴⁹ *Id.* at 112.

¹⁵⁰ See, e.g., *Rights and Remedies*, *supra* note 27, at 732-36.

¹⁵¹ *Id.* at 728.

their children).¹⁵² If the young driver comes from a "broken home," he may have emotional conflicts that insurers fear will affect his driving.¹⁵³ Young persons living alone or in nontraditional settings are considered both less subject to external restraint and generally more rebellious; this implies aggressive driving behavior.¹⁵⁴

Marital status is of some importance in the underwriting of adult risks. Persons living in the traditional nuclear family are preferred.¹⁵⁵ Insurers believe that family life has a stabilizing influence and suggests a commitment to sensible values and mores.¹⁵⁶ Those "living together" are thought more likely to be irresponsible; in addition, underwriters fear that with such arrangements a wider circle of people might be driving the car.¹⁵⁷ Divorced people (especially those whose marriages were recently terminated) are considered suspect drivers because divorce generates emotional turmoil that may lead to problems on the road.¹⁵⁸ Widowed people are chancy for much the same reasons, but less so because widowhood, unlike divorce, is not associated with a lack of maturity and irresponsibility.¹⁵⁹ Common-law marriage might be acceptable if of long duration, but otherwise is viewed as showing a refusal to assume responsibility.¹⁶⁰

Marital status is of like relevance to property insurance underwriters.¹⁶¹ For example, married people, particularly those with children, are preferred because it is assumed that someone will be at home

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¹⁵² G. GLENDENNING & R. HOLTOM, *supra* note 23, at 70-71.

¹⁵³ SRI SUPP., *supra* note 12, at 21.

¹⁵⁴ *Id.*

¹⁵⁵ N.J. REPORT, *supra* note 67, at 92-94.

¹⁵⁶ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 72-73.

¹⁵⁷ The term "mingles" is used to describe unmarried individuals living together. R. HOLTOM, *supra* note 116, at 27. The industry position is that such a relationship

is a temporary, transient type of living situation in most cases, with each party feeling free to terminate the arrangement at will. Thus, it is the direct opposite of the stability which underwriters desire. . . . The difficulty is that one who mingles may change living partners with ease. If an automobile policyholder is a young woman, her present mingling partner may be acceptable as an occasional driver, but what if he leaves and another man takes his place?

Id. at 28.

¹⁵⁸ Abramoff, *supra* note 9, at 686 n.14. See also *Rights and Remedies*, *supra* note 27, at 804-05 (submission of Crum & Forster Insurance Co. supporting marital status underwriting guidelines with loss statistics); N.J. REPORT, *supra* note 67, at 93-94 (quoting from Continental Insurance Company's underwriting manual).

¹⁵⁹ See, e.g., *Rights and Remedies*, *supra* note 27, at 12-25 (testimony recounting widow's experience with Allstate Insurance Company).

¹⁶⁰ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 73.

¹⁶¹ Like automobile insurers, property insurers look upon the divorced applicant as undesirable business: "[D]ivorced persons may feel the effect of strained finances and consequent failure to maintain property. Occasionally the new-found freedom from family responsibility produces a change in life-style which may be productive of poor experience." CIVIL RIGHTS REPORT, *supra* note 42, at 8 (quoting a Citizens Insurance underwriting manual).

during the daytime¹⁶² and that couples will spend more evenings and weekends at home than unmarried people.

C. Territories

Territory, a common status-grouping criterion, is also employed by insurance companies in classifying customers.¹⁶³ In modern society, people do not generally perform all of their activities—work, leisure, education, trade, and domestic life—in a single geographic area.¹⁶⁴ Rather, they travel among a cluster of territorial enclaves that are generally devoted to one specific function or another. Land, like the people situated thereon, is differentiated, functionally specialized, and hierarchically ranked.¹⁶⁵ Groups are identified with and identify themselves with stratified geographic areas. Where people live and work and how involved they become with the groups to which they belong by reason of such geographic location reflects their status. The industry is aware of these associations: "Geographical divisions, however designed, are often correlated with sociodemographic factors such as income level and race because of natural aggregation or forced segregation according to these factors."¹⁶⁶

The base amount on which an individual's automobile premium is calculated depends upon the territory in which the insured automobile is garaged or stored overnight.¹⁶⁷ Insurance companies recognize that drivers do freely traverse territorial lines, but the companies insist that people predominantly drive close to home, which is where most accidents occur.¹⁶⁸ Population and traffic density are said to be the chief factors influencing the drawing of territorial lines,¹⁶⁹ along with differences in law enforcement, climate, street design, medical and repair costs, wage rates, jury attitudes, claims-consciousness, and crime rates.¹⁷⁰ A single territory often consists of one or more political subdi-

¹⁶² G. GLENDENNING & R. HOLTOM, *supra* note 23, at 259.

¹⁶³ For a general discussion of the use of territory in automobile insurance rating, see GAO REPORT, *supra* note 11, at 133-40.

¹⁶⁴ Coleman, *Community Disorganization and Urban Problems*, in CONTEMPORARY SOCIAL PROBLEMS 578-88 (R. Merton & R. Nisbet 4th ed. 1976).

¹⁶⁵ T. LOWI, *supra* note 7, at 18.

¹⁶⁶ STANFORD RESEARCH INSTITUTE, THE ROLE OF RISK CLASSIFICATIONS IN PROPERTY AND CASUALTY INSURANCE 91 (1976) (Final Report) [hereinafter cited as SRI FINAL REP.].

¹⁶⁷ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 111, 159; SRI SUPP., *supra* note 12, at 44.

¹⁶⁸ *In re Public Hearings of the Ins. Comm'r Relating to Auto. Ins. Territorial Classifications—Effect on Rates*, File No. RH, 207, slip op. at 33-34 (Cal. Ins. Comm'n Dec. 20, 1979) [hereinafter cited as Calif. Findings]; N.J. REPORT, *supra* note 67, at 296.

¹⁶⁹ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 158; SRI SUPP., *supra* note 12, at 42.

¹⁷⁰ Calif. Findings, *supra* note 168, at 17; G. GLENDENNING & R. HOLTOM, *supra* note 23,

visions of a state.¹⁷¹ In addition, ZIP codes have proven to be a useful tool for territorial differentiation.¹⁷² Although the United States Postal Service makes no attempt to distinguish between status groups in the assignment of ZIP codes,¹⁷³ what is strictly an administrative convenience to facilitate the delivery of mail is nonetheless a useful indicator of social status to insurance companies, as well as to magazine publishers, political parties, and product marketers.¹⁷⁴

Because insurance companies give credence to the popular image of the city as an area of blight, high crime, on-street parking, and narrow, congested thoroughfares, urban areas wind up with higher base rates than suburban areas.¹⁷⁵ Also, city residents are supposedly of lower educational and economic attainment, factors that are associated with higher accident involvement.¹⁷⁶ Suburban commuters play a role in making urban territories riskier and insurance premiums for urbanites higher.¹⁷⁷ Although the city accidents of suburbanites are charged to the suburban territories where they live,¹⁷⁸ when commuter traffic contributes to an accident between two urbanites, the accident will be charged solely to the urban territory.¹⁷⁹

at 159. *But see* N.J. REPORT, *supra* note 67, at 291-95 (finding no support in factors allegedly dictating territorial lines).

¹⁷¹ SRI SUPP., *supra* note 12, at 42. It is not unusual, however, for a single political subdivision to be divided into multiple territories. For example, Boston, Ma. is divided into nine territories. *Rights and Remedies*, *supra* note 27, at 8.

¹⁷² G. GLENDENNING & R. HOLTOM, *supra* note 23, at 159.

¹⁷³ The first three digits of the five-digit ZIP code designate the entire delivery area of a major post office, while the last two digits specify delivery areas serviced by smaller associate post offices or branches. *U.S. Postal Service Plan for the Nine-Digit ZIP Code: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 96th Cong., 2d Sess. 8 (1980) [hereinafter cited as *ZIP Code Hearings*].

¹⁷⁴ "ZIP codes are now matched with census data, political party registration and other information for all kinds of marketing purposes. For example, someone wishing to sell swimming pools would solicit by mail only from high income ZIP Code areas. . . ." H.R. REP. NO. 1531, 96th Cong., 2d Sess. 23 (1980). The potential for abuse of a nine-digit ZIP code was cited during congressional hearings as an objection to its adoption. *See, e.g., ZIP Code Hearings*, *supra* note 173, at 22 (statement of Congressman Andrew Maguire).

¹⁷⁵ N.J. REPORT, *supra* note 67, at 293, 294.

¹⁷⁶ *Id.* at 304-05 (quoting Continental Insurance Company's underwriting manual).

¹⁷⁷ The effect of suburban commuters on urban insurance rates is the subject of much controversy. *See* Calif. Findings, *supra* note 168, at 11-12; N.J. REPORT, *supra* note 67, at 356-74; Stone, *Excerpt from the Opinion, Findings and Decision on 1978 Automobile Insurance Rates, in AUTOMOBILE INSURANCE RISK CLASSIFICATION: EQUITY & ACCURACY* 144, 163-65 (1978) (published by Mass. Div. of Ins.) [hereinafter referred to as *Mass. Opinion* and *EQUITY & ACCURACY*, respectively].

¹⁷⁸ Accidents are charged to the home territory of the automobile involved. Calif. Findings, *supra* note 168, at 24-25. *See also id.* at 11-12, 25; *Mass. Opinion*, *supra* note 177, at 164; N.J. REPORT, *supra* note 67, at 300-01. Commuters are also charged for the use of their automobiles in driving to and from work. SRI SUPP., *supra* note 12, at 34.

¹⁷⁹ Calif. Findings, *supra* note 168, at 11-12. Commissioner Stone asserts that the resulting overpricing of city insureds leads to subsidization of higher income suburbanites by lower income urban dwellers. *Mass. Opinion*, *supra* note 177, at 164. *See generally* Etgar, *Unfair Price Discrimination in P-L Insurance and the Reliance on Loss Ratios*, 42 J. RISK & INS. 615 (1975).

Territory is also significant in automobile insurance marketing and underwriting.¹⁸⁰ Because agents generally build a clientele in their immediate neighborhood by establishing rapport with members of the community, insurers do not place agents where business is not wanted.¹⁸¹ As a result, access to insurance producers is restricted for residents of city areas that are considered undesirable.

Additionally, auto insurance underwriters consider the physical risk to which the insured automobile is exposed, the type of residence in which the applicant resides, and its location.¹⁸² Cars parked in garages or driveways suffer fewer losses through theft, vandalism, and hit-and-run collisions than do cars parked on the street. An underwriter will prefer a person who lives on a safe and quiet street to one whose street is busy and dangerous, even if the streets are adjoining and are located in the same territory. Use of the automobile in a territory other than the one where it is garaged overnight is not considered important, even if the automobile is parked on the street all day. The place of garaging is deemed to be more significant because it is controllable.¹⁸³

In fact, insureds can manipulate to some extent the designation of the territory in which the insured automobile is garaged. It is not uncommon for an insured who has a vacation home located in a lower-rated territory to list it as the place where his car is garaged instead of listing his principal residence.¹⁸⁴

In property insurance, territory is a principal underwriting and rating criterion. The likelihood of natural disaster, the incidence of theft and vandalism, and the quality of police and fire protection vary with the location of the property.¹⁸⁵ Suburban or rural isolation from civic services and neighbors who might report emergencies is a negative consideration, but location in the heart of a densely populated city is also undesirable because of the increased possibility of man-made calamities.

Insurers' reluctance to extend coverage to urban property owners stems in part from their assumption that there is a close relationship between territory and the value of a building. Property insurance generally reimburses an insured for a partial loss to the extent of the cost

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¹⁸⁰ N.J. REPORT, *supra* note 67, at 286-87.

¹⁸¹ *Rights and Remedies*, *supra* note 27, at 49; N.J. REPORT, *supra* note 67, at 286.

¹⁸² G. GLENDENNING & R. HOLTOM, *supra* note 23, at 81-82.

¹⁸³ *Id.* at 81.

¹⁸⁴ Shayer, *Driver Classification in Automobile Insurance*, in EQUITY & ACCURACY, *supra* note 177, at 1, 15.

¹⁸⁵ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 236, 264-66.

of repair or replacement, less depreciation.¹⁸⁶ Such a measure of recovery may create an incentive to destroy property having a market value that is less than its repair or replacement cost,¹⁸⁷ a common characteristic of the housing stock in urban areas.¹⁸⁸ Insurers avoid the risk of intentional destruction by employing the practices associated with "redlining."¹⁸⁹

This discussion is not an exhaustive review of marketing, rating, and underwriting criteria. Insurers do employ classification criteria that are less obviously associated with status groups than those reviewed above. For example, automobile insurance underwriters consider driving ability as reflected in accident involvement, traffic violations, and driving history.¹⁹⁰ Although these criteria do not identify and are not identified with any particular status group recognized by the society at large, a record of traffic violations, for instance, may attest not to an individual's lack of capacity as a driver, but to his membership in a group that is the target of discriminatory traffic enforcement.¹⁹¹

D. Implications

The controversy generated by the insurance classification process arises from the same sources that produce discontent with the overall societal structure of hierarchically arranged groupings of individuals by status and role. These sources are, first, limitations on the options available to individuals who wish to assume more desirable statuses and roles, and second, destruction of the bonds or ties that make the statuses and roles individuals can and do assume meaningful.¹⁹²

Insurance companies are blind to social conditions in a way that creates and reinforces impediments to individual mobility and advancement. Insurers evince little concern for individuals who have adopted as reference points for governing their lives the values, behavior patterns,

¹⁸⁶ R. KEETON, *supra* note 6, at § 3.9.

¹⁸⁷ CIVIL RIGHTS REPORT, *supra* note 42, at 13.

¹⁸⁸ See *Rights and Remedies*, *supra* note 27, at 85-86 (testimony of William S. Gibson); see also CIVIL RIGHTS REPORT, *supra* note 42, at 7.

¹⁸⁹ See *supra* note 42.

¹⁹⁰ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 62-69. See also *infra* note 282.

¹⁹¹ But see N.J. REPORT, *supra* note 67, at 406 (the "mere supposition" "of uneven law enforcement" should not limit merit rating). Cf. *infra* text accompanying notes 298-300 (discussing the threat to autonomy posed by merit rating).

¹⁹² See generally R. DAHRENDORF, *LIFE CHANCES: APPROACHES TO SOCIAL AND POLITICAL THEORY* (1979). Dahrendorf defines life chances as socially provided "opportunities for individual growth, for the realization of talents, wishes and hopes." *Id.* at 30. Life chances are a function of options ("possibilities of choice, or alternatives of action") and ligatures ("allegiances," "bonds," or "linkages"). *Id.* In Dahrendorf's view, the absence of either options or ligatures can produce anomie or lead to social change. *Id.* at 87. Dahrendorf's book is devoted to a liberal attack on the egalitarianism that has destroyed ligatures; his position is at odds with that pursued in this article.

and economic expectations of status groups of which they are *not* members. Not only do insurers fail to recognize the widespread aspirations of advancement up the status hierarchy, but they also ignore the normative and behavioral socialization that is produced in anticipation of social mobility. Moreover, an individual's place (and even a group's position) in the social order is not static in the way insurance companies perceive it;¹⁹³ insurance companies are slow to recognize actual change.

Reduced opportunities for social mobility and threats to gains in status already won generate frustration and conflict. When expectations for advancement exceed the means for achieving it, aspiring individuals view the social order as unfair, illegitimate, and oppressive.¹⁹⁴ They compare their treatment to that received by groups occupying more favored positions in the status hierarchy and endeavor to undermine or avoid the effects of the status groupings that frustrate their aspirations. To the extent that the insurance classification system creates or simply reinforces existing roadblocks to social mobility, then, it too produces conflict and controversy.

The classification controversy may also be likened to a class struggle. The report of the former New Jersey Commissioner of Insurance, which emphasizes the correlation between high socioeconomic status and favorable marketing, underwriting, and pricing treatment,¹⁹⁵ implies that insurance classifications are antiquated and discriminatory in their treatment of the lower classes. This too would account for the controversy. Yet, an analysis that focuses exclusively on the battle for status and its trappings obscures the dimensions of the controversy surrounding the stratification practices of insurance companies in particular and society in general. The struggle to escape the consequences of a life restricted by status and role is not confined to people at the lowest socioeconomic levels or to those grouped by ascriptive criteria they cannot alter. Hostility toward the existing social order can be found even among those for whom the upper reaches of the hierarchy of status and role are anything but closed.¹⁹⁶

¹⁹³ See, e.g., N.J. REPORT, *supra* note 67, at 208.

¹⁹⁴ R. MERTON, *supra* note 97, at 321-22. Commissioner Stone provides an example of such behavior: "As rates reach elevated levels, particularly for drivers with clean records, a massive degree of resentment is generated. Some people who feel they are being cheated by the system are inclined to respond in kind. The incidence of fraudulent claims rises most rapidly where rates are highest, and a vicious cycle is born." *Mass. Opinion*, *supra* note 177, at 151. Commissioner Stone has elsewhere described insurance rating as "a pricing structure . . . whose only incentives are for fraud and resentment." *Rights and Remedies*, *supra* note 27, at 95-96 (testimony of James M. Stone).

¹⁹⁵ See, e.g., N.J. REPORT, *supra* note 67, at 104-12, 304-09.

¹⁹⁶ See A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 325-26 (1970).

Insurance companies do not view any insured as a whole person. Rather, every insured is compartmentalized. He is the sum of the many roles he plays as a result of being a member of many status groups. To an insurance company, the same individual may be an adult, a female, a divorcee, a parent, a lover, an executive, a debtor, a homeowner, a citizen, an urbanite, a commuter, a teetotaler, a lawbreaker, and a klutz. She is not a plenary, monolithic person. The company does not know her; it knows only the roles she plays.¹⁹⁷

Although the multiplicity of roles may cause the individual to suffer normative conflict and uncertainty, role or status inconsistency does not impede insurers. In automobile insurance pricing, for example, each relevant role is assigned a numerical value; the individual insured is literally the multiplicative product of his parts.¹⁹⁸ Under the most widely used assessment scheme, there are 234,360 possible cells or groups into which drivers fall based on the results of the multiplication process.¹⁹⁹ Conflicts notwithstanding, the scheme provides a place for everyone.²⁰⁰

Of course, these insurance cells are artificial; they do not necessarily relate to real collectivities or groups with which the cell occupants identify and in which they participate.²⁰¹ But there is reason to doubt that individuals have engrossing involvements with the many collectivities to which they actually belong by virtue of the roles they play. In liberal society,

every individual belongs to a large number of significant groups, but each of these groups affects only a limited part of

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¹⁹⁷ Cf. R. UNGER II, *supra* note 3, at 184 (Under and within a bureaucracy, "[m]en know and interact with one another as role occupants. . . . At no point do they acknowledge each other as entire persons.")

¹⁹⁸ For a fairly simple explanation of the multiplication involved in calculating an individual premium and charts setting forth the typical rate relativities, see GAO REPORT *supra* note 11, at 104-11.

¹⁹⁹ N.J. REPORT, *supra* note 67, at 21.

²⁰⁰ Under some plans there are more places than there are people to fill them: "[O]ne [automobile] insurer devised a plan which produced more than 500,000 rating slots for each of Illinois' 27 different territories, or a total of 13,500,000 rating slots in a State with an 11 million population base." *Rights and Remedies*, *supra* note 27, at 216 (testimony of J. Robert Hunter). See also FULL INSURANCE, *supra* note 19, at 4.

²⁰¹ In any given jurisdiction there will be relatively few insureds in any given cell. Competitive individualism could result in cells of one. Furthermore, over-classification is itself a device for "rating-out" unwanted risks by producing exorbitant rates "for certain unwanted classes." FULL INSURANCE, *supra* note 19, at 52-53. The Federal Insurance Administration report also argues that "[t]he proliferation of classifications militates against the concept of risk spreading which is basic to all insurance," and that such overly refined classifications prevent collection of adequate statistical data "to test the rate differentials between the various classes which were based initially upon judgment." *Id.* at 54. See also Works, *supra* note 15, at 460-64 (stressing the inherent limits of classifications, but noting that competitive forces create greater pressure for selectivity in classification).

his life. Thus, personality is carved up into a long list of separate or even conflicting specialized activities. The reverse side of this specialization is that the whole person comes to be seen and treated as an abstract set of capabilities never tied together in any one context of group life.²⁰²

Despite this social fact, people want and need to belong to meaningful groups. According to the sociologist Robert Merton, "the individual's sense of being 'at one with himself' is often only the result of being 'at one' with the standards of a group in which he is affectively engaged."²⁰³ One's sense of self depends upon the recognition of others, which in turn depends on satisfying their expectations. Moreover, individuals exercise their capacities by meeting the needs and desires of others. If there were no collective dependency, individual autonomy would not exist.

Individual mobility and role specialization bring with them a weakening of the kinds of bonds that communal solidarity and shared experiences produce.²⁰⁴ The associations that fill the void are formed out of a shifting coalescence of individual interest. People crave at the same time the autonomy that is produced by a social order based on specialized roles and the communalism that is generated by shared values, customs, and experiences.²⁰⁵ The two objectives are viewed as being incapable of coexisting: To assert one's individuality is to deny one's community; to be absorbed in one's community is to lose one's individuality. The tension between autonomy and communalism produces arguments for two sorts of change—one directed toward greater individual freedom and mobility, and a second directed toward greater recognition of the claims of aggrieved groups of people who see themselves as being meaningfully engaged with each other.²⁰⁶

III. ARGUMENTS ATTACKING THE CLASSIFICATION PROCESS

The arguments advanced in the classification controversy reflect the tension between individual mobility and group solidarity. Two other tensions are also inherent in these arguments. First, the emphasis on individuality is closely identified with arguments stressing the importance of the kind of competition that is associated with the free mar-

²⁰² R. UNGER I, *supra* note 3, at 143.

²⁰³ R. MERTON, *supra* note 97, at 384.

²⁰⁴ R. UNGER I, *supra* note 3, at 168.

²⁰⁵ *Id.* at 128.

²⁰⁶ *Id.* at 236. *But cf.* J. DEWEY, THE PUBLIC AND ITS PROBLEMS 193-94 (1954) ("That social evolution has been either from collectivism to individualism or the reverse is sheer superstition.").

ket. In contrast, the focus on the conditions of groups relies on the model of a market regulated with a regard for social welfare. In addition, the arguments also reveal a conflict as to the means by which change is achieved. Some of the arguments assume that there exists a consensus of values that can be called upon to resolve the controversy, while others proceed on the premise that its resolution depends upon the outcome of a political struggle.

Although the arguments may be clustered in several ways, the discussion that follows divides them into two categories. The first set maintains the perspective of a competitive market regulated pursuant to a widespread consensus that promotes individual mobility. The second takes the perspective of a market controlled by social welfare considerations determined by a political process that is responsive to intragroup unity and intergroup conflict.

A. *Arguments in the Individualist Mode*

In the individualist mode of argument, the unavailability and unaffordability of personal insurance produced by company grouping practices are treated as if they stem from a competitive apparatus that is basically sound but given to excess.²⁰⁷ The assumptions that underlie this perspective are briefly the following: Market conditions have prompted insurers to make underwriting and rating decisions based on criteria that are statistically unsound or downright outdated.²⁰⁸ Insurance companies have made erroneous decisions based on misconceptions of the risks presented and their own anti-competitive attitudes.²⁰⁹ New criteria more closely associated with accident losses would further accountability, generate a deterrent effect, and promote economic efficiency. Restrictions on underwriting and rating practices would be perfectly compatible with this model of regulated competition. The market would remain in the hands of the companies, which cannot oppose limited oversight intended to achieve the objectives of competition.

According to this perspective each insured should pay a premium that is as commensurate as possible with the measurable risk he poses.²¹⁰ Subsidization should be avoided.²¹¹ The product should be al-

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²⁰⁷ See FULL INSURANCE, *supra* note 19, at 8, 54-55. See also ESSENTIAL INSURANCE, *supra* note 81, at 51-54.

²⁰⁸ ESSENTIAL INSURANCE, *supra* note 81, at 9.

²⁰⁹ *The Report of the Advisory Committee on Competitive Rating to the National Association of Insurance Commissioners*, 2 NAT'L ASS'N INS. COMM'RS PROC. 415, 478-79 (1980). [hereinafter cited as NAIC PROC.].

²¹⁰ See FULL INSURANCE, *supra* note 19, at 7; see also U.S. DEP'T OF JUSTICE, *supra* note 14, at 368.

²¹¹ GAO REPORT, *supra* note 11, at 122. The position taken by these arguments is consistent

located so as to avoid "moral hazards"²¹² and underinsurance. The problems affecting personal property and automobile insurance can be solved without a further blurring of the distinction between the public and private markets; in fact, the distinction between the two markets should be sharpened so that only poor risks wind up in the residual mechanisms.²¹³ Furthermore, public market insureds should bear the costs of their own losses.²¹⁴ Any difficulties they face after wholesome competition is restored are their own problem.

Individual autonomy would be maximized, of course, if an insured were never burdened by the constraints of external judgments predicated on characteristics he shares with a group. The arguments based on individualism, however, do not go that far. They do not deny the propriety of grouping; they merely assert the right of individuals to move into groups other than those in which insurance companies have placed them.²¹⁵ Individual mobility is crucial, and it is assumed that grouping criteria can be accurate and rational, yet allow for mobility. Moreover, because individualized judgments are wasteful and inefficient, grouping is an economic necessity.²¹⁶ The failure to group would lead to arbitrary decisionmaking. Yet, as the analysis that follows demonstrates, the irreconcilable tension between mobility and grouping destroys the coherence of the arguments.

Those seeking a change in insurance grouping practices through individualist arguments claim that they are "clean risks" or good risks—that is, better risks than those with whom insurance companies have grouped them.²¹⁷ Residual mechanism insureds who want to es-

with the elevation of self-reliance and the abhorrence of sacrifice for the sake of others that are associated with the ideal of individualism. On the abhorrence of self-sacrifice, see Kennedy, *supra* note 3, at 1713-16.

²¹² A moral hazard is any characteristic or attitude of the insured that may increase the frequency or severity of loss. H. DENENBERG, *supra* note 14, at 9. For a discussion of "moral hazards," see Works, *supra* note 15, at 466.

²¹³ See FULL INSURANCE, *supra* note 19, at 74; Kimball, *supra* note 4, at 513; Works, *supra* note 15, at 562-63 & n.294.

²¹⁴ See FULL INSURANCE, *supra* note 19, at 7; UNITED STATES DEP'T OF JUSTICE, *supra* note 14, at 368. The industry argues along similar lines that subsidy programs should not be the responsibility of private industry. SRI FINAL REPORT, *supra* note 166, at 100.

²¹⁵ See generally C. FRIED, RIGHT AND WRONG 167, 171-76 (1978).

²¹⁶ See Thurow, *A Theory of Groups and Economics Redistribution*, 9 PHIL. & PUB. AFF. 25 (1979).

²¹⁷ *Rights and Remedies*, *supra* note 27, at 904-05 (letter from J. R. Estefania). For a general discussion of "clean risks," see FULL INSURANCE, *supra* note 19, at 38-45. But see Covey, *Meeting the Social Responsibility of the Auto Insurance Industry Through Full Insurance Availability*, 2 NAT'L ASS'N INS. COMM'RS PROC. 754, 755 (1976). Covey defines clean risks as those people who have had no accidents or violations in the past three years. Even so, "these drivers have a consistently higher accident rate than any other group. . . . According to separate surveys by the New York State Insurance Department, and by one of the nation's largest auto insurers, dollar losses caused by the 'clean,' 'nonsurcharged' risk will exceed even those losses caused by the driver with a record of accidents and repeated violations." *Id.* So insuring these untarnished risks

cape to the private market disassociate themselves from the "truly bad" risks who belong in the public market and seek identification with the favored risks who have been insured by the private market. Accepting the private market/public market distinction, those who want to break into the private market simply argue that they have been placed on the wrong side of the divide.²¹⁸ Similarly, the private market insureds who object to the criteria on which their premiums are assessed emphasize the traits and behavior patterns they as individuals share with groups receiving more favorable treatment, or argue that they do not possess a negative characteristic associated with a majority of their group. Those advancing such individualistic arguments for relief will be referred to hereinafter as the "good-risk claimants."

The arguments in the individualist mode appeal to a supposedly apolitical, entrenched consensus of liberal values. The asserted entitlement of any individual good-risk claimant advancing these arguments is not based on the fact that he is one of a group of people sharing a common predicament and willing to wield whatever political clout they have in order to achieve a solution. Not surprisingly, the individualist arguments are the ones that are most attractive to state and federal regulatory authorities attempting to change company practices. The most prominent of these arguments are those demanding classification criteria that (1) reflect predictive accuracy, (2) constitute the causes of accidents, and (3) reward merit.

1. Predictive Accuracy

Predictive accuracy concerns the extent to which classifications identify differences in risk among individuals by placing in the same class those posing risks that are essentially the same and in different classes those posing risks that are essentially different.²¹⁹ Accuracy would seem to be an attractive ground on which to resolve the conflict over the classification criteria because accuracy is an attribute of facts. The theory is that facts are subject to proof, because facts either exist or they do not.²²⁰ When they exist, they are true and correct without re-

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would unfairly raise rates for others less likely to suffer accident losses.

²¹⁸ See FULL INSURANCE, *supra* note 19, at 39.

²¹⁹ N.J. REPORT, *supra* note 67, at 77. The discussion that follows does not necessarily reflect the approaches statisticians or actuaries would take to the subject of accuracy. The concern here is with the way both sides in the controversy use accuracy as a tool in a social, political, and legal debate over the distribution of insurance protection and its costs. The analysis is based on T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); R. UNGER II, *supra* note 3, at 31-36, 133-44; PARADIGMS AND REVOLUTIONS (G. Gutting ed. 1980).

²²⁰ Discussing life expectancies and mortality tables, Kimball argues:

[L]ife expectancy is a matter of fact, not of law. It is also a matter of averages, not

gard to values, ends, goals, or ideals about which people may disagree. Factual accuracy, then, could serve as a neutral value, end, goal, or ideal that in and of itself should elicit broad support.²²¹

The good-risk claimants ostensibly accept this theory of objective accuracy, and go on to attack the classification criteria as being either inaccurate or, if accurate, in conflict with values of greater objective importance than accuracy. Yet their arguments reveal an internal contradictory rejection of the basic premise. Accuracy as utilized in the classification controversy does not conform to a standard of objectivity. Analysis reveals that accuracy either cannot be defined in a neutral, apolitical consensual fashion or must be balanced against, and sometimes give way to, competing non-neutral considerations through a blatantly political process.²²² The predictive accuracy of the classification system and its political acceptability are thus inextricably bound.²²³ Legitimacy does not follow accuracy; quite the reverse is the case. The criteria could be attacked on the ground that objective accuracy is no basis on which to gauge their propriety. Indeed, the good-risk claimants seem to recognize that only politics can determine which criteria are legitimate. Yet, they refuse to abandon accuracy in their quest for reform.

Consider the claimants' attack on the accuracy of underwriting criteria for which there is little or no statistical support. Insurance companies, the claimants charge, do not collect statistics to substantiate their underwriting practices, but rather rely on hunches, guesses, and stereotypes.²²⁴ The good-risk claimants demand the collection of data to verify the predictive power of an underwriting criterion such as the terri-

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an individual characteristic. . . . All any mortality table can do is to provide an approximation of the true individual life expectancy which is more or less accurate depending on factual questions relating to its data and the sophistication of its classifications and methodology, not on what Congress and/or the Supreme Court may say. The blessing of the Supreme Court does not make a mortality table any more accurate than it otherwise is . . . . If the mortality table is as accurate as the practical problems of the data and our knowledge permit, then use of the table treats the parties as equally as they can be treated in an imperfect world.

Kimball, *Reprise on Manhart*, 1980 AM. B. FOUND. RESEARCH J. 915, 917 (emphasis in original).

²²¹ See N.J. REPORT, *supra* note 67, at 540-41.

²²² As Works observes in a related context, "[a]ccuracy. . . has no customary defining ethos." Works, *supra* note 15, at 558. Works says the terms "are sentiments, not standards, and they share . . . [t]he fundamentally insatiable character of political goals." *Id.* (quoting M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 190 (1964)). See also *Rights and Remedies*, *supra* note 27, at 127; N.J. REPORT, *supra* note 67, at 19. Cf. Laycock & Sullivan *Sex Discrimination as "Actuarial Equality": A Rejoinder to Kimball*, 1981 AM. B. FOUND. RESEARCH J. 221, 225 ("proper approximation" is not "most accurate," but depends on purpose for which approximation is used).

²²³ See N.J. REPORT, *supra* note 67, at 4-5.

²²⁴ *ESSENTIAL INSURANCE*, *supra* note 81, at 14.

tory in which a homeowner's property is located.²²⁵ Furthermore, the claimants call for mandatory underwriting criteria reflecting reality as painted by the data.²²⁶ The alternative is to give free reign to the subjective judgment, intuition, and prejudice of the decisionmaker, be it the bureaucrat who formulates the underwriting guidelines or the bureaucrat who applies them.

The proponents of the status quo (hereinafter referred to as "proponents") respond that scientific studies show that, overall, subjective discretionary judgments of individually unique risks can be as accurate in differentiating groups with different loss experiences as statistically supported, rigidly applied rules.²²⁷ Moreover, they say, inaccuracy is penalized and checked by the market. If one company misidentifies good risks, another company will profit by realizing this and insuring them.²²⁸

A contradiction enters the arguments of the good-risk claimants because they too envision some role for individualized decisionmaking,

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²²⁵ The GAO Report calls for the collection of data based on territories. GAO REPORT, *supra* note 11, at 146. For opposition, see *Ninety Day Report*, *supra* note 48, at 529. The NAIC Redlining Task Force Advisory Committee concedes that some data should be disclosed so that consumers and industry can differentiate between insurable and uninsurable risks. It suggests three components to disclosure: (1) reasons for underwriting decisions in particular cases with respect to cancellations and nonrenewals; (2) unique features of new products that help consumers in "mature communities"; and (3) explanatory material on how the industry operates. The committee argues, however, that ZIP code disclosure might produce ZIP code rating, which would violate a fundamental principle of insurance—"spreading the risks over a large group." *Id.* at 530. The committee further claims that ZIP code disclosure would confuse consumers. Surprisingly, however, ZIP code disclosure has proven advantageous in curbing availability problems: after mandating ZIP code reporting, underwriting significantly increased in those Illinois areas that were formerly cancellation and nonrenewal areas. Wisconsin, Missouri, and Illinois now have mandatory ZIP code reporting. See COIL PROC., *supra* note 50, at 41 (testimony of Philip R. O'Connor).

²²⁶ FULL INSURANCE, *supra* note 19, at 73-75; ESSENTIAL INSURANCE, *supra* note 81, at 95-96. See also SRI SUPP., *supra* note 12, at 137.

²²⁷ The Continental Insurance Underwriting Manual states: "While we admittedly cannot readily document our opinion on this and many other points, we are nevertheless, convinced without the slightest reservation, that when considered as a group rather than individuals, persons engaged in some occupations have a greater frequency of loss under homeowner policies than do persons engaged in some other occupations." Quoted in *Rights and Remedies*, *supra* note 27, at 83 (emphasis added). Some argue that "in a free market, those companies whose underwriters' [subjective] judgments are correct will prosper at the expense of other firms. As a result, market forces push underwriting toward increasingly accurate risk assessments and there is therefore no absolute need for statistical support." SRI SUPP., *supra* note 12, at 19. See also SRI FINAL REP., *supra* note 166, at 14; *Mass. Opinion*, *supra* note 177, at 166; N.J. REPORT, *supra* note 67, at 46. Cf. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1423-25 (1979) (questioning studies that conclude statistical methods are more accurate than individualized "clinical" methods).

²²⁸ FULL INSURANCE, *supra* note 19, at 14. But says Commissioner Sheeran: "The argument assumes unrealistically that the industry competes equally for all subclasses of insureds, even when optimally priced. By their own admission, they do not." N.J. REPORT, *supra* note 67, at 71. He adds: "Although a competitive market should be expected to ferret out systematic pricing errors and penalize erring companies through loss of business and profit, pricing errors do not appear to be self-correcting in the automobile insurance market." *Id.* at 19.

though perhaps only after statistical data has been employed to debunk the criteria currently used by underwriters. Consider the following objection to subjective underwriting:

[A]n underwriting rule may be unduly simplistic. It is easy and convenient to write off entire areas or classes of people who, on the average, have higher losses than other areas or classes. It is more difficult, though more equitable, to find the true reasons for variations in loss characteristics, and to make individualized judgments based upon these factors.²²⁹

While rules embodying statistically supported explanations for riskiness will check subjectivity and arbitrariness, they cannot produce decisions tailored to the situation of each and every individual applicant. The claimants who seek accuracy desire both the uniformity primarily associated with rules and the flexibility primarily associated with discretionary decisionmaking (uniformity and flexibility being attributes each method could possess).²³⁰ Neither uniformity nor flexibility alone will guard against the ever-present twin threats to individual autonomy: inescapable, rigid grouping and competitive, isolating mobility. "Uniform" rules will almost always be simultaneously labeled "rigid," and "flexible" standards will almost always be simultaneously called "biased." A combination of rules and discretion will not provide a satisfactory alternative unless there is either a consensus as to the proper mix of grouping and mobility or a consensus that grouping and mobility do not conflict.²³¹ In sum, the use to be made of statistical data once it is collected does not depend on the supposedly neutral principle of accuracy, but on the values producing the opposition between grouping and mobility.

The arguments attacking the accuracy of classification criteria that are supported by statistics²³² are no less value-laden. The good-risk claimants allege that criteria such as age and sex do not accurately predict the likelihood of accidents or loss involvement.²³³ The claimants contend that the groups identified by such criteria are neither so inter-

²²⁹ ESSENTIAL INSURANCE, *supra* note 81, at 14.

²³⁰ See Kennedy, *supra* note 3, at 1710-13. Professor Underwood concludes that "clinical methods protect most effectively against failure to consider unanticipated individual differences, and statistical methods protect most effectively against the implicit use of illegal or otherwise unacceptable criteria for decision. The choice of a method must depend in part on which of these dangers seems most threatening." Underwood, *supra* note 227, at 1432. The analysis here suggests that each method entails a danger which the other might eliminate, and that it would accordingly be preferable not to be forced to choose between them.

²³¹ Kennedy, *supra* note 3, at 1712-13.

²³² See, e.g., Comment, *supra* note 72, at 1385-86; Comment, *An Appraisal of Sex Discrimination in Setting Automobile Insurance Rates*, 10 PAC. L.J. 201, 206 (1979).

²³³ See GAO REPORT, *supra* note 11, at 115-19.

nally homogeneous as to justify similar treatment for all of those possessing the same grouping trait, nor so discretely heterogeneous as to justify different treatment for groups possessing different traits.²³⁴

The proponents of the present grouping practices admit that the criteria they use are not completely accurate in that they do not completely account for the variance in losses,²³⁵ and further maintain that accuracy and inaccuracy coexist. A classification criterion embodies some measure of accuracy and some measure of inaccuracy; the choice is not between one or the other, but among the points along a continuum between the two.²³⁶ In categorizing insureds, specificity and particularity must be sacrificed for generality and universality, with the goal of attaining the maximum amount of ascertainable accuracy. The proponents claim that their practices are as accurate as possible.²³⁷

In sum, a classification can be considered a generalization or theory about the way the world is. Classifications and theories vary in accuracy as they vary in the extent to which they fit the particulars—the facts. Both the claimants and the proponents assume that some classifications, like some theories of nature, are more accurate than others and that the amount of accuracy embodied in the competing classifications can be gauged in a neutral fashion by comparing the classifications with the actual facts.²³⁸

The good-risk claimants' attack on the internal homogeneity of the automobile insurance rating group consisting of young males illustrates their pursuit of greater accuracy through greater attention to particularity.²³⁹ All young male principal drivers, for example, are charged a premium equivalent to the average cost of insuring the class,²⁴⁰ even though some of them are below-average risks and some are above-average risks.²⁴¹ Until recently, pricing them all at the average was consid-

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²³⁴ See, e.g., N.J. REPORT, *supra* note 67, at 77-78.

²³⁵ N.J. REPORT, *supra* note 67, at 57; SRI SUPP., *supra* note 12, at 49.

²³⁶ The choice is made from among "competing approximations," with the consequent debate over how to select one of them. See Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 512-13 (1980) [hereinafter cited as Brilmayer]; see also *Rights and Remedies*, *supra* note 27, at 82-85 (testimony of William S. Gibson), 211-13 (testimony of Anton A. Lubimir); N.J. REPORT, *supra* note 67, at 77-81, 536; Kimball, *supra* note 220, at 916-17; Laycock & Sullivan, *supra* note 222, at 224-25; Works, *supra* note 15, at 460, 471.

²³⁷ See, e.g., Calif. Findings, *supra* note 168, at 22-23, 26; N.J. REPORT, *supra* note 67, at 57-58 (citing company claims).

²³⁸ R. UNGER II, *supra* note 3, at 33.

²³⁹ See, e.g., *Mass. Opinion*, *supra* note 177, at 153-56; N.J. REPORT, *supra* note 67, at 69-77. The heterogeneity of rating groups has also been attacked. See, e.g., *id.* at 67-69. Insofar as sex is concerned, the argument is made that it is inaccurate to charge young men more than young women because *some* young men pose a lesser risk than do *some* young women. *Mass. Opinion*, *supra* note 177, at 153.

²⁴⁰ GAO REPORT, *supra* note 11, at 115.

²⁴¹ *Id.* at 122.

ered accurate and perfectly acceptable, especially since everyone assumed that there was no way to distinguish the subgroup of better, below-average risks from the rest.²⁴² All in the class were charged the same because each posed the same ascertainable risk.

Lately, however, a new perspective has gained adherents among those advocating the relief desired by the good-risk claimants. According to this view, if all young men pay the same premium, the below-average risks are being overcharged and the above-average risks are being undercharged or subsidized, relative to the amount associated with the expected loss they actually pose.²⁴³ If the group of young men is very heterogeneous in terms of individually expected loss, and those at the low-risk end of the spectrum are appreciably less risky than those at the high-risk end, it is possible that the low-risk young men are bearing an undue amount of overcharge.²⁴⁴ Statistical experts working on the side of the good-risk claimants have developed a way to determine what percentage of a class is being overcharged and by how much.²⁴⁵ The distribution and amount of the overcharges are said to be important, even though the overcharged individuals cannot be identified:

It is simple common sense that an individual wrongly overcharged by a thousand dollars as the result of pooling with a superficially similar group should be considered more aggrieved than a hundred individuals each overcharged by ten dollars in the interest of a broader spread of risk. The focus of attention should turn away from class accuracy and toward the equitable treatment of individuals.²⁴⁶

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²⁴² See Calif. Findings, *supra* note 168, at 22 (summarizing companies' position); N.J. REPORT, *supra* note 67, at 71.

²⁴³ According to Kimball, who espouses the traditional view, the "subsidy" debate rests on "[t]he misconception that premiums buy loss payments, as opposed to a contingent right to loss payments if losses occur." Kimball, *Reverse Sex Discrimination*: Manhart, 1979 AM. B. FOUND. RESEARCH J. 83, 106. This misconception leads to the notion that those who have no losses are unfairly paying for those who do. *Id.* Nothing, argues Kimball, could be further removed from the truth:

Insurance is an aleatory contract; premiums are paid for the transfer of risk. The essence of insurance price-setting is calculation of the risk transferred. When that is done accurately, there is no subsidy; each policy holder pays for the protection he gets against risk. The person who suffers no loss . . . [and] the one who does . . . both have bought and received protection against comparable risks and thereby have had equivalent benefits . . .

Id. See COIL PROC., *supra* note 50, at 19 (speaker discusses the "inability of the public to distinguish" between the subsidization of risk and the subsidization of actual loss).

²⁴⁴ Mass. Opinion, *supra* note 177, at 154-56.

²⁴⁵ See, e.g., Ferreira, *Identifying Equitable Insurance Premiums for Risk Classes: An Alternative to the Classical Approach*, in EQUITY & ACCURACY, *supra* note 177, at 74.

²⁴⁶ Mass. Opinion, *supra* note 177, at 158-59. But see G. CALABRESI, THE COSTS OF ACCIDENTS 39-40 (1970) (the theory of the diminishing marginal utility of the dollar ignores changes

To reduce the burden on the low-risk young men, the experts suggest that the premium charged everyone in the class be "tempered" or reduced and the cost spread among other classes of insureds.²⁴⁷

The claimants, of course, tout the superiority of their new perspective over that of the proponents. Says former Massachusetts Insurance Commissioner Stone in discussing the opposition:

The most difficult lesson for those imbued with traditional post-war insurance thinking is that classification accuracy must be thought of in individual terms rather than group terms. . . . Class accuracy by itself is not a legitimate goal of an insurance pricing system. . . . To understand insurance pricing, one must turn away from comparisons between classes of drivers and focus instead on the size and distribution of all of the individual errors within the system. . . .²⁴⁸

There are, then, two ways of viewing insureds such as young male drivers. One approach concentrates on the fact that, insofar as is individually ascertainable, they are the same. The second emphasizes the fact that to a grossly measurable extent they are different. Each perspective is a generalization that leaves out something that the other contains. Each perspective is accurate given the general premise from which it proceeds. The first is concerned with the fair and equitable treatment of individuals who are to some degree homogeneous and the second is concerned with the fair and equitable treatment of individuals who are to some degree heterogeneous. The choice between the two perspectives cannot be made by determining which fits the facts better, because the facts on which the test of fitness depends are the facts as ordered or emphasized by the perspective chosen. In couching the debate in terms of a choice between individual accuracy and class accuracy, the good-risk claimants are aware that "[i]t is the theory that

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in status).

²⁴⁷ *Mass. Opinion*, *supra* note 177, at 196-98.

²⁴⁸ *Mass. Opinion*, *supra* note 177, at 153-54. Professor Brillmayer and her collaborators reach a similar conclusion:

One reason for the vigorous and so far unproductive disagreement about the answer may be that most of the antagonists come from fundamentally different intellectual traditions with respect to the individuals-versus-groups issue. The insurance tradition analyzes risks, premiums, and benefit schedules in terms of groups; most actuaries cannot think of individuals except as members of groups. . . . [H]owever, the main civil rights tradition analyzes rights in terms of individuals. Its most fundamental principle has been that no individual shall be considered simply as part of a racial, sexual, religious, or ethnic group, or treated differently because of his membership in such a group.

Brillmayer, *supra* note 236, at 508 (footnote omitted).

determines what is to count as a fact and how facts are to be distinguished from one another."²⁴⁹ If that is so, factual accuracy is not a neutral basis for the allocation of insurance.²⁵⁰

Still, however contradictory it may be, the good-risk claimants do not abandon the view that accuracy can indeed be neutrally determined and can be relevant to the resolution of the controversy. The ambivalent position of the good-risk claimants with respect to the existence and significance of objective accuracy is exemplified by the following statement made by former Massachusetts Insurance Commissioner Stone in discussing the use of sex as an automobile insurance rating criterion: "Finally, I am impressed with the State Rating Bureau's findings about the small contribution that sex classification makes to predictive accuracy. My decision would be the same if gender factors in the rates were of great predictive value. It becomes a simpler decision though, given the actual facts."²⁵¹

Furthermore, instead of rejecting accuracy, the claimants emphasize the limits of accuracy or hedge against the possibility that accuracy will not be what they want it to be. Both they and the proponents will abandon accuracy in favor of efficiency,²⁵² equity,²⁵³ fairness,²⁵⁴ risk spreading,²⁵⁵ social acceptability,²⁵⁶ or some other "public policy" as the determining value or as a competing value to be weighed in the balance with accuracy. There is, as claimants recognize, also no agreement about what policy should replace accuracy as the determining value, and no balance can be struck without a hierarchy that assigns weights to the competing values.²⁵⁷

The claimants waver between viewing factual accuracy as objective and intelligible on the one hand, and as subjective and manipulable on the other. Accuracy cannot serve as a basis for the resolution of the classification controversy because it fails to mask an underlying conflict over values.

²⁴⁹ R. UNGER I, *supra* note 3, at 32.

²⁵⁰ Concludes former Massachusetts Insurance Commissioner Stone: "There is . . . no magic point at any percentage of accuracy, either in universal terms or with respect to so-called inherent risk, that represents an objective, optimal goal for the precision of the . . . classification mechanism." *Mass. Opinion*, *supra* note 177, at 158.

²⁵¹ *Id.* at 180.

²⁵² See Brillmayer, *supra* note 236, at 513 n.33.

²⁵³ See Badain, *supra* note 27, at 15.

²⁵⁴ See *id.*

²⁵⁵ See *Mass. Opinion*, *supra* note 177, at 158.

²⁵⁶ See COIL PROC., *supra* note 50, at 54 (presentation of Richard Roddis).

²⁵⁷ On the impossibility of balancing when values are viewed as being subjective, see R. UNGER II, *supra* note 3, at 94-95. See also *Mass. Opinion*, *supra* note 177, at 162 (characterizing the balancing tests as "human and not mechanical").

2. Causal Connection

Causation is a second basis of attack on, and a second basis of defense of, the status quo.²⁵⁸ The demand for a causal link between a characteristic and actual losses is a variation on the accuracy theme.²⁵⁹ One would expect a strong statistical association between a characteristic and losses if the former is the cause of the latter.²⁶⁰ More than that, causation is a traditionally accepted basis for the assignment of moral responsibility.²⁶¹ Causation requires acts; it appears to go beyond status and its use is therefore perceived as more just.²⁶² Like accuracy, however, causation cannot serve as a neutral basis on which to resolve the classification controversy because of its contradictory implications. Value choices cannot be avoided and individual autonomy will be compromised if causal criteria are employed.

The good-risk claimants argue that a driver's sex does not cause automobile accidents. If young males have more accidents than young females do, it is not because of their sex but because males drive more miles²⁶³ and are more apt to use their automobiles at night or while in highly charged emotional states.²⁶⁴ The claimants demand the use of causal factors that are within the control of the insured.²⁶⁵ They con-

²⁵⁸ See, e.g., Underwood, *supra* note 227, at 1444-47.

²⁵⁹ Thus one report notes: "The actuarial models should be improved to become more 'causal' and to be more thoroughly verified." SRI EXEC. SUMMARY, *supra* note 91, at 25.

²⁶⁰ But cf. Kimball, *supra* note 4, at 496 ("Not all categories for which considerable statistical evidence can be developed are in fact sound, since the defining characteristics chosen may have only a partial correspondence with the true causal factors.").

²⁶¹ T. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE 241-42 (1977).

²⁶² As Commissioner Stone has described the causality debate:

It is contrary to the most fundamental concepts of justice in this country to punish people for factors wholly beyond their control. Rating by income is punishing policyholders for being poor, a condition presumably beyond most people's control. Our legal system is also characterized by strong notions of what constitutes proximate cause. Rating by hair color or income violates any reasonable notion of proximate cause.

Mass. Opinion, *supra* note 177, at 161.

²⁶³ Teenage males drive twice as many miles as do females; the accident rates for 17- to 29-year-old males and females per 100,000 miles driven are "virtually identical." NEW JERSEY DEPT OF INS., HEARING ON AUTOMOBILE INSURANCE CLASSIFICATIONS AND RELATED METHODOLOGIES: FINAL DETERMINATION—MAJOR FINDINGS AND CONCLUSIONS ¶ 102 (1981).

²⁶⁴ Shayer, *supra* note 184, at 1, 10. See also Hartford Accident & Indem. Co. v. Insurance Comm'r, 65 Pa. Commw. 249, 265, 442 A.2d 382, 386 (1982) ("the male gender classification was being employed . . . as a proxy for (1) the class of those who tend to drive more while under the influence of alcohol and (2) the class of those who drive more during rush hour periods of the day").

²⁶⁵ See *Mass. Opinion*, *supra* note 177, at 161. Consensus about what is or is not controllable is unlikely. One commentator, for example, who supports the use of criteria based on self-controlled factors includes in the category of uncontrollable "immutable traits" occupation, scholastic record, education, and marital status. Abramoff, *supra* note 9, at 694 n.47. The only factors passing muster are driving record, type of use (including territorial classifications), driver education, and annual mileage estimates. *Id.*

tend that unalterable, noncausal criteria do not create incentives for safer behavior.²⁶⁶ The use of sex as an underwriting and rating criterion gives no indication that males as a group could reduce both their accident involvement and their insurance premiums by driving less or finding other emotional outlets. Moreover, any savings generated by a change of behavior by individual young males would be spread over the entire group and not solely among those who produced them. The incentive for any individual male to alter his behavior is weak as long as he has no way of extricating himself from the group and obtaining more favorable treatment short of altering his sex.²⁶⁷

The proponents agree that causality is important, but assert that it is indeed reflected in the criterion of sex,²⁶⁸ which to them is simply a shorthand way of invoking behavior that causes accidents. The proponents further suggest that criteria more closely related to the causes of losses or accidents cannot be employed because those causes are difficult to identify and the material and intangible costs of detecting the existence of the causal factors in the case of each individual applicant are too great.²⁶⁹ For example, miles to be driven may be predictive of future accident involvement, but insurers have not yet hit upon an unmanipulable way of determining the number of miles an insured has driven or will drive.²⁷⁰ Information concerning an applicant's emotional stability and drinking habits may be attained only at the cost of an invasion of his privacy.²⁷¹

The good-risk claimants, while arguing for causal criteria, also recognize that there are impediments to explaining events by reference to discrete controllable causes. This recognition destroys the coherence of their arguments. The former Insurance Commissioner of New Jersey, for example, attempted to recast the causal-link argument in order "to avoid the analytical uncertainties surrounding questions of strict causation."²⁷² In lieu of a requirement that the classification criteria be related to the causes of accidents, he would gauge the reasonableness of criteria by the extent to which there is a "direct" relationship between the criteria and "the operations-related factors" on which the probability of having an accident hinges—"how well, how much and

²⁶⁶ *Mass. Opinion*, *supra* note 177, at 162.

²⁶⁷ *See id.* at 161-62.

²⁶⁸ COIL PROC., *supra* note 50, at 55-56 (presentation of Richard Roddis).

²⁶⁹ *See, e.g., Shayer*, *supra* note 184, at 16-21.

²⁷⁰ *See id.* at 17. *But see* Hoffer & Miller, *The Distribution of Automobile Liability Insurance: An Alternative*, 46 J. RISK & INS. 441 (1979) (proposing collection of liability insurance premiums via a per gallon surcharge on gasoline).

²⁷¹ *See* COIL PROC., *supra* note 50, at 53-54.

²⁷² N.J. REPORT, *supra* note 67, at 61.

where on average the insured car is driven".²⁷³

The directness test therefore assumes that classifications cannot delineate the causes of accidents and that the proper focus is less causation *per se* than the relative potential for loss among insureds. The premise of the proposed test is merely that some variables are more likely related to loss-causing behavior than others.²⁷⁴

The Commissioner elaborates on his test as follows: "The closest possible nexus should be sought. The more distant or indirect the relationship between the criterion segregating insureds and the operations-related factors, the more numerous are the potential intervening circumstances affecting individual accident likelihoods."²⁷⁵ He gives an example of how his approach works:

Most would agree that the quality of drivers' eyesight . . . would be a reasonable basis for classification if it produced correlations to differences in accident experience. Poor eyesight does not necessarily cause accidents. A driver with impaired vision may curtail driving, drive more carefully or otherwise adjust driving behavior to compensate. Nonetheless, a driver's physical impairment of this sort is directly related to whether operation of the insured vehicle is likely to be hazardous. Whatever the ultimate merits of using a quality-of-eyesight variable, it is preferable under a "reasonable relation" test, all else being equal, to some variable which seeks to measure the same driver trait but indirectly, say through an age criterion.²⁷⁶

The Commissioner's test, however, eliminates neither the problems attacked by, nor those in turn raised by, the causation arguments. There is simply no neutral basis for choice among competing explanations of accidents. Casual links, no less than the Commissioner's "reasonable relationships," are predicated on something less than objective and absolute certainty. *B* is deemed the cause of *A*, even though potential causes *C*, *D*, and *E* are also involved, because it is concluded that *B* is more likely associated with *A* than *C*, *D*, and *E*. Causation always involves a choice among several variables.

Any student of the law of causation knows that the direct/indirect

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²⁷³ *Id.* at 60.

²⁷⁴ *Id.* at 62 (footnote omitted).

²⁷⁵ *Id.* at 61.

²⁷⁶ *Id.* at 62.

dichotomy as a basis for choice is inexact, if not entirely specious; the terms are mere labels for conclusions that are not the product of a precise factual rule. Whether a direct relationship exists between a cause and an event depends upon how many concurrent or intervening occurrences the finder of causal fact chooses to identify.²⁷⁷ He is the director who sets the stage; he arranges it so that the event directly follows the cause. Poor eyesight is a direct link because the Commissioner chooses to ignore the role of intervening causes like a failure to drive more carefully or to drive only in daylight. The Commissioner has concluded that it is appropriate that visually handicapped persons pay more and has attached to their poor eyesight the tag "a direct relationship" in order to justify the conclusion.

If causation really involves a judgmental choice among probable or possible causes, as this analysis of the Commissioner's approach suggests, then causation, like accuracy, ceases to be an objective basis for insurance allocation decisions. Every insured assessed according to a "causal" criterion can complain, like the individual whose eyesight is beyond his control,²⁷⁸ that his status or situation is being held against him and his individuality is being ignored.

The ambivalent causation arguments of the good-risk claimants reflect the tension between the theories of voluntarism and determinism.²⁷⁹ In a theory of voluntarism or contingent, individually controlled causality, accidents and losses are events that have causes that are produced by individuals and can be prevented by individuals. If events are contingent—because their occurrence is within the control of individuals—individuals can be encouraged to avoid conduct that causes accidents and penalized when they fail to do so.

At the same time, it must be acknowledged that any event may have many causes. To isolate one cause requires that others be ignored. Isolation is unavoidable, however, because treating every event as a cause of every other²⁸⁰ is tantamount to having no explanation at all. Yet, isolation requires a scheme for sorting among the potential and

²⁷⁷ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 43 (4th ed. 1971); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 20.6(4) (1956). Both treatises, however, acknowledge the usefulness of the concept of directness despite its limitations.

²⁷⁸ Persons with impaired vision that can be corrected with sophisticated lenses have initiated litigation asserting that the refusal to grant them drivers' licenses violates statutory and constitutional provisions prohibiting discrimination against the handicapped. *See, e.g., Commonwealth v. Liberati*, 131 PITT. LEGAL J. 55 (C.P. Allegheny County May 24, 1982); *see also Rights and Remedies*, *supra* note 27, at 762-81 (statements objecting to discrimination against the blind and the deaf).

²⁷⁹ The discussion that follows is based on A. GOULDNER, *supra* note 196, at 185-95; T. HASKELL, *supra* note 261, at 240-50; R. UNGER I, *supra* note 3, at 8-23.

²⁸⁰ T. HASKELL, *supra* note 261, at 245; R. UNGER I, *supra* note 3, at 10.

actual causes. Neutrality and objectivity can be obtained only if there are neutral, objective criteria on which the sorting may be based. The directness test of the New Jersey Commissioner represents an unsuccessful effort to supply an objective basis on which to select among causes of accidents.

Once a cause or a set of causes has been selected, accounts of accidents will be distorted. Whenever the event on which we have focused as a cause is associated with a loss or an accident, the event will be deemed the cause of the loss or accident; other events contributing to the accident will be ignored. For example, if recklessness is a "cause" of accidents for the purpose of automobile premium pricing, then recklessness is the cause of every accident befalling a reckless young man. The account is distorted if another factor, such as the construction of the highway, also played a role in producing the accident.

The process of causal explanation suggests that there is a *necessary* connection between the "causal" event and the accident. The causes, in turn, have causes. They too are events and, as such, they too are necessitated.²⁸¹ Taken this far, contingency gives way to determinism. Determinism may not be altogether unattractive, because it connotes neutrality, objectivity, and a world ordered by rules. But, given determinism, causes are no longer within the control of individuals. Rather, the assessment of causal relationships now depends upon the individual's status or situation.

Deterministic necessity undermines the significance of individual control and free will and, with it, the reason for demanding criteria that are related to the causes of accidents. Yet the demand for such criteria persists because, as a matter of ideology, accidents are considered to some extent within the control of the individual. A theory meshing voluntarism and determinism might solve the dilemma by suggesting that some things are controllable and some things are not, and by supplying a test for determining which is which, but the effort would be doomed. Causal attribution is merely a subterfuge and cannot be a substitute for value judgment. The threat to individual autonomy from value judgments externally imposed cannot be avoided by invoking notions of objective causation.

3. Merit Rating

Taking a more positive tack, the good-risk claimants advance underwriting and rating based on merit as a substitute for the present

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²⁸¹ See R. UNGER I, *supra* note 3, at 13.

classification schemes. For example, whereas under the automobile insurance rating plans currently in use merit rating plays but a small part,²⁸² the claimants propose that premiums depend totally or largely upon the number of traffic accidents and violations attributable to the insured drivers.²⁸³

Those who are clean risks²⁸⁴ make particularly strong arguments that the practices of insurance companies that purportedly take merit into account do not go far enough. For example, insurance companies generally surcharge drivers with accidents and traffic violations an amount equivalent to a percentage of their regular premium. Some bad drivers start out with low premiums because of the territory in which they garage their automobiles or because of their demographic characteristics. As a result, they often wind up with total premiums (including surcharges) that are less than the amount paid by clean risks who live in higher-rated territories and possess higher-rated demographic characteristics. The following argument is typical of those made in attacking this disparity:

It just isn't fair to force a good driver, without tickets or accidents, to pay more, based on where the person lives, than a driver in another area who has a bad record with tickets, accidents and even a drunk-driving conviction.

Auto insurance premiums should be based on the single factor of a person's driving record. A bad driver should pay more than a good driver. It's that simple.²⁸⁵

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²⁸² For a general discussion of the prevailing limited use of merit rating, see G. GLENDENNING & R. HOLTOM, *supra* note 23, at 64-69; SRI SUPP., *supra* note 12, at 37-39. Many auto insurers use some variant of merit rating as a secondary classification factor. Most companies surcharge for accidents that result in bodily injury or property liability claims exceeding a specific dollar amount (such as \$100). Physical damage claims may also be considered. Merit rating plans do not consider accidents that are obviously not the fault of the applicant, such as a collision occurring when an auto is hit while parked or stopped, but do surcharge for other accidents, even if fault is not clear. Merit rating plans also generally surcharge for certain serious traffic violations like drunk driving, negligent homicide, and leaving the scene of an accident. Beyond this common ground, plans vary; many insurers do not surcharge for any other kinds of violations, but others use different charges depending on the severity of the violation. Examples of severe violations include, in addition to those listed above, driving without a license, stealing a car, and falsifying statements on a license or registration application. Serious but less severe violations include reckless driving or racing, refusing to take a sobriety test, and accumulating points leading to license penalties. The least serious charged violations include driving with inadequate brakes and failing to report an accident. *Id.*

²⁸³ See GAO REPORT, *supra* note 11, at 119-20. An exception to the industry position is Commercial Union Assurance Companies which, in a separate study, found that "[b]oth accident record and conviction record are useful in predicting future potential for losses . . . [I]t appears that it is valid and practical to use driving record as a primary rating factor." *Quoted in id.*

²⁸⁴ See *supra* note 217.

²⁸⁵ *Rights and Remedies*, *supra* note 27, at 51 (prepared statement of Kenneth Hahn, Supervisor, County of Los Angeles).

The criterion of merit, as employed in the arguments of the good-risk claimants, has the appearance of a neutral basis on which to distribute insurance.²⁸⁶ It has much in common with criteria that are identified with accuracy and causality. Merit is commonly invoked to justify distributional results in other spheres of economic and social life. In a scheme governed by merit, an individual earns and deserves his place; his position is not the product of assignment by a dominating force, nor the consequence of factors over which he has no control.²⁸⁷ Merit rating might be expected to provide incentives for reducing accidents and deterring the kind of behavior that causes losses.²⁸⁸ Even the proponents of the status quo share the opinion that merit is relevant as a classification criterion although they disagree about the extent to which it should operate.

Though the good-risk claimants invoke the ideal, they also seem to realize that a scheme of distribution based on merit would be fatally problematic in terms of individual autonomy and political neutrality. They struggle unsuccessfully to reconcile the contradictions that make merit both possible and impossible of achievement. Because a scheme of distribution based on merit has many of the attributes of a scheme of distribution based on status, merit is politically controversial. Ultimately, merit is only what a political decision determines it to be.

The acknowledgement of the significance of chance in accident involvement undercuts the claims for merit. Arguing that automobile accidents occur at random,²⁸⁹ some proponents contend that people who suffer losses are often simply unlucky²⁹⁰ and not necessarily poor risks for the future.²⁹¹ To assess insurance premiums on the basis of mere accident involvement does not eliminate the role of happenstance, luck, and chance—factors beyond the control of the individual. The claimants respond that this defect is cured if merit underwriting and rating surcharges are limited to accidents, violations, or losses attributable to the fault of the insured.²⁹² Yet the claimants ignore the possibility that faulty driving may be attributable to a want of natural talent that is not

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²⁸⁶ See R. UNGER II, *supra* note 3, at 167-68.

²⁸⁷ Ferreira, *Merit Rating and Automobile Insurance*, in *EQUITY & ACCURACY*, *supra* note 177, at 57. Merit rating is perceived as individualized rating. See SRI SUPP., *supra* note 12, at 142.

²⁸⁸ *Mass. Opinion*, *supra* note 177, at 161; N.J. REPORT, *supra* note 67, at 398.

²⁸⁹ N.J. REPORT, *supra* note 67, at 54. *But see* SRI FINAL REP., *supra* note 166, at 60. ("Most consumers and companies feel that 'accidents don't just happen—bad drivers cause them.'").

²⁹⁰ G. GLENDENNING & R. HOLTOM, *supra* note 23, at 65.

²⁹¹ The typical merit rating scheme considers an individual's driving record for the previous three years. Evidence suggests, however, that 80% of all accidents are caused by drivers who have had no accidents in the preceding five-year period. GAO REPORT, *supra* note 11, at 121.

²⁹² See N.J. REPORT, *supra* note 67, at 398.

distributed according to merit or subject to the control of the driver. Even some factors within the driver's control, such as lack of attention and foolhardiness, may be affected by natural abilities and outside influences like parental training.²⁹³

In any event, the good-risk claimants are reluctant to carry merit to the extreme. The ambivalence is reflected in the following passage:

Although the equity and deterrent objectives of merit rating are straightforward in concept, their results often fail to match the public's expectations. If consistently bad drivers caused most of the accidents and were readily identifiable, merit rating might work very well. But, those who have accidents over a period of a few years are not always bad drivers in any meaningful sense. A generally good driver whose rare instance of misjudgment causes an accident should not necessarily pay significantly higher premiums during subsequent years. Yet, if such unlucky drivers are not severely surcharged, a merit rating plan is not likely to save good drivers much money. It is difficult to design a merit rating plan that is both equitable and financially severe enough to serve as a deterrent.²⁹⁴

In the prevailing discourse, there is an affinity between merit, on the one hand, and chance or luck on the other. Whether merit is invoked to legitimate the status quo or to challenge it, chance operates to limit what can be achieved through adherence to the objective principle of merit. If merit does not adequately explain the status quo, chance does. According to Robert Merton, the financially successful often attribute their situations to luck: "[T]he doctrine of luck as expounded by the successful serves the dual function of explaining the frequent discrepancy between merit and reward while keeping immune from criticism a social structure which allows this discrepancy to become frequent."²⁹⁵ For the unsuccessful, the idea of luck preserves self-esteem and legitimates the status quo by suggesting that the effort to seek a greater correlation between merit and reward would be futile.²⁹⁶ Merton identifies a third group who reject luck and adopt "an individuated and cynical attitude toward the social structure, best exemplified in the cultural cliché that 'it's not what you know, but who you know,

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²⁹³ See A. GOULDNER, *supra* note 196, at 322-23.

²⁹⁴ Ferreira, *supra* note 287, at 56-57.

²⁹⁵ R. MERTON, *supra* note 97, at 202.

²⁹⁶ *Id.* at 203.

that counts.²⁹⁷

The good-risk claimants who are unsuccessful under the current system but who would be successful if their arguments prevailed are understandably ambivalent about merit and luck. Luck, chance, and other factors that limit an individual's opportunity to control accidents and losses frustrate the claimants' hopes of complete relief through merit and cause them to temper their claims. The good risks exhibit a sense of solidarity with the victims of bad luck. Perhaps because clean risks will have accidents in the future, they identify with some of those who have had them in the past, and express concern that merit rating will impose a prohibitively high premium on the latter group. In sum, then, the good-risk claimants invoke merit as the basis for altering the status quo, but at the same time they recognize that individual autonomy will not be protected because of the role of luck.

The claimants' ambivalence about merit extends beyond the concern identified with chance to an uneasiness about the association between merit and desert. Although it is said that "[m]erit rating is not justified as a mere punishment-reward system, nor, incidentally, as a mechanism for recouping the costs of past claims,"²⁹⁸ clean risks appear to be rewarded with a break in premiums while others are penalized. Merit rating surcharges can easily be equated with fines and penalties assessed for past behavior and not simply with sums warranted by an increased prospective risk. The stiffer the surcharge, the more it seems that the clean risks are unjustifiably benefitting themselves at the poor driver's expense.

Fundmentally, the acceptability of merit rating hinges on whether merit rating deters accidents or punishes drivers who happen to be caught engaged in conduct of which some segment of society disapproves. If it does promote highway safety, the objective benefits of merit rating may justify its use. If it is a sanction for antisocial behavior, however, merit rating is a threat to individual autonomy, for it deprives the individual of the freedom to choose the values that will govern his life. Unless society as a whole shares an operating consensus, the individual is at the mercy of the values prevailing among the insurance company executives and employees, regulators, legislators, judges, and law enforcement officials who perform the tasks necessary to the implementation and operation of a merit rating scheme.²⁹⁹

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²⁹⁷ *Id.*

²⁹⁸ N.J. REPORT, *supra* note 67, at 398 (footnote omitted); see also COIL PROC., *supra* note 50, at 12 (presentation of Emmett Vaughan).

²⁹⁹ Despite her commitment to autonomy, Professor Underwood sees nothing grossly inconsistent in suggesting that "[a] good reason to use a particular behavior as a predictor of success appears when society seeks to encourage or reward that behavior for reasons apart from its predic-

Merit comes down to this: It is no more neutral than accuracy or causation. Meritorious conduct depends on what is valued. In the absence of consensus, merit can be a source of oppression and a device for maintaining the status quo and penalizing deviants.³⁰⁰ The good-risk claimants can only appeal to shared values that distinguish an acceptable incentive for accident reduction from an illegitimate disincentive, failure to comply with which will result in unjustified punishment. Because consensus is wanting, the claimants fear that autonomy is threatened, and their ambivalence and inconsistency destroy the coherence of their claims for merit classifications. What constitutes meritorious behavior and the extent to which the distribution of insurance will depend upon merit are political questions requiring political decisionmaking.

None of the alternate classification schemes can achieve the claimants' stated goal of abolishing grouping that is inconsistent with the principle of autonomy. Furthermore, accuracy, causation, and even merit are all subject to value judgments that cannot be avoided by resort to a consensus agreed upon by all interested parties.

The individualist arguments end there. Decisionmaking by private parties based on supposedly neutral principles is an impossibility. Proceeding as if it were possible can only result in the maintenance of the status quo. Conflicting values and political decisionmaking cannot be avoided.

B. *Arguments in the Collectivist Mode*

There is a second perspective and mode of argument employed by those attacking insurance classifications. This perspective assumes the existence of an economy regulated to promote social welfare, and the arguments further a collectivism that demands group relief.

Those espousing the social welfare model reject the ideal of market competition because, they assert, the profit-maximizing classification practices of insurance companies do not deter accidents or reduce their

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tive power." Underwood, *supra* note 227, at 1438-39. She continues:

When a favorable prediction is based on socially valued, meritorious behavior, then there can be little objection to the fact that the prediction scheme may induce applicants to perform the acts that improve their scores. That inducement should be seen not as an unjustified infringement of autonomy, but rather as an independent good, on the theory that . . . [the rewarded conduct] has some social value apart from its power to predict success.

Id. at 1441. She thus assumes that autonomy is not infringed by the designation of activities that are socially valuable.

³⁰⁰ See C. OFFE, *supra* note 109, at 98.

costs.³⁰¹ Moreover, competition has produced offensive discrimination and an inequitable distribution of the insurance product and premiums. Because insurance companies will not act in the best interest of insureds, distribution decisions cannot be left to them.³⁰² Social welfare, not private profit, must determine who is insured and how much he pays. Capitalism is not entirely abandoned under this model, however, for there is room in the scheme for profit-making.³⁰³

If subsidization is required in order to achieve availability and affordability, it is appropriate that insurance companies collect and redistribute the subsidy as if they were private tax collectors.³⁰⁴ The collectivist arguments acknowledge the demise of the distinction between public and private entities and functions,³⁰⁵ and consider decisions concerning the distribution of the insurance product and premiums to be political ones.³⁰⁶

The social welfare model is attuned to the demands of groups³⁰⁷ and assesses the propriety of the distribution of goods, services, power,

³⁰¹ See G. CALABRESI, *supra* note 246, at 302-04.

³⁰² *Summary of Dissenting Comments by Consumer Members*, 2 NAIC PROC., *supra* note 209, at 488-89 (1980).

³⁰³ Squires, DeWolfe, & DeWolfe, *Urban Decline or Disinvestment: Uneven Development, Redlining and the Role of the Insurance Industry*, 27 SOC. PROBS. 79, 90 (1979) [hereinafter cited as Squires].

³⁰⁴ See COIL PROC., *supra* note 50, at 6-9. One commentator has observed, however:

Opponents of a cost-based pricing system argue that insurance premiums should favor the poor at the expense of the rich . . . that is, that insurance should in effect redistribute income. Such a pricing system is appropriate in a social insurance system, the purpose of which is commonly to provide on a compulsory basis a floor of protection for all insured [sic], but . . . under a private insurance system, "there is no reason why other insureds should be charged excessive rates in order to subsidize their less fortunate brethren. If a premium reflecting the hazard of loss and expense cannot meet legitimate costs, there is no more reason for using insurance as [a] means of redistribution of wealth than for varying the price of gasoline according to the ability of the car owner to pay."

Gerber, *The Economic and Actuarial Aspects of Selection and Classification*, 10 FORUM 1205, 1224 (1975) (footnote omitted) (quoting R. Blanchard, *Government Regulation of Business*, J. AM. INS., May 1945, at 16).

³⁰⁵ See generally *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

³⁰⁶ See generally Austin, *The Problem of the Legitimacy of the Welfare State*, 130 U. PA. L. REV. 1510 (1982).

³⁰⁷ Insurers recognize the fact that their actions are affected by interest groups and are adjusting their behavior accordingly. See Golanka, *The Many Faces of Consumerism*, J. INS., Jan.-Feb., 1981 at 26, 30, for four observations for the 1980's: (1) insurance will be a hotter public consumer issue; (2) the businesses that do the best job of dealing with consumer interests will succeed; (3) single-issue groups at the grassroots level will have more importance; and (4) a communication challenge will demand a working partnership between industry and consumers. Some insurers are making efforts to establish joint committees of insurers and consumers to deal with insurance problems. See also *Insurers, Consumers Must Talk to End 'Confrontation Politics' III* *President Warns*, INS. ADVOC., Nov. 8, 1980, at 16. Insurers feel compelled to counter the controversy promoted by the media. Consequently, they have organized several consumer information programs—Connecticut Open Line, Western Insurance Information Service and hotlines in the offices of the Insurance Association of Connecticut and the Insurance Federation of Pennsylvania.

and authority not at the individual level but at the group level. Collectivist arguments therefore recognize that improper classification and discrimination by insurance companies demand group relief.³⁰⁸ Those advancing collectivist arguments will be referred to as the "group-relief claimants."

The arguments in support of collective remedies are not particularly well-developed in regulatory decisions or law review articles. The attack on insurance classification practices that appears in the legal and insurance literature is largely couched in the individualist terms discussed in the preceding section.³⁰⁹ Although the insurance markets are regulated to promote social welfare, the departures from the competitive model are well-camouflaged.³¹⁰ American society is deeply wedded to the ideals of individual responsibility, free competition, and equality of opportunity. Actual mobility and role specialization dampen the development of collectivist unity; individuals concentrate on their own advancement.³¹¹ Even group activism is perceived to be motivated by a coalescence of individual interests and not by group solidarity.³¹² Collectivist arguments and activity are always vulnerable to attack on the grounds that they ignore individuality, personal accountability, and liberty.

The collectivist arguments explored in this section are most likely to be found in the works of lawyer-activists, civil rights advocates, and community organizers who seek change through a variety of political measures. The arguments are weakened because they reflect the inadequacy of their proponents' underlying political theory and practice—a theory and practice that focuses on a struggle between interest groups and denies the possibility that conflicts may be resolved in a way that produces a real consensus as to the common good.³¹³ In failing to em-

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³⁰⁸ For example, the Metropolitan Area Housing Authority (MAHA) of Chicago led a campaign against Allstate Insurance Company that produced a 96% drop in policy terminations for 12 formerly redlined neighborhoods. Results were evidenced in little over a year. See R. SCHACHTER, *supra* note 31, at 180. Insurance companies are fighting back in their own way. Companies sometimes pit insureds against each other to avoid regulatory reform. *Id.* at 140. In 1978, State Farm sent scare letters to suburban Detroit policyholders to prejudice them against their neighbors in the city. "Because these high risk policyholders wouldn't pay nearly enough to match their losses," said the letter, "someone should have to make up the difference for the loss, and that someone is YOU and other good risk homeowners in Michigan." Quoted in *id.*

³⁰⁹ See generally *supra* text accompanying notes 207-99.

³¹⁰ See COIL PROC., *supra* note 50, at 32 (suggesting that one reason subsidies are included as a component of insurance rates is that "it is a lot easier if the people don't know what the subsidy is").

³¹¹ See D. BASKIN, AMERICAN PLURALIST DEMOCRACY 139 (1971); R. DAHRENDORF, *supra* note 105, at 60.

³¹² See R. UNGER I, *supra* note 3, at 69.

³¹³ See D. BASKIN, *supra* note 311, at 72-74, 96; R. WOLFF, THE POVERTY OF LIBERALISM 159-60 (1968).

body a theory or practice that adequately accounts for social order and change, the arguments are powerless to produce the desired relief.³¹⁴ Three collectivist arguments will be used to explore the deficiency. The arguments present claims of three kinds: (1) of a right or entitlement to insurance; (2) of social causality and shared responsibility; and (3) of externalized costs of social benefits.

It must be emphasized that the critique that follows rejects the possibility that the politics of interest-group pluralism is the best that may be expected and therefore desired. It is premised upon the belief that society can achieve a participatory democracy capable of rendering and pursuing decisions that are more than the product of the compound interests of stratified groups differing most especially in wealth and power.³¹⁵

1. Claims of Right

Adopting a collectivist perspective, the claimants assert that everyone in a given group has a right or entitlement to insurance. The claim, which appeals to a principle of distributive justice or equality, is pressed against the companies as well as the state,³¹⁶ in recognition of the demise of the distinction between public and private power. The rhetoric associated with the political sphere is invoked as a basis for altering the allocation of goods and services, which allocation was formerly within the exclusive domain of the private market.³¹⁷ While the rhetoric may be transferable, its power and effect are not, primarily because the allocation of economic rights seems to involve questions of scarcity and sacrifice.

The group-relief claimants assert that personal insurance is included among the "civil rights."³¹⁸ It is a basic necessity, not "just an-

³¹⁴ See R. UNGER I, *supra* note 3, at 23-37, 262-65.

³¹⁵ See Frug, *supra* note 3, at 1068-73. For extended discussions of the theory of participatory democracy, see C. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY*, 93-115 (1977); C. PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION* 142-62 (1979) (discussing Rousseau's democratic contract theory); C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

³¹⁶ For an elaboration of a theory of economic entitlements, see Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659 [hereinafter cited as Michelman, *Welfare Rights*]; Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

³¹⁷ In the context of liberal politics, "rights" generally refers to "powers of the individual to act within a sphere of absolute discretion rather than . . . [to] entitlements to definite substantive goods." R. UNGER I, *supra* note 3, at 85.

³¹⁸ Cincotta, *Insurance Redlining, Some Directions for Change*, in *INSURANCE REDLINING AND REINVESTMENT: DIRECTIONS FOR CHANGE* 7, 9 (1979) (report of conference sponsored by National Training and Information Center and Illinois Advisory Committee to U.S. Commission on Civil Rights) [hereinafter cited as *DIRECTIONS*].

other commodity for which consumers choose to cast their dollar 'votes.'"³¹⁹ A former Michigan Commissioner of Insurance, Thomas C. Jones, has said that "for both society and the individual, automobile and homeowner insurance is essential. Society's stability and growth depend upon it and the financial equilibrium and sense of well-being of individual citizens demand it."³²⁰ He elaborated on his notion of "guaranteed right to insurance" as follows:

Guaranteeing the right to essential insurance is providing the availability of necessary coverages on an equal basis to every individual who meets a minimum standard of insurability, regardless of considerations of the relative desirability of the risk. Risks which are often perceived by the industry (rightly or wrongly) as "undesirable" must be given the same opportunities to buy the same essential insurance coverages as those perceived to be "desirable". Any program of mechanism which fails to guarantee the availability of all coverages offered in these essential lines of insurance on an equal basis to all citizens who meet the minimum standards of insurability is not sound public policy.³²¹

More specifically, the claims of right and entitlement proceed along the following lines: Private home ownership is the preferred form of shelter in American society. Most buyers assume mortgages to finance the purchase of a home. Mortgages are not available if property insurance cannot be procured to protect the mortgagee's interest.³²² The tie between shelter and insurance creates an entitlement. Similarly, in the automobile insurance context, the argument rests on the idea that the right to travel is a fundamental one in American society.³²³ The right to drive an automobile is the keystone of that right. Lawful driving generally requires a driver's license. Once acquired, a license is constitutionally protected property. Since use of that property is dependent upon the registration of an automobile, which is in turn dependent upon the purchase of state-mandated insurance,³²⁴ it follows that a mo-

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³¹⁹ INSURANCE INFORMATION INSTITUTE, FINAL REPORT ON CONSUMER/INSURANCE INDUSTRY DIALOGUES 6 (1980).

³²⁰ ESSENTIAL INSURANCE, *supra* note 81, at 4. See also GAO REPORT, *supra* note 11, at 13.

³²¹ ESSENTIAL INSURANCE, *supra* note 81, at 26. It should be noted that the former Commissioner's conception of a guaranteed right is accompanied by a goal of fair pricing which seems not to involve subsidization. See *id.*

³²² See *id.* at 4; see also *supra* note 10.

³²³ The right to automobile insurance is discussed in *Shavers v. Kelly*, 402 Mich. 554, 598-600, 267 N.W.2d 72, 86-87 (1978). See *supra* notes 75-90 and accompanying text; see also ESSENTIAL INSURANCE, *supra* note 81, at 4.

³²⁴ See *supra* note 9.

torist has a property right in the availability of insurance. The rights at issue are not rights to housing and transportation per se, but to the insurance that will enable the claimants to procure housing or transportation.

A number of objections can be advanced against the claimants' asserted entitlements to insurance. There are an infinite number of things that groups of people could be said to need and that society could be required to supply under a claim of right. A short list of essential goods and services founded upon a consensus would be advantageous, but does not exist.³²⁵

Moreover, assuming that a right exists, the question arises as to whether it is negative or positive.³²⁶ If the right is a negative one, the state may not bar applicants from procuring insurance from private sources. If the right is positive, the state must make insurance available. If it is extremely positive, the state must make it affordable or supply it to persons who cannot bear the expense.³²⁷ The group-relief claimants are in the somewhat anomalous position of arguing that the positive right they already have should be upgraded to positive-plus (that is, that available insurance should be affordable), or that the positive-plus right that covert subsidization has created is insufficient (that is, that the cost to the claimants should be further reduced). Once provision has been made for supplying some quantity of a good or service to the deserving and needy, there is no formula of uniform and general application that can be invoked in arguing for an increase. The line between too much and too little varies with the circumstances of the claimants.³²⁸ Absolute equality is a determinate but undesirable alternative because it is inconsistent with the basic premises of the capitalistic welfare state. Thus, claims of right may be adequate to require some change in a system that fails to deliver "essential insurance" to a large number of citizens, but they cannot resolve the remaining dilemma of scarcity and sacrifice.

Claims of economic entitlement generate opposition because when one group gains such a right, some other group assumes an obligation that it may prefer not to undertake. In the insurance context, the obli-

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³²⁵ See C. FRIED, *supra* note 215, at 119-24.

³²⁶ For a discussion of negative and positive rights, see *id.* at 110-14.

³²⁷ In Hawaii, welfare recipients do not have to pay for automobile insurance, which the state requires all its drivers to purchase. HAWAII REV. STAT. § 294-24(b)(2) (Supp. 1976). See also COIL PROC., *supra* note 50, at 10-11, 23 (statement of Emmett Vaughan, arguing that subsidies should be made available only to the poor, perhaps through an insurance stamp program).

³²⁸ See R. UNGER II, *supra* note 3, at 74; see also Michelman, *Welfare Rights*, *supra* note 316, at 680-81 ("Positive rights . . . pose problems largely because the reciprocity and boundedness of duties seem gravely threatened by the idea of being duty-bound to contribute actively to the satisfaction of other people's interests or needs.").

gation becomes that of better risks to subsidize the insurance costs of poorer risks.³²⁹ As the previous discussion of the individualist arguments illustrates,³³⁰ this added cost is precisely what some good-risk claimants object to so strenuously, and the rhetoric of rights and entitlements is short on justifications for such an imposition. The group-relief arguments assume the existence of a consensus upon which a demand might be based, without suggesting how the consensus has been achieved and why others should be obligated to meet the demand. It might be charged that the rhetoric of rights is antilibertarian in that it does not confront the necessity of engaging competing claimants for scarce resources in a dialogue so as to secure their consent to the desired distribution.³³¹ But if the group-relief claimants really had the power to deny others the liberty to choose, they would not have to rely on the rhetoric of rights to support their claims. Rights protect the powerless and less powerful. The powerful do not need rights.

The consensual nature of the rhetoric of rights is useful to the claimants because it obscures the role of politics, but it cannot negate politics. If anything, the consensus seems to be that economic entitlements such as the claimants seek can exist only to the extent that the political process recognizes and creates them.³³² The scope of the entitlement depends upon the grant or leave of the dominant political forces. Lacking dictatorial powers, the group-relief claimants must resort to arguments that acknowledge the potential conflict of interests over the allocation of scarce resources and persuade opposing groups to join them in seeking to change the status quo.

2. Social Causality

The collectivist arguments often acknowledge the existence of increased risk among the claimant groups, but explain it by advancing a theory of social causation³³³ or "shared responsibility."³³⁴ The appeal is intended to invoke an almost objective sense of the "public" interest,³³⁵

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³²⁹ Subsidization is, of course, debated within the insurance controversy. See *supra* notes 303-04 and accompanying text.

³³⁰ See *supra* text accompanying notes 207-99.

³³¹ The criticism assumes that real consent can be obtained in a liberal democratic state. For an opposing perspective, see C. PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION* (1979).

³³² See, e.g., Michelman, *Welfare Rights*, *supra* note 316, at 684-85.

³³³ See T. HASKELL, *supra* note 261, at 252-56, on the origins of social causation as an area of sociological inquiry.

³³⁴ See, e.g., N.J. REPORT, *supra* note 67, at 85-87.

³³⁵ See Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 149-52 (1977-1978). There are conflicting views concerning the nature of a public interest that is more than a coalescence of subjective interests. Compare, e.g., Barry, *The Public Interest*, in *THE BIAS OF PLURALISM* 159,

consisting of an altruistic concern for the welfare of others.³³⁶ The group-relief claimants present themselves as victims of conditions over which they have little control and offer a perspective that looks beyond themselves in seeking an explanation for their situation.³³⁷ For example, they argue that males have more accidents because they are socialized to exhibit aggressive, adventuresome behavior behind the wheel.³³⁸ Urbanites have more accidents because their streets are clogged by suburban commuters who cannot be turned back at the limits of the city.³³⁹ The social environment, then, is held accountable for a group's low status as insurable risks and for the group's limited ability to alter its circumstances. This explanation for their low status also serves as an objective rationale for the group's common pursuit of relief.³⁴⁰

With respect to redlined neighborhoods, the group-relief arguments pointedly assert that insurance companies share the responsibility for deteriorating conditions. Residents of redlined neighborhoods contend that luck and individual initiative do not alone determine who lives where; social domination of some groups by others plays a role. Banks, realtor associations, and insurance companies impel housing patterns.³⁴¹ Moreover, insurance companies have enormous sums available for investment in housing and community development, but they have steered clear of urban projects. By withholding insurance coverage and investment monies, insurance companies are impeding the efforts of

173-77 (W. Connolly ed. 1969) (identifying the public interest with what each person would deem best for himself and everyone else because all are affected equally) with Benditt, *The Public Interest*, 2 PHIL. & PUB. AFF. 291 (1973) (defining an act in the public interest as one that promotes an interest of the public, i.e., an interest of anyone) and J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 24-28 (1980) (predicating common interests on group and individual altruism). But see R. UNGER II, *supra* note 3 at 76-81, 238-40. According to Unger, in the classical conception, "[o]bjective values are standards and goals of conduct that exist independently of human choice." *Id.* at 76. They arise out of "eternal moral laws that inhere in the nature of things." *Id.* at 240. Unger argues that the theory of objective values is untenable because it "presupposes that the mind can grasp and establish moral essences or goods," an assumption that has never been proven. Moreover, "the doctrine denies any significance to choice other than the passive acceptance or rejection of independent truths." *Id.* at 77. See also *id.* at 238-39. He suggests that what may appear to be objective values are merely a convergence of subjective interests. *Id.* at 78-79.

³³⁶ Duncan Kennedy posits the ideal of altruism as the antithesis of the ideal of individualism. Kennedy, *supra* note 3, at 1717-22. "The essence of altruism is the belief that one ought not to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful." *Id.* at 1717 (emphasis in original).

³³⁷ See Squires, *supra* note 303, at 79-80.

³³⁸ See Shayer, *supra* note 184, at 10.

³³⁹ *Mass. Opinion*, *supra* note 177, at 164-65.

³⁴⁰ See generally Balbus, *The Concept of Interest in Pluralist and Marxian Analysis*, 1 POL. & SOC'Y 151 (1971). Balbus defines an objective interest as "an effect by something on the individual which can be observed and measured by standards external to the individual's consciousness." *Id.* at 152. He argues that a theory of pure subjective interest cannot account for the group formation that leads to political change.

³⁴¹ Squires, *supra* note 303, at 79-80, 85.

low-status communities to increase their habitability and desirability.³⁴² To relieve the burdens imposed on them by society, the residents demand subsidies and a species of domestic aid to underdeveloped communities.³⁴³

Even if social domination is acknowledged, and it is agreed that the financial hardship of the group-relief claimants must be reallocated or shared, altruism alone provides no basis for resolving the problem. There must be some scheme for spreading the cost among the remaining groups,³⁴⁴ and it is not easy to separate the victims from the villains.³⁴⁵ For example, if sex is abolished as a rating criterion for automobile insurance, young men will pay less and young women will pay more.³⁴⁶ Because of social circumstances, young women are generally poorer than their male counterparts and are still limited by the restrictions that account for their lesser accident involvement. Women do not drive at night, not because of their cumulative preferences, but because women justifiably believe that they are not safe alone on the streets or in cars after dark. The adverse effect on women that would result from abandoning sex as a rating criterion should therefore be offset by juggling some other criterion. Other groups burdened by the changes will then invoke some theory of social domination which makes them victims, too. There is a collision of subjectively conceived interests. Every group believes itself deserving of altruistic relief and sees itself as powerless to determine its own fate, let alone the fate of some other group. Power may exist, but its locus cannot be determined. Thus, no group feels obliged to yield, as all have already been overpowered. Because appeals to altruism must confront this obstacle, group-relief claimants cannot construct a scheme, acceptable to all groups, that factors social causality into insurance rates.

Arguments for redistributing insurance protection and its costs in accord with principles of social responsibility and altruism are weakened by the absence of a shared basis for giving deference to the interests of one group at the expense of the interests of another. Indeed, the

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³⁴² Squires, *supra* note 303, at 91-92. *But cf.* FULL INSURANCE, *supra* note 19, at 22-24 (portraying insurance companies as merely responding to independent socioeconomic developments).

³⁴³ See, e.g., Shepard, *A New Urban Partnership*, in DIRECTIONS, *supra* note 318, at 1-4.

³⁴⁴ See T. NAGEL, THE POSSIBILITY OF ALTRUISM 133-42 (1970).

³⁴⁵ Cf. J. HABERMAS, LEGITIMATION CRISIS 38-39 (1973) (postwar capitalism has spread effects of averted economic crisis over a broad range of groups, fragmenting class consciousness and making "(almost) everyone at the same time both a participant and a victim").

³⁴⁶ See *Strong Opposition to Gender Elimination as Auto Insurance Rating Factor Raised by NAII*, INS. ADVOC., Feb. 27, 1982, at 8. The New Jersey legislature found that eliminating gender as a rating factor for auto insurance would increase the price of auto insurance for young women by 46% and decrease premiums for young men by only 16%.

prevailing theory is that the interests of every individual in every group are entitled to equal weight in the determination of public policy.³⁴⁷ The point may be summarized as follows:

Interests belong to the individual, not the community. Accordingly, political society depends for its purpose on the sum of the interests of its members. As a mechanical contrivance whose authority is based on consent, it has no independent interest to impart to its members higher than their own conflicting antecedent interests. Nor, given the inviolable status of each member's interests, can the polity use the interests of some to define the proper content of the public order and judge all interests by it.³⁴⁸

3. Externalized Costs of Benefits

In the scheme of pluralistic politics, group interests are added, not shared, and the total determines the course chosen. Claimants must therefore cultivate other groups with whom they might jointly demand reform.³⁴⁹ Moreover, those groups that are to assume an added obligation must be convinced that they are not really losers but gainers; they must agree that it is in their own best interests to grant the relief the claimants seek.³⁵⁰ To add their interests to those of the claimants, the subsidizing groups must be persuaded that they are receiving a quid pro quo for their subsidies.³⁵¹ Thus, a subsidized personal insurance program must either benefit the classes of better risks directly or protect them from the potentially greater future demands that can be made upon them through other social programs.³⁵²

Partially subsidized first-person no-fault automobile coverage, for instance, is offered to bad risks so that other forms of insurance—private or social—will not bear the cost attributable to the in-

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³⁴⁷ D. BASKIN, *supra* note 311, at 74; J. MANSBRIDGE, *supra* note 335, at 17.

³⁴⁸ D. BASKIN, *supra* note 311, at 72.

³⁴⁹ Cf. Cummings, *What Goes Around, Comes Around*, in DIRECTIONS, *supra* note 318, at 10 (regretting that redlining, a problem long plaguing blacks, received attention when it affected white communities).

³⁵⁰ Cf. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (the interest of blacks in achieving racial equality is accommodated only when it converges with that of whites).

³⁵¹ These benefits are referred to as "externalities." See, e.g., GAO REPORT, *supra* note 11, at 12; Mass. *Opinion*, *supra* note 177, at 164. Economic externality analysis, despite its suggestion of scientific neutrality, is simply covert political argumentation. See Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 398-400 (1981).

³⁵² See Musgrave, *The Role of Social Insurance in an Overall Program for Social Welfare*, in *The Princeton Symposium on the American System of Social Insurance* 23 (W. Bowen, F. Harbison, R. Lester & H. Sommers eds. 1968). Cf. Michelman, *supra* note 335, at 154-57 (giving two "individualistic economic" rationales for acceptance of the welfare state).

sured activity. Likewise, third-person automobile liability coverage protects the vast pool of potential victims. The payout depends upon the damages suffered by the injured party. Affluent victims are more likely to incur higher medical costs and lost wages than are poor victims for an identical injury.³⁵³ Because affluent victims are likely to reap a larger recovery from a liability insurance fund, the argument runs, it is appropriate that they subsidize the insurance purchased by poorer folks.³⁵⁴

An appeal to the self-interests of other groups may involve a demonstration of the potential to affect them adversely if change is not forthcoming. The extent of the relief thereby secured depends on the extent to which the claimants jeopardize the interests of others.³⁵⁵ The use of disruptive tactics as a component of the strategy of the group-relief claimants illustrates this point. Confrontation has been used by activists attacking redlining practices as a device to get insurance companies to the negotiating tables. A tract on conducting anti-redlining campaigns instructs that negotiations should be undertaken only after a demonstration of power that shows the targeted carrier that it is "better to negotiate now than to wait for [an] invasion of its annual meeting."³⁵⁶ When State Farm Insurance Company did not negotiate in Cleveland, Ohio, the Buckeye Community Congress sent busloads of angry insureds to the regional vice president's suburban home; in Chicago, the Metropolitan Area Housing Alliance had a busload of consumers invade the office of the president of State Farm.³⁵⁷ According to the tract, the attention of the media should be captured by "identify[ing], isolat[ing], and personalizing the enemy."³⁵⁸ To keep negotiations going and to thwart violation of any agreement, confrontation should continue with a second insurer, in order to remind the first company of the omnipresent threat.³⁵⁹

Despite all this, the effort to obtain relief based on a compounding of interests is doomed. Benefits that further the interests of the subsidizers do not necessarily improve the lot of the subsidized groups that are, in fact, seeking the elimination of oppressive treatment. For example, Hawaiian drivers who receive public assistance "are provided with free liability insurance which they really do not *need* (but for the require-

³⁵³ N.J. REPORT, *supra* note 67, at 85.

³⁵⁴ Leatherbury, *No-Fault Automobile Insurance: Will the Poor Pay More Again?*, 26 CASE W. RES. L. REV. 101, 142-43 (1975).

³⁵⁵ See Offe, *Political Authority and Class Structures—An Analysis of Late Capitalist Societies*, 2 INT'L J. SOC. 73, 87-89 (1972).

³⁵⁶ R. SCHACHTER, *supra* note 31, at 68.

³⁵⁷ *Id.* at 66.

³⁵⁸ *Id.* at 105.

³⁵⁹ *Id.* at 80.

ments of compulsory insurance laws) since they have few assets to protect. They are not provided with free or low cost physical damage insurance which is the only coverage they really need,"³⁶⁰ and which is likely to be required in order to obtain financing for the purchase of a car.³⁶¹ Although the subsidies provide protection for accident victims, they do not alter the system of discriminatory pricing that makes the insurance the low-income driver might like to purchase so costly.³⁶²

Relief that is motivated by the self-interest of the more powerful will eventually prove to be a source of frustration for the group-relief claimants, because it will not alter the unequal allocation of power, wealth, and prestige that is the real source of the conflict. Consequently, the acceptability of any resolution of the conflict generated by their claims is undermined as it is being achieved. The impossibility of securing change through real consensus untainted by the manifestations of hierarchy and domination is demoralizing—indeed, politics in the liberal welfare society is demoralizing.

The theory of interest-group pluralism does not deal adequately with expressed interests and demands for change because it disregards the allocation of power and the engineering of authority.³⁶³ The theory is essentially conservative in that it protects the status quo. Interest-group politics is a function, not the source, of social order.³⁶⁴ Because the outright suppression or rejection of an articulated demand for reform could threaten the legitimacy of the power structure (be it the public or private component), there must be a response to the demand that will be considered authoritative—that is, one to be respected without an independent assessment of its justification.³⁶⁵ The decisions that emerge from the conflict of pluralistic interests are authoritative only because a consensus exists about the process.³⁶⁶ Roberto Unger calls this consensus the association of interests: "The basic premise of the association of interests is that men will abide by relatively stable standards of interaction because they believe it to be to their mutual advantage to do so rather than because they participate in an identical vision

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³⁶⁰ J. Sheldon & E. Sarason, *supra* note 29, at 83 (emphasis in original).

³⁶¹ J. Sheldon & E. Sarason, *The Impact of Automobile Insurance Practices on Legal Services Eligible Clients* 54 (May 1979) (available through Research Institute on Legal Assistance, Legal Services Corp.).

³⁶² *Id.* at 88.

³⁶³ Much attention has been given to the fact that interest-group pluralism does not work because suppressed and unexpressed interests are not considered in the calculus. See, e.g., S. LUKES, *POWER: A RADICAL VIEW* (1974); Balbus, *supra* note 340, at 151; Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 242-46 (1981).

³⁶⁴ D. BASKIN, *supra* note 311, at 136.

³⁶⁵ See Austin, *supra* note 306, at 1513-14.

³⁶⁶ See D. BASKIN, *supra* note 311, at 130-32; see also R. WOLFF, *supra* note 313, at 160.

of the truth and the good.”³⁶⁷ Yet a polity based on such an association of interests is “precarious;”³⁶⁸ as another commentator has noted, there is an “acute preoccupation with order and equilibrium.”³⁶⁹ Confidence that order can be achieved through a balancing of interests is accompanied by an anxiety “about impending chaos and disorder inspired by . . . [an] acute awareness of conflict, competition and energetic exertion incident to an egalitarian society.”³⁷⁰ Conflict is chronic, and as illustrated by the analysis of the supposedly neutral criteria invoked by the individualist mode of argument,³⁷¹ consensus is illusive. Authority and legitimacy are always at stake. Any political solution to the controversy predicated on the arguments analyzed above will be unsatisfactory and short-lived.

IV. CONCLUSION

The arguments analyzed in this Article are the tools of individuals and groups attempting to free themselves from the oppressive consequences of a variant of social stratification practiced by private insurance companies. Arguments aimed at the achievement of such liberation should, of course, be pressed so long as they produce results. When they fail and their useful lives are over, however, new ones must be found. The object of this Article is to demonstrate the weaknesses of the arguments currently being advanced against the insurance classification system with limited success, and to suggest that energies might be directed toward the creation of an alternative arsenal.

The insurance classification controversy cannot be resolved by an appeal to neutral, apolitical principles predicated upon the impossible achievement of individual autonomy and essentially private decision-making. Even with supposedly neutral criteria, such as accuracy, causation, and merit, value judgments are unavoidable, and there is no consensus of values upon which the controversy may be stilled. In order to resolve the controversy, the private decisionmaking sanctioned by the individualist arguments must be abandoned in favor of politics.

The collectivist arguments advanced in the controversy do acknowledge the primacy of politics, but these arguments, too, ultimately founder. While politics may produce a solution to the controversy, that solution is bound to be unsatisfactory as long as political outcomes are predicated on an interest-group pluralism that tends to preserve the sta-

³⁶⁷ R. UNGER I, *supra* note 3, at 144-45.

³⁶⁸ R. UNGER II, *supra* note 3, at 78.

³⁶⁹ D. BASKIN, *supra* note 311, at 141.

³⁷⁰ *Id.*

³⁷¹ See *supra* text accompanying notes 207-99.

tus quo and does not alter the allocation of power or the pursuit of self-interest. Every political solution is suspect because it does not, and cannot, represent a consensus judgment as to what the common good requires.

It should not be forgotten that the source of the classification controversy is the alienation and conflict that are generated when people are unable to leave groups that have become too confining and to participate in groups that are deeply involving. The ultimate solution to the controversy must therefore lie in the achievement of real voluntary groups or communities whose members are engaged in important economic and social tasks relevant to the control of risks and the provision of support and resources for the victims of accidents and losses. These activities must be undertaken pursuant to a genuine consensus of values that evolves through face-to-face political communication and interaction untainted by domination.³⁷²

This solution requires far-reaching changes in the structure of economics, politics, kinship, and community.³⁷³ In the meantime, attention can be focused on the creation of insuring institutions that (1) foster the integration of individuals and groups which, under generally accepted status distinctions, would be segregated and removed from one another, and (2) provide the opportunity for the practice of a brand of politics that is not oriented solely around the pursuit of self-interest. Integration in general should ameliorate the controversy, since insurance classifications reflect society's stratification patterns. The development of a politics that determines how many resources should be set aside as insurance against foreseeable contingencies, and how or from whom these resources should be amassed, will give people experience in running their own lives. Such political decisionmaking could then be extended to other areas.

It is beyond the scope of this Article to develop more concrete proposals for legal and political reform. Some of the relief against insurance classifications that is currently being pursued, particularly that requiring more nearly identical treatment of various status groups, should

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³⁷² The solution lies in the theory and practice of what Roberto Unger calls "organic groups." R. UNGER II, *supra* note 3, at 236-95. In an organic group, the tension between individualism and collectivism is resolved; individuality and communality complement one another. *Id.* at 262. The organic group is "characterized by face-to-face co-existence and by multipurpose organization." *Id.* Multipurpose organization permits the individual to be viewed as more than a performer of a specialized role. He can be known as a unified personality. *Id.* at 262-63. Because the spectrum of interaction is broad, "there will be . . . [a] basis of common experience upon which common ends might develop." *Id.* at 263. Furthermore, decisions concerning resource allocation are considered political and collective. *Id.* at 263. The individual is entitled to leave and enter groups as he chooses. *Id.* at 279-80.

³⁷³ See generally M. ALBERT & R. HAHNEL, *SOCIALISM TODAY AND TOMORROW* (1981).

foster social integration.³⁷⁴ Municipal fire or property insurance, a concept that is not new, is the most radical alternative to the present system that has been proposed so far.³⁷⁵ A number of California localities are experimenting with a program whereby they will market group homeowners insurance to residents through a master policy procured from private carriers.³⁷⁶ The locality-marketed product should cost less because coverage will be limited to dwellings that pass the safety and maintenance inspections to be conducted by fire fighting personnel without fires to fight.³⁷⁷ According to William Hanna, a consultant:

For the homeowner there will be a chance for a lower insurance premium when the municipality is able to impose a high standard of dwelling maintenance. For the municipality there will be the prospect of better utilization of fire fighting personnel and the chance to participate in some of the profits of the insuring endeavor. . . .³⁷⁸

The proposal's viability, however, is said to depend on the non-profit equivalent of risk selection. A program that largely serves the worse risks would not be financially sound,³⁷⁹ researchers say, and solidity can only be assured if all residents in the community are required to purchase insurance from the locality.³⁸⁰ One visionary exponent of community-based insurance also suggests that "[p]rofessional risk-management experts will be needed. Legal and marketing assistance will be essential."³⁸¹

³⁷⁴ See *supra* notes 47-90 and accompanying text.

³⁷⁵ See, e.g., CIVIL RIGHTS REPORT, *supra* note 42, at 53-55; Squires, *Community Self-Insurance*, PROGRESSIVE, Dec. 1979, at 47, 49. In his article, *The City as a Legal Concept*, Professor Frug suggests that cities might undertake insuring activities, Frug, *supra* note 3, at 1128, 1150, in order to exercise a real power that is a necessary predicate to their residents' realizing "'public freedom'—the ability to participate actively in the basic societal decisions that affect one's life." *Id.* at 1068. "[T]he need for the individual to gain control over these portions of his life now determined by others" could be satisfied by "popular involvement in the decisionmaking process" of small-scale entities possessing decentralized power. *Id.* at 1069. If cities undertook insuring activities, decisions concerning the allocation of protection and premiums could be politicized so as to be directly determined by an electorate small enough and intimate enough to have personal knowledge of the risks involved and personal opinions of how the burden they impose on the community should be distributed.

³⁷⁶ McLean, *Big Name Insurers Tied to Group Homeowners Move*, NAT'L UNDERWRITER (Prop. & Casualty Ins. ed.), June 4, 1982, at 2, col. 2. The group marketing programs are an outgrowth of an assessment of the feasibility of various plans of municipal insurance, including one providing for the direct supplying of insurance by the locality to its residents. 1 Mission Research Corp., *Municipal Fire Insurance Feasibility Analysis* (Oct. 24, 1980) (prepared for Institute for Local Self Government, Berkeley, Cal.).

³⁷⁷ McLean, *supra* note 376, at col. 3.

³⁷⁸ *Id.* at col. 4.

³⁷⁹ 1 Mission Research Corp., *supra* note 376, at 3-27.

³⁸⁰ See *id.* at 3-29.

³⁸¹ Squires, *supra* note 375, at 49.

These proposed reforms are heading in the right direction in that they involve a measure of social destratification and political decision-making by the persons affected. Even if adopted, they will not entirely eliminate the alienation and conflict that are the sources of the classification controversy. Any argument or reform that is not directed at the realization of a society composed of voluntary groups practicing participatory democracy will and must be found wanting and inadequate, sooner or later. Such is the failing of the arguments this Article has explored.