2022

The Color of Property and Auto Insurance: Time for Change

Jennifer B. Wriggins

THE COLOR OF PROPERTY AND AUTO INSURANCE: TIME FOR CHANGE

JENNIFER WRIGGINS

ABSTRACT

Insurance company executives issued statements condemning racism and urging change throughout society and in the insurance industry after the huge Black Lives Matter demonstrations in summer 2020. The time therefore is ripe for examining insurance as it relates to race and racism, including history and current regulation. Two of the most important types of personal insurance are property and automobile.

Part I begins with history, focusing on property insurance, auto insurance, race, and racism in urban areas around the mid-twentieth century. Private insurers deemed large areas of cities where African Americans lived to be "blighted" and refused to insure all homes in these areas, despite lacking clear evidence of increased risk. This created a property insurance crisis in the cities. Affordable automobile insurance in areas such as Harlem was hard to come by; complaints of race discrimination went back to the 1930s. The federal government got involved in the late 1960s after state and local remedies were insufficient. The federal Urban Property Protection and Reinsurance Act of 1968 (UPPRA) was aimed to incentivize private insurance companies to enter the urban market and to support states in establishing plans (known as Fair Access to Insurance Requirements or FAIR Plans) that would require companies to cover a certain amount of risk in urban areas.

The UPPRA and FAIR plans led to a robust urban property insurance market at minimal cost to the government and industry, Part II finds. The federal program later was discontinued and largely forgotten, probably due to its success. This forgotten history tells us that insurance markets have not functioned in a neutral way and that for long periods companies did not sell property insurance based on objective neutral data but based at least in part on racial prejudice. It further shows that the federal government can play a socially positive rule in insurance markets without miring the government in taking on the entire risk or costing taxpayers huge sums. Yet the reform measures did not end redlining or challenge many of the equity issues involved in insurance. Property and auto insurance companies have shifted in recent decades from explicit race-based exclusions to the use of facially neutral practices for pricing and underwriting such as algorithms, machine learning, and credit scores. However, insurance antidiscrimination law (which is largely state law) has not kept pace. No federal law directly bans race discrimination in auto insurance, and federal *housing antidiscrimination law has not been consistently applied to housing insurance practices which have a disproportionate impact on racial minorities.*

Three reforms would improve current practices, Part III asserts. First, insurance regulation should require more disclosure with requirements parallel to those of the Home Mortgage Disclosure Act. Insurers should be required to collect and disclose specific data on insurance applications and declinations, membership in protected groups, and other information. Second, a private cause of action should potentially be made available for insurance discrimination when insurance practices lead to a disparate impact on African Americans and other racial minorities. Third, insurance regulation should be shifted away from rate regulation which currently serves no useful purpose; this would make more room and time for the other proposed reforms which might lead to long overdue changes in property and auto insurance regulation and practices.

INTRODUCTION[1]

Thurgood Marshall was denied auto insurance when he lived in Harlem in 1940 because, he was told, it was a "congested area." He wrote that although the problem of insurance discrimination was getting worse, it was "practically impossible to work out a court case because the insurance is usually refused on some technical ground."[2]

"[H]istorically there are numerous examples where the insurance industry has discriminated against people of protected classes such as race…While many forms of direct unfair discrimination have been eliminated, subtle, less obvious forms of discrimination remain in access to insurance and risk classification."[3]

Insurance on a house for loss to the property is just as important to a house's value as its foundation or construction, but is invisible to passersby.[4] Auto insurance on a car is necessary to drive; cars are often essential for transportation to work or school.[5] Insurance "is of the greatest public concern" and is "affected with a public interest" stated the United States Supreme Court in 1914.[6] Yet the history of homeowners and auto insurance in urban areas where African-Americans

---

1. Acknowledgments; Sumner T. Bernstein Professor of Law, University of Maine School of Law. Many thanks to Dean Leigh Saufley of University of Maine School of Law for leadership and support. I also thank Mike Green, Sadhbh Neilan, Anya Prince, Dan Schwarcz, Gregory Squires, Merle Weiner and my colleagues at University of Maine School of Law for comments on drafts. I appreciate the research help of librarians at the Garbrecht Law Library at University of Maine School of Law, Maureen Quinlan, Megan York, Library Director Christine Dulac and most especially Cindy Hirsch. Also, I thank Deborah Lorenzen at University of Maine School of Law for outstanding assistance. I am grateful to Mary Bonauto, Maye Emlein, and Adam Gordon for instructive conversations. Thanks to the editors of the FSU Law Review for their hard and excellent work. Of course, I am responsible for any errors.

2. Mary L. Heen, *Ending Jim Crow Life Insurance Rates,* 391 N.W. J. L. & SOC. POL. 359, 391-392 (2009) (quoting letter from Thurgood Marshall to Roger Baldwin (Apr. 9, 1940)).

3. *Milestones of Racial Discrimination within the Insurance Sector*, NAIC (Aug. 2020), https://content.naic.org/cipr_article/milestones_racial_discrimination_within_insurance_sector.htm [https://perma.cc/E65P-HCZD].

4. *See* HUGHES ET AL., MEETING THE INSURANCE CRISIS OF OUR CITIES: A REPORT BY THE PRESIDENT'S NATIONAL ADVISORY PANEL ON INSURANCE IN RIOT-AFFECTED AREAS 1 (January 1968) [hereinafter HUGHES REPORT] (asserting that for property owners' insurance such as homeowners' insurance is a "basic necessity"); Daniel Schwarcz, *Towards a Civil Rights Approach to Insurance Anti-Discrimination Law*, 69 DEPAUL L. REV. 657, 660, 677-78 (2020) [hereinafter Schwarcz, *Civil Rights Approach*]. The liability insurance that is sold with property insurance likewise is essential but invisible. *See generally*, KENNETH S. ABRAHAM, THE LIABILITY CENTURY 177 (2008) [hereinafter ABRAHAM, LIABILITY].

5. *See* Abraham, LIABILITY, *supra* note 4, at 69-74; Schwarcz, *Civil Rights Approach, supra* note 4, at 677-78; Jennifer Wriggins, *Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act*, 13 CONN. INS. L.J. 275, 301-04, 310-16 (2013) [hereinafter Wriggins, *Mandates, Markets & Risk*].

6. German All. Ins. Co. v. Lewis, 233 U.S. 389, 415 (1914) (deciding that government regulation of insurance including rates was acceptable in view of the public interest aspects of insurance). Other courts have made similar statements; for example, "[insurance] affects

and other racial minorities live is forgotten and overlooked. More people are now paying long overdue attention to issues involving race and racism; property and auto insurance issues in cities are germane to those issues. Private insurers have made strong statements challenging structural racism in the wake of George Floyd's murder and large Black Lives Matter protests in the past year.[7] The National Association of Insurance Commissioners (NAIC), a hugely influential regulatory group,[8] established a Special Committee on Insurance and Race in summer 2020 which pledged to "scour through existing practices . . . to identify those that may disadvantage minorities."[9] Yet regardless of these public statements, private insurers are also an important part of structural racism. In the 1950s and 1960s, they engaged in race-based "redlining," deliberately refusing to insure any properties at all in large swaths of cities where African-Americans lived which led to a nationwide crisis of urban insurance access.[10] Finding affordable auto insurance in cities has been a persistent problem

---

large numbers of people and is intimately connected with the general welfare." In re Opinion of the Justices, 147 N.E. 681, 698 (Mass. 1925) (Massachusetts Supreme Judicial Court advisory opinion concluding that Massachusetts's first-in-the-nation auto insurance mandate was constitutional).

7. For example, Kirt Walker, the CEO of Nationwide Insurance Company, stated after the murder of George Floyd, "in the coming days, I encourage each of us to step outside of our comfort zones, seek to understand, engage in productive conversations and hold ourselves accountable for being part of the solution. We must forever stamp out racism and discrimination." Kirt Walker, *A Message from CEO Kirt Walker*, NATIONWIDE: NEWSROOM (June 1, 2020), https://news.nationwide.com/message-from-kirt-walker/ [https://perma.cc/725N-NSJP]. The CEO of American Family Insurance Company, Jack Salzwedel, stated that George Floyd's death in Minneapolis is the most recent example of "a broken society, fueled by a variety of factors but all connected by inherent bias and systemic racism . . . [I]t also requires people of privilege– white people– to stand up for and stand with our communities like we never have before." Jack Salzwedel, *Viewpoints – American Family CEO Jack Salzwedel: Turning anger into action*, BIZTIMES MILWAUKEE BUSINESS NEWS (June 5, 2020, 1:43 PM), https://biztimes.com/viewpoints-american-family-ceo-jack-salzwedel-turning-anger-into-action/ [https://perma.cc/E65P-HCZD].

8. For detailed discussion of the structure, roles and influence of the National Association of Insurance Commissioners, *see* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV 625 (1999).

9. *Insurance Group to Scrutinize Rate Guidelines for Racial Bias; Use of credit scores, educational attainment puts Black Americans and other minorities at a disadvantage, critics of existing practices say*, ONLINE WALL ST. JOURNAL (July 23, 2020), https://www.wsj.com/articles/insurance-group-to-scrutinize-rate-guidelines-for-racial-bias-11595494800 [https://perma.cc/DR4K-2W4Q]; *see also* NAIC Announces Special Committee on Race and Insurance, NAIC NEWSROOM (July 23, 2020), https://content.naic.org/article/news_release_naic_announces_special_committee_race_and_insurance.htm [https://perma.cc/HQS3-R623].

10. HUGHES REPORT, *supra* note 4, at 6, 27. The term 'redlining' originated from maps prepared by the federal Home Owners' Loan Corporation (HOLC) which was created in 1933 to buy mortgages that were about to default and issue new more favorable mortgages. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 63 (2017). *See* Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible*

going back at least since the 1930s.[11] It was not until Congress finally took aim at the property insurance crisis in 1968, passing the Urban Property Protection and Reinsurance Act (UPPRA) which aimed to expand private property insurance coverage in cities, that insurance companies began to cover urban properties.[12] The UPPRA is largely forgotten today, perhaps because of its success in bringing property insurance to cities.[13]

This forgotten history matters now for four primary reasons. First, it reminds us that insurance companies, while they often now insist that they set insurance prices and availability simply based on objective risk, for long periods actually did not sell property insurance policies based on objective, neutral risk calculations but rather based on racist assumptions. Indeed, insurance companies played a significant role in urban segregation and disinvestment in areas inhabited by African Americans. Second, insurance companies did not change on their

---

to Whites and Out of Reach for Blacks, 115 YALE L.J. 186 (2005). HOLC maps labeled each urban and suburban area as A, B, C or D. "D," the lowest "quality" neighborhoods, were colored red, which is how the term "redlining" came to be used. *Id.* at 207; ROTHSTEIN, *supra* at 64. The term "redlining" was used in connection with property insurance and insurance underwriting maps as well. The Hughes Report quotes an actual underwriting guide that uses the term as follows: "A good way to keep this information [about blighted areas and other factors] available and up to date is by the *use of a red line* around the questionable areas on territorial maps centrally located in the Underwriting Division for ease of reference by all underwriting personnel." Hughes Report at 6. State insurance regulators generally did little to oppose insurance companies' actions. Hughes Report, *supra,* at 56-57, ROTHSTEIN, *supra* at 95, 101, 106. Although some states and localities started responding to the crisis starting in 1960. HUGHES REPORT, *supra* note 4, at 57-59. *See infra* Part I.B.1. *But cf.* Amy E. Hillier, *Redlining and the Home Owners' Loan Corp.,* 29 JN. OF URBAN HISTORY 394 (2003) (disputing commonly held ideas about HOLC maps' role in redlining). Redlining was engaged in by government as well as insurance companies and has enduring effects. See, e.g., ROTHSTEIN, *supra* at 184-6 (explaining that for middle class Americans, home equity is the major source of wealth and detailing how government policies excluded African Americans from homeownership in myriad ways in the twentieth century), MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 105-110 (2017) (outlining government policies that supported housing segregation and situating them within a broader analysis of capital and racism).

11. *See* discussion *infra* Part I.B.2.

12. Urban Property Protection and Reinsurance Act (UPPRA) of 1968, Pub. L. No. 90-448, 82 Stat. 555 (codified as amended in scattered sections). The law created a targeted federal-state-industry plan for inner city policies and provided a federal 'backstop' of reinsurance covering riots. The UPPRA aimed to expand coverage by creating a targeted federal-state-industry plan for urban policies and providing a federal 'backstop' of reinsurance covering riots. *See infra* Part I.E.2. Reinsurance is insurance that insurance companies obtain to cover them if the claims they must pay exceed their ability to pay. ROBERT JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW sec. 150 (2012) (stating that "reinsurance is essentially insurance for insurance companies"). *See* discussion *infra* Part I.E.2.

13. The federal backstop program was discontinued in the 1980s because the private market was functioning reasonably well and there was no need for the federal support. Ronald W. Demerjian et al., *Forty Years of Involuntary Property Insurance Markets in the United States*, 54 CHARTERED PROP. & CAS. UNDERWRITERS J. 174, 189 (2001); 12 U.S.C. sec. 1749bbb(b)(1994); Baird Webel, CONG. RESEARCH SERVICE, TERRORISM RISK INSURANCE: ISSUE ANALYSIS AND OVERVIEW OF CURRENT PROGRAM 11 (2014). Yet redlining continued for decades afterwards and additional problems have endured. See *infra* Part II.

own; 'the market' without regulation produced huge market failures, i.e., redlining and related issues in African-American neighborhoods. It took federal government involvement to get insurance companies to change their behavior as state regulation was not sufficient to lead to major changes. Third, the UPPRA shows that government can influence insurance practices in constructive, socially positive ways without taking on the entire risk or costing taxpayers huge amounts. Fourth, the UPPRA and its limitations highlight the need for further reforms.

Although property insurance companies did enter cities after the UPPRA took effect, explicit redlining persisted for decades and has enduring effects. [14] Insurance companies faced no reckoning for their past actions. Access to affordable insurance for homes and cars has remained a persistent problem for some residents of urban areas.[15]

Insurance companies no longer explicitly wall off large areas of cities where African Americans and other members of racial minorities live and refuse to write policies there. Yet, insurance in these areas is more expensive in ways that may or may not be justified by insurers' claims experiences.[16] Insurance practices that are not explicitly race-based but that nonetheless result in disproportionate impact on African Americans such as use of insurance credit scores to determine prices of insurance are widely used.[17] Increasingly, insurance companies use artificial Intelligence (AI), machine learning, and algorithms

14. The federal backstop program was discontinued in the 1980s because the private market was functioning reasonably well and there was no need for the federal support. Ronald Demerjian, George Flanagan, & Douglas Jensen, *supra* note 13, at 189, 12 U.S.C. § 1749bbb(b) (1994); Webel, *supra* note 13, at 11. For information on enduring effects of redlining, *see generally,* BARADARAN, *supra* note 10; ROTHSTEIN, *supra* note 10.

15. *See* discussion *infra* Part II.B; *e.g., Insurance Redlining: Fact or Fiction?:* Hearing *Before the Subcomm.* on Consumer Credit *& Ins.* of the *H. Comm.* on Banking, Finance & Urban Affairs, 103d Cong. (1993); Schwarcz, *Civil Rights Approach, supra* note 4, at 90 and accompanying text.

16. Even if higher expenses in these areas are based on insurers' claims experiences there are broader issues at stake. As Rick Swedloff recently wrote, "[p]ricing based on risk, even if accurate, could unfairly burden vulnerable groups and those whose riskiness is undeserved with higher prices or skimpier coverage[.]" Rick Swedloff, *The New Regulatory Imperative for Insurance*, 60 B.C. L. REV. 2031, 2042 (2020) [hereinafter Swedloff, *Regulatory Imperative*]. Swedloff notes that while risk-based pricing seems fair in an individualist sense, "purely risk-based pricing might be based on undeserved or immutable characteristics, or the riskiness might be based on historical and sociological injustices and inequities[,]" raising difficult, broader issues about fairness, context and risk. *Id.* These issues are largely beyond the scope of this article, but I hope to focus more directly on them in future work.

17. *See* INSURIFY, The Insurify Annual Report 2020, 39 (2020), https://insurify.com/report/auto-insurance/2020/ [https://perma.cc/V4DQ-L5MU] (stating in a comprehensive analysis of the 2020 car insurance price landscape that credit scores are generally used in auto insurance pricing). Use of credit scores in insurance pricing has long been controversial and challenged by racial equity advocates. *See* discussion *infra* Part II.B. A hearing on March 4, 2020 regarding H.R. 1756, An Act Preventing Credit Score Discrimination in Auto Insurance Act before the before House Financial Services Committee-Subcommittee on Housing, Community Development and Insurance presented current arguments in favor and opposed from the National Association of Mutual Insurers (NAMIC), the Consumer Federation of America (CFA) and others.

for pricing and underwriting, making it ever more likely that seemingly neutral and impossible to pinpoint insurance practices will have a disparate impact on racial minorities and low income residents of urban areas, resulting in higher prices or inability to obtain insurance.[18] Yet, current law largely allows these practices to continue without examination or challenge. Moreover, identifying the problems caused by current practices requires systematic data about premiums, losses, applications, and the like – all of which is information insurers have not been willing to make available.[19]

Existing antidiscrimination laws, whether state or federal, do not provide adequate remedies or regulation in this realm. State insurance laws are particularly important since states are the primary regulators for most kinds of insurance.[20] State insurance anti-discrimination laws have a narrow and outdated definition of unfair discrimination which does not focus on practices that may disadvantage minorities and low-income people but instead focuses on rate regulation.[21] State insurance antidiscrimination law, which is limited in scope to begin with, is ineffective at targeting these seemingly neutral practices.[22] Federal antidiscrimination law also falls short, failing to require disclosure of information that would reveal whether insurance practices are discriminatory and allowing practices with disproportionate impacts to evade scrutiny.[23]

Given the importance of insurance for economic security and mobility, the history of racial discrimination in insurance, recent evidence showing higher insurance costs for urban residents, the weakness of existing insurance antidiscrimination laws, and the increasing threat

---

18. *See, e.g.,* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions,* 89 WASH. L. REV. 1, 4 (2014); Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data,* 105 IOWA L. REV. 1257 (2020). Darcy Steeg Morris et al., *Do Credit-Based Insurance Scores Proxy for Income in Predicting Auto Claim Risk?,* 14 J. EMPIRICAL LEGAL STUD. 397, 398-99 (2017). Swedloff, *Regulatory Imperative*, *supra* note 16 at 2033-36, 2057-59; Rick Swedloff, *Risk Classification's Big Data (R)evolution*, 21 CONN. INS. L.J. 339 (2018).

19. *See* discussion *infra* Part II.B.2; Schwarcz, *Civil Rights Approach, supra* note 4.

20. Insurance is the largest regulated industry that is primarily regulated by the states. TOM BAKER, ET AL.., INSURANCE LAW & POLICY 141 (5th ed. 2021). The federal McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, passed in 1945, favors state regulation of the business of insurance. JERRY & RICHMOND, *supra* note 12 at 69, 84. State insurance regulation long has been criticized as weak, with understaffed offices and other shortcomings. See, e.g., Christopher C. French, *Dual Regulation of Insurance*, 64 VILL. L. REV. 25, 30, 58-64 (2019) (detailing current shortcomings of state insurance regulation) (.); Randall, *supra* note 8 at 639, 676-8 (asserting that the insurance industry reflects regulatory capture); HUGHES REPORT, *supra* note 4, at 51 (discussing a 1958 report).

21. *See* discussion *infra* PART II.B.2.1.; *See, e.g.,* Daniel Schwarcz, *Ending Public Utility Style Rate Regulation in Insurance*, 35 YALE J. REG. 941 (2018) [hereinafter Schwarcz, *Public Utility Style].*

22. Ronen Avraham et al., *Understanding Insurance Antidiscrimination Laws,* 87 SO. CAL. L. REV. 195, 267 (2014); Schwarcz, *Civil Rights Approach, supra* note 4, at 697.

23. *See* discussion *infra* Part II.B.2.

that AI and machine learning will increase discrimination that harms racial minorities and low-income people, the case for concrete reforms is compelling. Indeed, reforms are long overdue.[24] This article proposes three reforms to auto and property insurance. First, Congress (or states) should institute a disclosure regime which would bring to light data on insurance practices that are currently opaque. They could do so by passing a law or laws that are analogous to the Home Mortgage Disclosure Act, which has worked successfully for years.[25] Second, insurance regulators should institute a disparate impact approach to insurance practices that have a disproportionate negative impact on members of protected groups.[26] Third, insurance regulation should shift away from rate regulation, as this type of regulation is aimed at a regulatory problem that no longer exists.[27] These reforms are likely to result in more equitable property and auto insurance and will preserve competition. But these reforms should not be the end of the process. If insurance companies are serious in their concern about dismantling structural racism, they should review their past and present practices, including the consequences of all their actions, and be part of a national reckoning for the harmful effects of past discriminatory practices.

Part I focuses on property and auto insurance, race, and racism in urban areas in the decades around the mid-twentieth century. Private insurers refused to insure all homes in large areas of cities where African Americans lived, deeming these areas blighted and too risky despite lacking clear evidence of increased risk.[28] This created an insurance crisis in the cities.[29] Affordable auto insurance in "congested area[s]" such as Harlem was hard to come by; this led to complaints of race discrimination going back to the 1930s.[30] After state and local remedial measures were insufficient, the federal government got involved in the federal property insurance crisis and passed reform legislation, specifically the Urban Property Protection and Reinsurance Act of 1968 (UPPRA).[31] The federal law aimed to incentivize private companies to enter the urban market and states to establish plans that

24. *See* discussion *infra* Parts II, III.

25. *See infra* Part III.B.

26. *See infra* Part III.C.

27. *See infra* Part III.D.

28. *See infra* Part I; *See* HUGHES REPORT, *supra* note 4 at 2-8, 24-52.

29. *Id.*

30. *See infra* Part I.

31. The Urban Property Protection and Reinsurance Act (UPPRA), Title X of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, §§ 2-1722, 82 Stat. 476 (Aug. 1, 1968) (codified in scattered sections).

would require companies to cover a certain amount of the risks in urban areas.[32] These plans are known as "FAIR" plans or Fair Access to Insurance Plans.[33]

Part II assesses the UPPRA and FAIR Plans, finding that they led to a robust property insurance market in urban areas at minimal cost to the government and industry.[34] Still, the reform measures did not end redlining or challenge many of the equity issues involved in insurance and permitted higher prices and inferior coverage in urban areas. The contrast with the federal government's approach to flood insurance issues and the government's approach to urban property insurance issues is striking.[35] Property and auto insurance companies have shifted in recent decades from explicit race-based exclusions to use of facially-neutral practices for pricing and underwriting such as use of credit scores and algorithms, but insurance anti-discrimination law has not kept up.[36] Yet data that would illuminate the extent of (or lack of) discriminatory practices is not public.[37] Further, state anti-discrimination laws in the insurance arena (whether for property or auto insurance) are generally weak, outdated, and not focused on practices that actually hinder economic mobility and stability for racial minorities and low income people.[38] There is no federal law directly banning race discrimination in auto insurance, and federal housing anti-discrimination law has not been robustly or consistently applied to housing insurance practices which have a disproportionate impact on racial

---

32. This is creating a residual or involuntary market. According to Robert W. Klein,

> Residual markets play an important role in certain insurance markets, such as automobile, homeowners and workers' compensation insurance. Because of the 'essential' nature of these coverages and the fact that many states (lenders in the case of property insurance) impose compulsory insurance requirements in these areas, the states have established mechanisms to provide coverage to those who cannot obtain it through the voluntary market.

ROBERT W. KLEIN, A REGULATOR'S INTRODUCTION TO THE INSURANCE INDUSTRY 186 (2d ed. 2015) (prepared for the National Association of Insurance Commissioners) [hereinafter REGULATOR'S INTRODUCTION]. According to the International Risk Management Institute (IRMI), residual markets are defined as

> Insurance market systems for various lines of coverage…They serve as a coverage source of last resort for firms and individuals who have been rejected by voluntary market insurers. Residual markets require insurers writing a specific coverage line in a given state to assume the profits or losses accruing from insuring that state's residual risks in proportion to their share of the total voluntary market premiums written in that state.

Residual Market, INTERNATIONAL RISK MANAGEMENT, https://www.irmi.com/term/insurance-definitions/residual-market [https://perma.cc/H8KG-PF93].

33. *See infra* Part I.E.2.

34. *See infra* Part II.A.1-5.

35. *See infra* Part II.A.5.

36. *See infra* Part II.B.

37. *Id.*

38. *See infra* Part II.B.2.

minorities.[39] Putting all this together, access to insurance in urban areas has improved, but residents of predominantly African American and low income areas pay significantly more for insurance. Existing laws provide no traction to challenge or even shed light on insurance practices that might lead to these results because disclosure requirements are lacking.

Part III proposes three reforms to improve current practices. First, insurance regulation should be changed to impose more disclosure with requirements parallel to those of the Home Mortgage Disclosure Act.[40] This would mandate that insurers collect and disclose specific data on insurance applications and declinations, membership in protected groups, and other information.[41] Second, a private cause of action potentially should be available for insurance discrimination when insurance practices lead to a disparate impact on African Americans or other racial minorities.[42] As with other areas of law such as employment law and mortgage lending, if a facially-neutral practice disproportionately impacts a protected group, this creates a prima facie case of discrimination.[43] However, this prima facie case can be rebutted based on a company's showing of business necessity.[44] The third reform recognizes that insurance regulation is time-consuming and expensive, and advocates that certain wasteful and expensive aspects of insurance regulation such as rate regulation should be jettisoned; this will make more room and time for the other proposed reforms.[45]

---

39. *See infra* Part II.C.2.

40. *See infra* Part III.B.; 12 U.S.C. §§ 2801-09 (2012).

41. This idea was first proposed at least as early as 2003. Gregory D. Squires, *Racial Profiling, Insurance Style: Insurance Redlining and the Uneven Development of Metropolitan Areas,* 25 J. OF URB. AFF. 391-410 (2003). With reliable data it should be possible to identify practices that unreasonably harm members of protected groups; without data this is not possible. The HMDA has been useful in expanding knowledge about mortgage availability and public disclosure of similar information in this context is likely to lead to similar benefits. Schwarcz, *Civil Rights Approach, supra* note 4, at 689.

42. *See infra* Part III.C.

43. Griggs v. Duke Power, 424 U.S. 431 (1971). To be more specific, the prima facie case can be rebutted by a showing of legitimate nondiscriminatory purpose based on business necessity. Schwarcz, *Civil Rights Approach, supra* note 4, at 695.

44. Plaintiff could still prevail if it could show that the insurer's legitimate aims could be reached with a less discriminatory alternative. 424 U.S. at 432; Schwarcz, *Civil Rights Approach*, *supra* note 4, at 695.

45. *See infra* Part III.D; *See generally* Schwarcz, *Public Utility Style, supra* note 21.

I. PROPERTY AND AUTO INSURANCE COVERAGE IN URBAN AREAS PRIOR TO FEDERAL PROPERTY INSURANCE REFORM IN 1968: RACE-BASED REDLINING, EXCLUSION, UNFAIR DISCRIMINATION

A. *Importance of Property and Auto Insurance*

Property and auto insurance are extremely important yet often overlooked. In 1968, the Report of the President's National Advisory Panel on Insurance in Riot-Affected Areas suggested that "[i]nsurance is a *basic necessity* for a property owner."[46] This report, known as the Hughes Report,[47] is probably the most detailed look at urban property insurance issues ever undertaken on behalf of a federal entity. It was part of the work of the National Advisory Commission on Civil Disorders established by President Johnson in 1967 after the urban riots of the mid-1960s.[48] The Hughes Report stated:

> [i]nsurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not—and cannot—make loans. New housing cannot be constructed, and existing housing cannot be repaired . . . Without insurance, buildings are left to deteriorate; services, goods, and jobs diminish . . .Communities without insurance are communities without hope.[49]

As a condition for getting a mortgage, lenders always require insurance on the property itself.[50] Since the 1940s, property insurance has always been sold with liability insurance.[51] Thus, throughout this article, the term "property insurance" also includes the liability insurance that comes with it. Liability insurance sold with property insurance protects the homeowner from tort claims whether or not they are

46. HUGHES REPORT, *supra* note 4, at 1 (emphasis added).

47. The Report was named after its Chair, Governor Richard Hughes of New Jersey. *Id.*

48. The National Advisory Commission on Civil Disorders was established by President Johnson in July 1967 after urban riots had taken place in Watts, Los Angeles, in 1965, in Detroit in 1966, and in Newark in 1967. The mission of the commission was to answer "three basic questions: What happened? Why did it happen? What can be done to prevent it from happening again?" *Report of the National Advisory Commission on Civil Disorders* 1 (1968), http://www.eisenhowerfoundation.org/docs/kerner.pdf [https://perma.cc/AG3K-H8KA]. In answer to the question of why did the riots happen, the commission, commonly known as the Kerner Commission, found that "the most fundamental is the racial attitude and behavior of white Americans toward black Americans . . . White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II." *Id.* at 9.

49. HUGHES REPORT, *supra* note 4, at 1.

50. Property insurance is closely linked with mortgage insurance; lenders also require insurance on the mortgages they issue; the Federal Housing Authority has long been the largest provider of mortgage insurance, effectively setting the standards for the market. This is effectively a requirement also of the federal government because mortgage insurance requires property insurance as a condition of getting mortgages. *See* Gordon, *supra* note 10, at 190.

51. ABRAHAM, LIABILITY, *supra* note 4, at 177.

related to the home, anywhere in the world.[52] Liability insurance is important for many reasons. It provides a potential source of recovery for people injured by property owners' torts.[53] It protects the property of policyholders from being taken away by lawsuits and it allows for civil disputes to be resolved in the legal system because without it, tort cases are generally not filed.[54] Property insurance is an invisible yet essential part of communities and an irreplaceable part of individuals' wealth protection.

Auto insurance is similarly important, although for different reasons. Automobiles often were and are essential for getting to jobs, schools, healthcare appointments, and grocery stores.[55] Having auto insurance has long been a mandatory requirement for drivers to operate automobiles.[56] Automobiles were often welcomed by African Americans as a way of escaping the indignities of segregated public transportation starting in the 1940s.[57] Auto liability insurance has the two-sided purpose of providing a fund for persons injured by driver negligence and providing legal protection for the driver.[58] Automobiles and auto insurance are thus indispensable and inseparable.

B. Property and Auto Insurance, Race, and Racism

1. Property Insurance

Property insurance has been unevenly distributed by race; the story of property insurance in urban areas in the mid-twentieth century is in part a story of racism.[59] Many public and private forces excluded

---

52. Cara O'Neill, *Does My Homeowners' Insurance Cover Accidents that Occur Off My Property?*, https://www.nolo.com/legal-encyclopedia/does-my-homeowners-insurance-cover-accidents-that-occur-off-my-property.html [https://perma.cc/98PS-GNGU] (explaining that standard homeowners policies cover liability from off-property accidents).

53. Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action,* 12 CONN. INS. L. J. 1 (2005) [hereinafter Baker, *Liability Insurance as Tort Regulation*].

54. *Id.* at 4-5 (explaining that liability insurance is a de facto element of tort liability in most circumstances because without it tort lawsuits are not filed). *See generally,* ALEXANDRIA LAHAV, IN PRAISE OF LITIGATION (2017).

55. *See* ABRAHAM, LIABILITY *supra* note 4, at 69-74 (discussing the centrality of cars and car insurance in our society); Wriggins, *Markets, Mandates, and Risk, supra* note 5, at 301-04 (reviewing facts about car use and cases recognizing driving as a necessity).

56. The first auto insurance mandate was passed by Massachusetts in 1927. Wriggins, *Markets, Mandates, and Risk, supra* note 5 at 310.

57. CATHERINE BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT, 17-18 (1983).

58. JERRY & RICHMOND, *supra* note 12 at 919-22; Wriggins, *Mandates, Markets, and Risk, supra* note 5.

59. My focus here is on homeowners' insurance, but much of this discussion applies to commercial insurance as well.

African Americans from homeownership[60] including insurance companies and the federal government.[61] Recent attention has focused on the federal government's actions, but insurance companies' roles are important as well.[62]

Insurers refused to insure property in neighborhoods where African Americans lived years before the 1960s; this practice often was known as "redlining."[63] Where insurance was offered in these areas, it was priced higher than elsewhere.[64] As the Hughes Report found, "adequate insurance was unavailable in the urban core even before the riots [of the 1960s]."[65] This refusal to insure large parts of urban areas extended to reinsurance.[66] Reinsurance is insurance that insurance companies buy to protect themselves from claims that are greater than their assets.[67] Insurance companies were not able to obtain reinsurance for urban areas at all, or at reasonable prices, in the 1960s, either before or after the urban riots.[68] The financial structure of the industry conspired against insuring African American neighborhoods—reward

---

60. *See generally,* ROTHSTEIN, *supra* note 10.

61. *See generally,* Gordon, *supra* note 10; ROTHSTEIN, *supra* note 10.

62. *See generally,* ROTHSTEIN, *supra* note 10. There is a chicken-egg quality to urban property insurance issues. As the foreword to the Hughes Report noted, "[t]here is a close relationship between urban blight and insurance. Insuring property in decaying urban areas is difficult. Yet the failure to insure such properties only increases the blight. Good property that is not insured becomes deteriorating property." HUGHES REPORT, *supra* note 4 at iii. The Report further noted: "Some representatives of insurance companies have said that if the underlying problems of urban blight were corrected, insurance would be readily available. But if insurance were more readily available for property that is adequately maintained, the underlying problems of urban blight would be more readily corrected." *Id.* at 7-8.

63. The term 'redlining' was used in the private insurance industry in the 1960s. An underwriting guide quoted in the 1967 Hughes Report stated at page 6:

> "An underwriter should be aware of the following situations in his territory: 1. The blighted areas. 2. The redevelopment operations. 3. Peculiar weather conditions…. 4.The economic makeup of the areas. 5. The nature of the industries in the areas, etc. This knowledge can be gathered by drives through the area, by talking to and visiting agents, and by following local newspapers as to incidents of crimes and fires. A good way to keep this information available and up to date is *by the use of a red line* around the questionable areas…." *Id.* at 6.

See supra note 10 (referring to redlining in HOLC maps).

64. HUGHES REPORT, *supra* note 4, at 2, 27-8.

65. *See* HUGHES REPORT, *supra* note 4, at 5. For information on the urban riots of the mid-1960s and the Kerner Commission Report, see *id.* at 1. The Report further noted, "[w]e are dealing with an inner city insurance problem that is broad in scope and complicated in origin, and riots are only one aspect of it." *Id.* at 5. The Hughes Report noted that after the urban riots of 1967, some insurance companies added "riot exclusions" to policies so they would not have to cover riot damages. *Id.* at 31. The Hughes Report notes that "[r]iot losses, although widely publicized, have been a relatively small cause of catastrophic losses.*"* *Id.* at 37.

66. *Id.* at 37-38.

67. *Id.* at 35.

68. *Id.* at 39. The Hughes Report notes that "[r]iot losses, although widely publicized, have been a relatively small cause of catastrophic losses." *Id.* at 37.

ing structures of private insurance companies and informal steering practices which in turn encouraged brokers to not sell insurance in African American neighborhoods.[69]

The Hughes Report found that insurance company decisions to completely refuse to write policies in urban areas or to charge urban residents more were not actually based on data but rather on unsupported assumptions about costs and risks, noting that "[a]lthough insurance companies have catalogued a list of restrictions on underwriting urban core business, responses to the Panel's requests for information established that companies have virtually no separate statistical information on their experience in urban core areas."[70] Witnesses from the insurance industry admitted that they had assumed without data that core urban areas were more expensive to insure than other areas.[71] Race, ethnicity, and risk were intertwined in the insurance industry; 1950s insurance textbooks instructed underwriters on the need to determine applicants' ethnicity and race in determining their riskiness.[72] Yet, redlining did not reflect the actual riskiness of urban areas or the cost to insure properties in those areas accurately.[73]

Racial segregation was a key goal of these policies. In 1957, renowned historian John Hope Franklin[74] asked his life insurance agent in New York about the company's program to loan money to policyholders to help buy a home. The agent told him that the company would not give him a loan because giving a loan would mean that "he would have helped Negros 'jump' over the line into a 'white' neighborhood. His company's standing rule was never to directly facilitate such a jump."[75] This story illustrates a powerful and well-documented pattern of exclusion.[76] It happened to have been written down, but one can only imagine how many others were not memorialized.

---

69. *See* HUGHES REPORT, *supra* note 4, at 25-30. Discriminatory policies included compensation practices, pricing, and underwriting. For example, commissions for life insurance policies sold to African-Americans in New York were lower than for policies sold to whites. Mary L. Heen, *Ending Jim Crow Life Insurance Rates*, 4 NW. J. L. SOC. POL'Y 360, 390 (2009). New York banned race-based commissions in 1935; after this Metropolitan Life simply stopped soliciting business from African-Americans. Heen, *supra*, at 378 n.149, 380 n.159, 391 n.256.

70. HUGHES REPORT, *supra* note 4, at 32.

71. HUGHES REPORT, *supra* note 4, at 32. If the Report was written today, it would probably use different terminology such as implicit bias and structural racism.

72. Brian J. Glenn, *Post Modernism: The Basis of Insurance*, 6 RISK MGMT. & INS. REV. 131, 134 (2003).

73. *See* HUGHES REPORT, *supra* note 4, at 32.

74. John Hope Franklin was the author of acclaimed books, From Slavery to Freedom (1947), Reconstruction After the Civil War and others, taught at Cambridge, Howard, Duke, and Harvard Universities as well as Brooklyn College, and received the Presidential Medal of Freedom. Will Haygood, *Obituary: John Hope Franklin, 1915-2009*, WASH. POST (Mar. 26, 2009), [https://perma.cc/F9Y2-YFBN].

75. Heen, *supra* note 69, at 392.

76. *See, e.g.*, HUGHES REPORT, *supra* note 4, at 5-7; ROTHSTEIN, *supra* note 10, at 24-35.

The federal government played an active role. In the 1950s, homeownership expanded rapidly with the help of the federal government.[77] The GI bill provided low-cost mortgages to returning white GIs after World War II, while returning black GIs were excluded from the benefits.[78] The Federal Housing Authority, which insured mortgages for lenders in general, discriminated against African Americans in its decisions about providing mortgage insurance until John F. Kennedy ended the practice in 1962.[79] All these actions had negative consequences for homeownership and wealth building for racial minority urban residents. Government policy and private insurance companies worked in tandem to oppose African American homeownership.[80]

2. *Auto Insurance*

Complaints about racial discrimination in auto insurance access and pricing go back many decades, although the issues have received much less visibility and federal attention. The NAACP in the 1930s and 1940s received complaints about discrimination against African Americans with respect to auto insurance.[81] The NAACP did not file lawsuits against these practices, although they did collect information and urged state regulators to investigate; it is not clear whether state regulators actually did investigate.[82] Thurgood Marshall was denied auto insurance when he lived in Harlem in 1940 because, he was told, it was a "congested area."[83] He wrote that although the problem of insurance discrimination was getting worse, it was "practically impossible to work out a court case because the insurance is usually refused on some technical ground."[84] Complaints about treatment of African Americans by auto insurers surfaced repeatedly in New York.[85] In 1949, three Harlem auto insurance brokers explained at an insurance hearing that car owners in Harlem were discriminated against by being consistently turned down for policies with regular rates and were

---

77. *See* Gordon, *supra* note 10, at 188; *see, e.g.*, ROTHSTEIN, *supra* note 10, at 66.

78. *See* ROTHSTEIN, *supra* note 10, at 65, 70, 75.

79. Gordon, *supra* note 7, at 217. It is difficult to know precisely how these actions interacted but it is clear that both the federal government's role in mortgage insurance and other aspects of homeownership and the private insurers' decision regarding property insurance were mutually reinforcing and had negative consequences for African Americans and other racial minorities living in urban areas. According to the FHA website, "[m]ortgage insurance is a policy that protects lenders against losses that result from defaults on home mortgages." *FHA Requirements: Mortgage Insurance for 2021*, FED. HOUS. ADMIN., https://fha.com/fha_requirements_mortgage-insurance [https://perma.cc/3Y8Z-C5UN].

80. *See generally,* HUGHES REPORT, *supra* note 4.

81. The complaints extended to life insurance. Heen, *supra* note 69, at 391-93.

82. Heen, *supra* note 69, at 391.

83. *Id.*

84. *Id.* at 392.

85. More study would be necessary to know whether New York was an outlier or typical of insurance company practices.

only offered policies in the high risk (also known as 'assigned risk') plan, which would involve paying at least twenty-five percent more.[86] This was harmful to both the car owners and the brokers.[87] In 1950, New York legislators claimed that insurance companies discriminated against African American drivers by cancelling their policies and forcing them into the more expensive assigned risk plan.[88] In a hearing that year, a former assemblyman testified that he was denied an auto insurance policy specifically because he was African American,[89] but representatives of thirteen insurance companies denied that their actions were unfair. In harmony with insurance company defenses against discrimination claims used ever since,[90] they stated that their decisions for fire policies in Harlem and other "congested neighborhoods" were governed only by business considerations and careful attention to risks.[91] According to these representatives, "automobile liability...is accepted with similar caution and new [auto] policies are issued with some reluctance."[92]

In 1960, at another New York hearing, the business manager of a union representing sanitation workers stated that both inside and outside the union, African Americans "are in the Assigned Risk Plan not because they have been involved in accidents or have penalty points but because of the color of their skin and where they live."[93] It is not clear what, if anything, was done about these public complaints.

In the 1960s, complaints about auto insurance pricing escalated across the country and many small auto insurance companies became

86. A.J. McNaught, Letters to The Times, *Race Bias in Insurance: Discriminatory Practices Against Negroes by Underwriters Charged*, N.Y. TIMES, June 17, 1949, at 22. 'Assigned risk' plans are plans in each state according to which insurance companies have to cover a share of the 'high risk' motorists in the state. *See, e.g.*, Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 107 (1951) (*aff'g* Cal. State Auto. Ass'n Inter-Ins. Bureau v. Downey, 216 P.2d 882 (Cal. App. 1st Dist. 1950)); Wriggins, *Markets, Mandates & Risk, supra* note 5, at 313.

87. *8% Increase Seen in Auto Liability: Sharp Rise for Drivers Under 25 Urged at State Meeting on Rating Practices,* N.Y. TIMES, May 14, 1949, at 19.

88. *Democrats Charge Bias on Insurance: Warn at Albany That a State Fund May Be Needed to Give Protection to Negroes*, N.Y. TIMES, Feb. 2, 1950, 18.

89. *Bias on Insurance in Harlem Denied: Company Witnesses Declare Business Factors Guide Issuance of Policies*, N.Y. TIMES, Aug. 3. 1950, at 19.

90. *See infra* text and accompanying footnotes regarding how insurance company responses have stayed the same for decades.

91. *Bias on Insurance in Harlem Denied: Company Witnesses Declare Business Factors Guide Issuance of Policies,* N. Y. TIMES Aug. 3, 1950, at 19. The article also stated "Henry S. Moser, general attorney for the Allstate Insurance Company, said that the organization provided auto coverage of all types, and had a 'very substantial amount' in Harlem. However, the automobiles are inspected and their owners subjected to a check on accident, 'moral' and credit records." *Id.*

92. *Id.*

93. *Race Bias Charged in Auto Insurance,* N.Y. TIMES, April 22, 1960, at 60.

insolvent,[94] leading Congress to hold hearings about the auto insurance industry and consider asserting more regulatory authority.[95] Two Congressional committees held hearings about auto insurance in the late 1960s, specifically the Commerce Committee and the Committee on Antitrust and Monopoly. The Chairman of the Senate Commerce Committee in 1967 stated "[s]harp underwriting practices… including arbitrary cancellations and failures to renew, geographical, racial and economic blackouts in coverage, and discriminatory, escalating premium rates equally demand appropriate reforms."[96] Witnesses told the Commerce Committee of explicitly racist cancellations.[97] The Committee on Antitrust and Monopoly in 1968 heard testimony about pricing and cancellations for rural Mexican-Americans in California as well as urban African-Americans in Chicago.[98] President Johnson in his 1968 State of the Union address stated that "[a]rbitrary coverage and policy cancellations are the cause of frequent complaint – particularly from the elderly, the young, the serviceman, and the Negro and Mexican-American."[99] But in the end, neither the President nor Congress took action, apparently expecting the industry to make necessary changes.[100]

C. The Lack of Legal Remedies

Legal remedies were not clear or effective; practices that now might be seen as invidious and illegally discriminatory seem to have been considered legal, or at least regulatory action was not taken against these practices. Even if the U.S. Constitution forbade these practices by the government, private companies like insurance companies were not bound by the Constitution. One provision of the Civil Rights Act of

94. S. Res. 233, 90th Cong. (1968); H.R.J.Res. 958, 90th Cong. (1967).

95. Sal Nuccio, *Senate Hearings Worry Insurers,* N.Y. TIMES, April 4, 1965, at F1.

96. John D. Morris, *Car Insurance: The Buyer Takes the Risk*, quoting Warren Magnuson, Senate Commerce Committee Chair, N.Y. TIMES, July 16, 1967, at 133.

97. *Witness Tells Senate Committee a Nickname Can Be a Bar to Auto Insurance*, N.Y. TIMES, 27 (Mar. 14, 1968). "If you are a Negro longshoreman, have a nickname and live in the state of Washington, you may have your automobile insurance cancelled by a nonexistent executive named Mr. T Case, Congress was told today." *Id.*

98. The Directing Attorney of the Santa Rosa Office of California Legal Assistance testified in detail about "the basic unavailability of automobile insurance to poor persons at low cost on a regular basis. Second is the almost absolute control and often arbitrary use of such control to virtually eliminate many poor persons and members of minority groups from adequate insurance coverage through cancellations and refusals to renew policies as well as initial refusals by underwriters." Hearing, Committee on Antitrust and Monopoly, 90th Cong., 2d Sess., at 8304, July 19, 1968 (Testimony of Robert Y. Bell). His full statement is at pages 8314-8320.

99. Lyndon B. Johnson, President of the United States, *Special Message to theCongress: "To Protect the Consumer Interest* (Feb. 6, 1968) https://www.presidency.ucsb.edu/documents/special-message-the-congress-protect-the-consumer-interest [https://perma.cc/N3LD-RZB2].

100. Report of the Committee on the Judiciary of the U.S. Senate made by its Committee on Antitrust and Monopoly pursuant to S. Res. 233, 90th Cong. 2d. Session at 6-7 (1969).

1866, 42 U.S.C § 1981, protected equal rights to contract and, by its terms, could have applied to insurance companies as it does not have a requirement that the discrimination be by the government.[101] Still, no cases have applied the Act against property or auto insurance discrimination on the basis of race.[102] Insurance is primarily regulated by state law, as noted earlier.[103] State insurance commissioners generally did not take action against property insurance redlining or other discriminatory actions by insurance companies.[104] It is not clear exactly what legal authority they would have had to challenge these practices. The 1968 Hughes Report stated:

> [i]t is not clear whether state regulators have adequate authority to control restrictive underwriting and to prohibit red-lining, blackout maps, keep-out areas, and other area underwriting practices. A commissioner may attempt to act under laws relating to "unfair or deceptive practices" and "methods and practices" not in the interests of the policyholders. But the present statutory framework may be inadequate to provide protection against practices that unfairly deny a policyholder needed insurance.[105]

The observation that the state regulatory framework was inadequate naturally leads to consideration of what options there were under federal law.

It was not until 1968 that the federal Civil Rights Act passed including the Fair Housing Act (FHA) outlawing private discrimination in housing.[106] The FHA did not specifically mention insurance and insurance companies vigorously fought the idea that it outlawed intentional redlining and other forms of race discrimination in insurance.[107]

---

101. 42 U.S.C. § 1981 (2018).

102. Avraham, Logue & Schwarcz, *supra* note 22, at 242. One court has held that section 1981 does not apply to life insurance companies charging higher premiums to African-American insurers than to others. Guidry v. Pellerin Life Ins. Co., 364 F. Supp. 2d 593, 599 (2005).

103. HUGHES REPORT, *supra* note 4, at 51; McCarran-Ferguson Act, 15 U.S.C. § 1011-1015.

104. HUGHES REPORT, *supra* note 4, at 50.

105. HUGHES REPORT, *supra* note 4, at 50. The Report also noted "[a]lthough recent statutory enactments and contractual provisions have restrained individual automobile cancellations, no legislative restraints exist for property coverages." HUGHES REPORT, *supra* note 4, at 50. Mary Heen's outstanding article, *Ending Jim Crow Insurance Rates*, states that some states in the 1880s began passing civil rights statutes to outlaw race discrimination such as race-based rates and premiums in life insurance. Heen, *supra* note 69, at 363. Insurance companies generally responded by withdrawing business from those states or instructing their agents not to solicit business from African Americans. Heen, *supra* note 69, at 363, 391.

106. The Civil Rights Act of 1968 included the Fair Housing Act, 42 U.S.C. § 3601-3614. The Fair Housing Act did not mention insurance, and it was years before it was interpreted to reach insurance. See *infra* Part II.B.2.b.i.

107. *See, e.g.*, Dunn v. Midwestern Indemnity, 472 F. Supp. 1106, 1108 (S.D. Ohio 1979).

Decades passed before insurance redlining was recognized as a violation.[108] Debates continue about the FHA's meaning and scope.[109]

D. State and Local Public Policy Measures to Expand Urban Insurance Coverage.

States and cities developed programs to help fix the property insurance problems in inner cities well before the 1968 Hughes Report. As early as 1960, Boston established the first of such plans to improve access to insurance in Roxbury, a large Boston neighborhood which the insurance industry considered "blighted[.]"[110] The industry considered every single Roxbury residential property to be substandard and refused to write insurance there.[111] Participation was voluntary but the Massachusetts Insurance Department was very involved in urging companies to participate and monitoring their participation. Through a free property inspection program and the Massachusetts Insurance Department's pressure on companies, insurers were more willing to issue policies in Roxbury by 1967.[112] By December 1, 1967, thirteen states had plans of various types.[113] Auto insurance access and pricing issues have received less sustained policy attention.[114]

---

108. *See infra* Part II.B.2.b.ii.

109. *Id.*

110. HUGHES REPORT, *supra* note 4, at 56.

111. The Hughes Report stated "By 1960, most, if not all, standard rate companies had already ceased providing insurance protection for residential property[.]" *Id.* The Report noted that the critical reason for the inadequate insurance was insurance companies not distinguishing between "good and bad risks." *Id.* at 56-7. The report also noted that "[I]t may also have been that some agents and brokers preferred to receive the higher commissions available from writing policies at rates in excess of standard." *Id.* at 57. Clearly, competition was not present there. The Boston Plan responded to the paucity of fire insurance in Roxbury, even for properties that were well-maintained as to fire hazards. To make sure that well-maintained properties could be insured and to give property owners the chance to repair hazards, the Boston Plan required individual inspections before insurance denials and provided those inspections at low prices or for free. Demerjian, Flanagan, & Jensen, *supra* note 13, at 174. The Massachusetts Insurance Commissioner, which had power over licenses--insurance companies have to have permission from state insurance commissioners to write coverage in the states-- applied pressure on brokers to participate (although the specific statutory authority for this may not have been crystal clear) and by 1967 insurers were more were more willing to issue fire insurance in Roxbury; prices of fire polices were greatly reduced and the program was extended to other areas. However, in 1968 Roxbury still had a high rate of uninsured and underinsured properties for reasons that are not clear. HUGHES REPORT, *supra* note 4, at 85.

112. HUGHES REPORT, *supra* note 4, at 57-9.

113. Demerjian, Flanagan, & Jenson, *supra* note 13, at 174; HUGHES REPORT, *supra* note 4, at 56-72 (reviewing different plans).

114. More study of this would be useful, but each state had an assigned risk plan and, as noted above, African Americans were often assigned to their state's plan which required

E. Congress' Involvement

1. The National Advisory Panel on Insurance in Riot-Affected Areas and Its Recommendations

The federal government did nothing about the problems of property insurance in urban areas until after the riots of the mid-1960s.[115] President Johnson's National Advisory Commission on Civil Disorders (the Kerner Commission)[116] decided shortly after its formation in January 1967 that a specialized group could best deal with the insurance issues of the "urban core" and in August 1967, the Commission appointed a National Advisory Panel on Insurance in Riot-Affected Areas.[117] In fall 1967, this group worked to stabilize the urban insurance market, researched state insurance remedies, floated ideas, held hearings, and ultimately issued a report, *Meeting the Insurance Crisis of Our Cities,* in January 1968.[118] The Hughes Report began by stating:

> [t]here is a serious lack of property insurance in the core areas of our nation's cities. For a number of years, many urban residents and businessmen have been unable to purchase the insurance protection they need. Now, riots and the threat of riots are aggravating the problem to an intolerable degree."[119]

Change was necessary, but the report explicitly rejected the idea that the federal government should underwrite the risks, noting that "[w]e believe that so marked a departure from the free enterprise insurance system is unjustified at this time."[120] It stated that "with limited federal assistance" state insurance departments and the insurance industry could successfully tackle the challenge of "critical insurance needs of our center cities."[121] The overarching approach of the report was that a cooperative effort of the insurance industry, local, state, and federal

---

them to pay more. *See supra* Part I.B.2. Whether states developed policy interventions parallel to the state and local property insurance plans requires more investigation. Cal. State Auto Ass'n Inter-Ins. Bureau v. Maloney, 216 P.2d 882 (Cal. App. 1950), *aff'd* 341 U.S. 105, 107 (1945) (upholding California's assigned risk plan as constitutional). The lower court's opinion mentioned the difficulties African Americans and Mexican Americans had in obtaining insurance coverage. 216 P.2d at 885. The fact that each state has long had an assigned risk plan reflects the importance of cars, private transportation, and car insurance in our society. KENNETH ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 219 (1986).

115. *See supra* note 47, (regarding urban riots and the Kerner commission). The President's Commission on Law Enforcement and the Administration of Justice in 1966 conducted a study called "Insurance Problems of Business and Organizations in High Crime Areas" which did not focus on the problems of homeowners. HUGHES REPORT *supra* note 4, at 149.

116. National Advisory Commission on Civil Disorders, HUGHES REPORT *supra* note 4, at 7.

117. HUGHES REPORT, *supra* note 4, at 7.

118. HUGHES REPORT, *supra* note 4, at ii, iii.

119. *Id.* at 1.

120. *Id.* at 8.

121. *Id.*

governments, and the residents and businesspeople of the urban core, working together, could meet the insurance crisis.[122] The report made specific recommendations for legislation; Congress adopted them.

2. *Federal Legislation on Property Insurance*

"[T]he most significant insurance legislation adopted in [the twentieth] century" was how an influential industry newsletter at the time characterized the new Urban Property Protection and Reinsurance Act of 1968 ("UPPRA") passed by Congress based on the Hughes Report's recommendations.[123] The House report stated that the law "authorize[s] a new program of Federal reinsurance for private insurance companies to encourage them to write property insurance in areas threatened by riots and civil commotion."[124] The law was an exercise in cooperative federalism, aiming to involve states and private companies with limited– but important– federal assistance. The UPPRA encouraged states to pass laws authorizing certain insurance plans known as Fair Access to Insurance Requirements ("FAIR") plans, which private companies would write covering property insurance in urban areas, and offered federal riot reinsurance for sale to companies who participated in the plans.[125] The states could vary the contents of policies under FAIR plans if the policies met basic federal requirements as prerequisites for the federal government providing federal reinsurance.[126] The law established the Federal Insurance Administration to administer the program and write reinsurance.[127] In 1970, Congress amended the law to allow the Secretary of HUD to offer federal insurance against burglary and theft.[128]

---

122. *See generally, id.*

123. Denenberg, *The Federal Reinsurance Program,* BEST'S FINANCIAL NEWS, 28 PROP. & LIABILITY EDITION. (OCT. 1968). Title X of the Housing and Urban Development Act of 1968, Pub. L. No. 90-338 §§ 2-1722, 82 Stat. 476 (Aug. 1, 1968) (codified in scattered sections). The UPPRA was a small part of the multifaceted Housing and Urban Development ("HUD") Act of 1968.

124. House Report HR 90-1585 at 3-4.

125. Demerjian, Flanagan, & Jensen, *supra* note 13, at 177.

126. *See supra* note 32 (defining involuntary markets); Demerjian Flanagan, & Jensen, *supra* note 13, at 177. Most plans were "involuntary"; insurance companies generally could deny coverage only for one of three reasons specified by the UPPRA. These were 1. Physical condition, 2. Extended vacancy or improper storage of flammable materials, and 3. "[O]ther specific characteristics of ownership, condition, occupancy, or maintenance that are in violation of public policy and that result in substantially increased exposure to loss." *Id.*

127. Demerjian, Flanagan, & Jensen, *supra* note 13, at 177; Hughes Report, *supra* note 4, at 100.

128. Housing and Urban Development Act of 1970, Pub. L. No. 91-609 § 602(b),(d), 84 Stat. 1770, 1788-9 (codified at 12 U.S.C. § 1749bbb-2(a)(2),-10a(b)(1994). As noted above, the federal government did not take action regarding auto insurance access or pricing following its 1968 hearings.

After the UPPRA passed, 28 states established FAIR Plans between 1968 and 1970.[129] The plans provided basic property insurance in the areas they covered and later expanded to include liability insurance.[130] As the 1970s and early 1980s progressed, private insurers and reinsurers entered the urban property insurance market.[131] In 1985, the reinsurance and theft programs were discontinued as unnecessary.[132] Riots are now covered under standard homeowners' policies.[133] The market for property insurance in cities currently has many competing companies. This is a success, but a partial one, as the next section discusses.

II. ASSESSING THE 1968 FEDERAL INSURANCE REFORMS AND INSURANCE ANTIDISCRIMINATION LAWS: ONGOING ISSUES, POSITIVE IMPACTS, SHIFT FROM EXCLUSION TO FACIALLY NEUTRAL FACTORS RESULTING IN CONTINUING PRICING AND ACCESS ISSUES, INADEQUATE REMEDIES, INSUFFICIENT DATA

This section assesses the property insurance reforms of the 1960s, highlights the shift from blatant redlining to other more subtle and opaque practices, and outlines how current insurance antidiscrimination law is ineffective at dealing with such practices. The FAIR Plans helped create an urban property insurance market at very little cost to either the government or private companies. However, not only did redlining continue long after the UPPRA, but less direct insurance practices such as use of credit scores and artificial intelligence (AI) resulted in and still result in residents of urban areas being charged more for property and auto insurance for reasons that might or might not be related to claims history and risk. The federal government's limited approach to discriminatory urban property practices contrasts strongly with its generous approach to flood insurance. Current insur-

129. Demerjian, Flanagan, & Jensen, *supra* note 13, at 175. In 1987 and 1988, Mississippi and Arkansas respectively passed FAIR plans focused on rural insurance availability. *Id.* Seven states passed beach plans between 1969 and 1987. *Id.*

130. Different states' statutes established distinct plans. Some states required a pooling arrangement, while some required a joint association tasked with helping property owners and tenants obtain property insurance. All required property insurers to participate in the plan as a condition of selling property insurance in the state. Alan S. Kaplinsky, *Insurance in Urban Core Areas: An Analysis of Recent Statutory Solutions*, 10 B.C. INDUS. & COM. L. REV. 650, 667-8 (1969). Thus, they established an involuntary market. *See supra note* 32 (defining involuntary market). The basic property coverage initially offered was that provided in standard fire policies and included fire, lightning, windstorm, hail, explosion, riot, civil commotion, and other risks. Demerjian, Flanagan, & Jensen, *supra* note 13, at 177. They expanded later to be homeowners' policies, including replacement cost and liability insurance. *Id.* at 187.

131. Demerjian, Flanagan, & Jensen, *supra* note 13, at 189.

132. 12 U.S.C. § 1749bbb(b) (1994); Webel, *supra* note 13.

133. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-179, HOMEOWNERS INSURANCE: MULTIPLE CHALLENGES MAKE EXPANDING PRIVATE COVERAGE DIFFICULT 9 (2014).

ance antidiscrimination laws (state and federal) unfortunately are ineffective in tackling issues of insurance access and fairness for racial minorities and low-income people.

A. Federal Urban Property Insurance Reforms: Successes and Limitations

1. The UPPRA Led to Insurance Companies Entering Urban Markets

The urban insurance market eventually came to life in the 1970s and 1980s; this success likely stems in large part from the UPPRA, the FAIR plans it authorized, and the federal reinsurance that was part of the bargain. To go from a situation where property insurance was absent to a competitive market was a very important, positive contribution. During the early years of FAIR Plans, in some states they wrote 10% of property insurance—all concentrated in urban areas.[134] Thus, they were the primary insurer in urban areas. This percentage went down as private companies entered the urban market. By the 1990s, the average share of the market nationwide was below 2%.[135] FAIR plans were often later extended to cover the whole state and also sometimes changed to focus on insurance availability for rural and coastal areas.[136] The overall trend in many states has been reducing the numbers of FAIR plan policyholders.[137] As one of the few articles on this subject states, "FAIR plans have been a small but very important part of the insurance marketplace."[138] Without FAIR plans, it seems fair to say that the urban insurance situation would have stayed in crisis indefinitely.

2. FAIR Plan Insurance Extended Liability Insurance to Areas Where It Had Been Absent

FAIR Plan insurance, like homeowners' insurance generally, eventually included liability insurance.[139] Even though it is not the most

---

134. Demerjian, Flanagan, & Jensen, *supra* note 13, at 189. In the early years, FAIR plans were only urban plans, therefore during these early years the FAIR plan insurance necessarily was concentrated in urban areas. *Id.*

135. *Id.* at 189.

136. *Id.* at 187. As of 2001, the following states had beach plans: Florida, Louisiana, Mississippi, South Carolina, and Texas. *Id.* The impacts of beach and windstorm FAIR plans are beyond the scope of this article.

137. Demerjian, Flanagan, & Jensen, *supra* note 13, at 189.

138. *Id.* As noted earlier, the federal reinsurance program was discontinued in the 1980s as no longer needed. 12 U.S.C. § 1749bbb(4)(1994), Webel, *supra* note 13.

139. As noted above, initially FAIR plan insurance did not have a liability component and just covered risks that a standard fire policy would cover but was expanded to include some liability insurance like other homeowners' policies. Demerjian, Flanagan, & Jensen, *supra* note 13, at 177, 187. *See* Kaplinsky, *supra* note 129. *See generally,* ABRAHAM, LIABILITY *supra* note 4 at 177.

obviously important aspect of property insurance, the liability component of property insurance is consequential. Without liability insurance, victims of torts are extremely unlikely to receive any compensation whatsoever.[140] This seems particularly likely in the urban areas that FAIR plans first served. The liability insurance that is part of the homeowners' package protects policyholders from tort suits anywhere in the world, even if not connected with the house itself.[141] Liability insurance, like property insurance, is a significant source of security. [142] It provides a potential source of compensation, preventing an injured person from going bankrupt because of medical expenses or ability to work due to injuries.[143] Additionally, it protects homeowners from their biggest asset being taken away in a lawsuit, encouraging homeowners to invest in the property.[144] Renters insurance policies have a liability component but are held by only a minority of renters, making it unlikely that tort losses would be compensated unless a potential defendant was a homeowner with insurance (or a family member of a homeowner with insurance).[145] Civil litigation has many positive aspects and its absence has important negative consequences.[146]

3. The UPPRA Created a Limited, Targeted Role for the Federal Government and Cost the Federal Government and Industry Very Little

The UPPRA aimed to encourage private insurers to underwrite risks they had abandoned by building on state and local plans and ideas. It fostered states choosing many features of their plans while

140. *See generally,* Baker, *supra* note 53.

141. O'Neill, *supra* note 52.

142. *See generally,* ABRAHAM, LIABILITY, *supra* note 4 at 176, Jennifer Wriggins, *Teaching Torts with a focus on Race and Racism*, MAINE LAW (Feb. 19, 2020), https://mainelaw.maine.edu/faculty/teaching-torts-with-a-focus-on-race-and-racism/ (discussing insurance and liability aspects of torts classic Garrett v. Dailey, 279 P.2d 1091 (1955)).

143. Tom Baker and Kyle Logue note, "for claims against all but the wealthiest individuals and organizations, liability insurance is a de facto element of tort liability. . . liability exclusions become de facto limits on tort liability." BAKER & LOGUE, *supra* note 20, at 696; Wriggins, *Teaching Torts with a focus on Race and Racism*, blog post Feb. 2020. https://mainelaw.maine.edu/faculty/teaching-torts-with-a-focus-on-race-and-racism [https://perma.cc/LP7P-VML3], *supra* note 141.

144. ABRAHAM, LIABILITY, *supra* note 4, at 176.

145. *See*, The Editors, *Only 41% of Renters Carry Renters Insurance,* HOUSING J., (Aug. 15, 2018) (41% of renters carry renters insurance compared with 95% of homeowners).

146. *See generally*, LAHAV, *supra* note 54.

creating a federal 'floor' for minimal coverage, somewhat like the 'Essential Health Benefits' aspect of the Affordable Care Act.[147] It responded to a need for reinsurance that states and localities were not equipped to fill and supplied it at a low cost to those companies that wanted to purchase it. This approach meshed with the traditional role of states in regulating insurance.[148] The UPPRA's intervention strategy allowed for a limited, targeted role for the federal government (unlike many federal interventions) and did not mire the federal government in decades of expanding costs, wasteful subsidies, or perverse incentives.[149]

Similarly, the federal reinsurance cost also was minimal--losses amounted to only 26 million dollars.[150] A 2001 study summarizing the first forty years of FAIR plans estimated that $1.5 billion was the total underwriting loss for all FAIR plans.[151] The authors noted that "$1.5 billion… is modest when compared to industry losses from Hurricane Andrew ($15.5 billion, 1992) and the Northridge earthquake ($12.5 billion, 1994), as well as to other involuntary markets."[152] The study's authors stated that "when viewed from the perspective of 29 states over 30 years and spread out over an average of 400 companies, the cost is nominal."[153] FAIR plans and the UPPRA were an incredible bargain for taxpayers and insurance companies. The minimal cost and finite federal involvement show that carefully tailored government investment coupled with industry commitment can lead to positive, albeit limited, changes.

4. *Criticisms of FAIR Plans*

147. 42 U.S.C. § 18022, Essential Health Benefits Requirements (listing requirements that approved plans under the Affordable Care Act had to contain).

148. The McCarran-Ferguson Act, 15 U.S.C. § 1011-1013, passed in 1945, provided that state regulation superseded federal law when states exercised their power over insurance regulation. *See generally,* JERRY & RICHMOND, *supra* note 12, at § 21[b].

149. See *infra* Part I.A.5.

150. Demerjian et al., *supra* note 13, at 183 FN 9 (losses paid amounted to 26 million dollars).

151. Demerjian et al., *supra* note 13, at 185. This is from 1968 to 2001.

152. *Id.*

153. *Id.* This minimal cost is important and contradicts industry claims about the costliness of FAIR plans. At a 1993 hearing on a bill that would have required insurance companies to disclose their underwriting criteria, the representative of the Alliance of American Insurers stated "FAIR plans lose money" as if the amount of money they lose is significant. But the actual amount lost was minimal. *Hearing, Insurance Redlining: Fact or Fiction? before Subcommittee on Consumer Credit and Insurance of the Committee on Banking, Finance and Urban Affairs, House of Representatives* 103d Cong. 1st Session 2-24-93, at 177 (testimony of David Farmer) (hereinafter Redlining: Fact or Fiction?).

FAIR plans were criticized on several grounds. One was lax underwriting, particularly in the early years.[154] Another critique was "overinsurance."[155] The concern was that the FAIR plans had become the insurer for many risks which belonged in the voluntary market.[156] This is always a risk with an involuntary market.[157] The risk is that customers who would otherwise buy insurance on the voluntary, private, competitive market will buy insurance from the involuntary market instead and, thus, weaken the voluntary market. [158] But this criticism rings very hollow, since FAIR plans were introduced exactly because the voluntary market was not functioning at all—that is, insurance companies were not willing to sell property insurance coverage in large areas of cities.[159]

An additional and related criticism was that FAIR plan policies did not provide equivalent policies to those found in the voluntary market.[160] However, the idea behind FAIR plans was to have risks assessed individually and provide a basic policy where there had been none. If FAIR plans offered policies equivalent to those that the private market might supply, at lower prices, the private market would not develop, as explained above. If the product offered on the involuntary market is cheaper and better than the private market can offer, then customers will flock to the involuntary market, creating the opposite result to

154. Demerjian, Flanagan, & Jensen, *supra* note 13, at 183, 185. Although the idea of FAIR plans was that there should be individual inspections, assessment of risks, and opportunity for owners to fix up dangerous conditions in their properties, some policies were written on unduly risky properties.

155. The Federal Insurance Association (FIA) leveled this criticism in 1974. Demerjian, Flanagan, & Jensen, *supra* note 13, at 185.

156. *Id.*

157. *See supra* note 32 (defining involuntary markets).

158. *See* National Association of Insurance Commissioners (NAIC), NAIC Insurance Availability and Affordability Task Force Final Report, 38-39 (Jan. 1998). This has happened in Joint Underwriting Association plans for car insurance. *See, e.g.,* State Farm Mutual Auto Ins. Co. v. New Jersey, 590 A.2d 191 (N.J. 1991).

159. Recall that the private insurance market considered *every single property* in Roxbury, Massachusetts to be blighted and refused to insure any property in that area before the Boston Plan tried to remedy the situation. HUGHES REPORT, *supra* note 4, at 156. Other criticisms included that the plans collected inadequate statistics, so it was impossible to assess their operations, that they were inefficient and poorly managed, and that they tended to encourage arson for profit schemes in the 1970s. *See* Joanne Dwyer, *FAIR Plans: History, Holtzman and the Arson-for-Profit Hazard,* 7 FORDHAM URB. L. J. 617, 622-3, 626 (1978). Reforms were made to deal with these critiques. Demerjian, Flanagan & Jensen, *supra* note 13 at 185. The causes of the urban fires and arson in the 1970s have received scholarly attention. *See, e.g.,* JOE FLOOD, THE FIRES: HOW A COMPUTER FORMULA, BIG IDEA, AND THE BEST OF INTENTIONS BURNED DOWN NEW YORK CITY AND DETERMINED THE FUTURE OF CITIES (2010); Dwyer, *supra.*

160. Demerjian, Flanagan, & Jensen, *supra* note 13, at 185.

what was sought.[161] While this feature of more limited, inferior coverage[162] is an important part of the involuntary market, from the perspective of the homeowners and policyholders who had to buy the coverage, this was far from ideal and sometimes stigmatizing.[163] Limited coverage did not always protect the properties it insured fully and also provided limited protection from tort suits, which are both significant negatives. However, even limited FAIR plan coverage was preferable to none, and FAIR plan coverage was followed by a competitive insurance market in urban areas.

5. The Contrast with the Federal Response to Flood Insurance

In the same 1968 session that it passed the UPPRA, Congress also took action regarding another important insurance access issue– flood insurance.[164] Private insurance had retreated from both urban areas and flood-prone areas (mostly near rivers at that time), creating huge holes in owners' insurance coverage.[165] Urban and rural interests both wanted insurance reform. The contrast between Congress' actions regarding insurance reform in the two contexts could hardly be starker. For urban insurance access issues, Congress passed a targeted remedy– affordable federal reinsurance– that encouraged insurance companies to enter the market in cities, fostered by state-by-state variation, and built on existing models. With the National Flood Insurance Program, the federal government agreed to directly underwrite a risk that the private market had run from. There were no state models and no good maps on which to base risk estimates. While experts warned that there was not enough knowledge of the risk for anyone to responsibly underwrite it, the administrator of the program went full speed ahead.[166] Congress knew the flood program would run deficits and designed it to run deficits in years with large damaging floods. Congress

---

161. *See supra* note 158 (regarding State Farm v. NJ).

162. Demerjian, Flanagan, & Jensen, supra note 13, at 185. Liability insurance is perhaps a good example. FAIR plan coverage initially offered no liability coverage, but eventually became homeowner policies covering liability, albeit in limited amounts. *Id.* With liability coverage initially lacking and then limited, tort claims where damages were large, such as serious lead poisoning claims, would be undercompensated. Although in theory a plaintiff could obtain the defendant's property to satisfy a tort judgment if the insurance was inadequate, in reality this has happened very rarely. *See* Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law* 35 LAW & SOC. REV. 275 (2001). Still, some liability insurance is better than no liability insurance from the perspective of protecting the property owner, supporting the stability of the neighborhood, and tort victim compensation.

163. Redlining: Fact or Fiction, *supra* note 153, at 7, 10 (testimony of Lisa Price, Fair Housing Director, City of Toledo).

164. Title XI of the HUD Act of 1968.

165. Adam F. Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Ins.,* 26 MISS. COL. L. REV. 3 at 14.

166. James M. Wright, *The Nation's Response to Flood Disasters: A Historical Account*, ASS'N OF STATE FLOODPLAIN MANAGERS (Wendy L. Hessler, ed., 2000) at 33-34.

showed solicitude for owners of older homes by giving them huge subsidies from having to pay risk-based rates– including owners of coastal second homes– which had the effect of discouraging replacement of old flood-prone properties.[167] The subsidies lasted for decades and many still persist.[168] Moreover, the program still charges below-market rates, even on properties without explicit subsidies.[169] Although the purported intent of the program was to encourage private insurance companies to enter the market, it has not had that effect for many reasons, including that the government basically volunteered to insure a risk that the private market had deemed uninsurable. The policies under both programs were basic policies, limited in amount. The flood program has borrowed $36.5 billion from the Treasury Department since 2005.[170] The federal flood program was and is in many ways a huge handout to property owners of flood-prone property, regardless of its intent. By contrast, the UPPRA was not a handout at all to urban property owners. From the perspective of insurance regulation that favors limited market intervention and has an overarching concern for the distortions and unintended consequences that market intervention can cause,[171] the UPPRA was a success, and the flood program was a failure.

Both sets of insurance issues are complex, and more research on the two programs may be valuable in understanding the differences between them, but the differences between them are troubling. A plausible interpretation of the differences in the programs is that the flood program was benefiting mostly whites while the UPPRA was seen as benefiting mostly racial minorities, so Congress was less generous with the urban insurance program than the rural insurance program. Another interpretation is that the flood program was dealing with a huge, long-term correlated risk that insurance companies could not handle while the risk of riots was a short-term risk which was smaller and less correlated than the flood risk. Still, it is puzzling why Congress was so much more generous and proactive in flood-prone areas than in cities. It is also puzzling that our system (private insurance and government) insists in some contexts, like urban auto and property insurance, that rates should be based solely on risk, but when it comes to flood insurance, has no problem with all taxpayers picking up

---

167. Howard Kunreuther & Erwann O. Michel-Kerjan, *At War With the Weather: Managing Large-Scale Risks in a New Era of Catastrophe*, 111-2 (2011); Jennifer Wriggins, *Flood Money: The Challenge of U.S. Flood Insurance Reform in a Warming World,* 119 PENN. ST. L. REV. 361, 378 (2014).

168. *See* GAO Report 20-508, National Flood Insurance Program, *Fiscal Exposure Persists Despite Property Acquisitions,* 30-36 (June 25, 2020).

169. *Id.*

170. *Id.*

171. *See, e.g.,* KLEIN, *supra* note 32.

some of the insurance cost through government-subsidized flood insurance. There is no acceptance of the idea that some of the cost of living in an urban area (if it is more risky) should be borne by those living in a less risky area. This contrast is hidden in plain sight, accepted because of its invisibility. Examining it, facing it, and doing something to change it is one of the tasks for insurance companies and lawmakers in this era of consciousness of structural racism.

B. Broader and Ongoing Concerns About Urban Property and Auto Insurance

1. After the UPPRA: Ongoing Property and Auto Insurance Pricing and Access Issues, Increasing Use of Facially Neutral Factors, AI, and Machine Learning for Pricing and Underwriting

The UPPRA did not end insurance redlining. Explicit redlining by insurance companies persisted for many years after the Act's passage until at least 1993, alongside insurance companies' entry into the urban markets.[172] The effects of redlining persisted for decades in wealth disparities and climate disparities, to name just two impacts.[173]

However, in recent decades, insurance companies no longer blatantly refuse to insure property and automobiles in urban areas. The

172. Clear examples of explicit insurance redlining can be found at least until 1993. In 1978, for example, the agency for Housing and Urban Development found that redlining practices persisted and denied many urban property owners' access to the voluntary property and fire insurance market. Alfred E. Clark, *HUD Says Insurers Redlining in Urban Areas,* N.Y. TIMES at 47 (June 4, 1978) (citing HUD Report, Insurance Crisis in Urban America). It found that since many urban property owners did not have access to a voluntary market, "many decent risks are treated as second class consumers who must seek insurance protection under the Fair Access to Insurance Requirements, or so-called FAIR plan, or in the surplus lines market where they pay [more] for less coverage than their suburban counterparts." *Id.* Many claimed insurance companies were redlining by zip code, which has obvious discriminatory racial dimensions given housing segregation. *Id.* In 1993, the California Insurance Commissioner displayed a map of San Francisco that an agent of a significant insurance company had given his agent, showing minority and low-income areas blocked off with a yellow marker where the agent was not supposed to write policies at a Congressional hearing, Testimony of Commissioner Garamundi at 7, 10. Redlining: Fact or Fiction, *supra* note 153. This is not intended as a comprehensive list.

173. About wealth disparities, *see e.g.,* Michelle Singletary, *Being Black Lowers the Value of My Home: The Legacy of Redlining,* WASHINGTON POST (October 23, 2020); ROTHSTEIN, *supra* note 10, 182-6; Gordon, *supra* note 10 at 189. About climate, *see, e.g.,* Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to IntraUrban Health: A Study of 108 U.S. Urban Areas*, 8 CLIMATE 1 (2020); Bev Wilson, *Urban Health Management and the Legacy of Redlining*, 86 J. OF THE AMER. PLANNING ASSOC at 44 (2020). These studies discuss how higher temperatures are linked with redlined areas of the FHA's HOLC maps. The insurance industry created its own redlining maps. *See* HUGHES REPORT at 55. It seems likely that the insurance industry's redlined areas overlapped or matched the redlined areas of other maps. *See generally* Rethinking Reparations: Redlining, Housing Discrimination, and Climate Change, unpublished paper by Maye Emlein, on file with the author.

problems now are much harder to see and assess. It is not that insurance on homes or cars is not available in urban areas, but that insurance continues to be more expensive in ways that may or may not be justified by insurers' claim experiences.[174] Data that would allow thorough analysis of pricing and underwriting are not available, but studies of the issues are troubling.[175]

A 2018 Massachusetts study of auto insurance finds prices much higher for drivers based in minority neighborhoods.[176] Strikingly,

> [i]n the lowest income communities, experienced drivers with excellent driving records (no recent history of at-fault accidents or violations) paid higher average liability premiums than experienced drivers in the most affluent communities *who had a recent history of at-fault accidents and/or violations* and who purchased, on average, significantly more coverage.[177]

A 2017 study by ProPublica and Consumer Reports of auto rates in four states found that some insurers charged customers in minority neighborhoods up to 30% more than different areas with similar accident costs.[178] A Consumer Federation of America (CFA) Study found that major auto insurers charged good drivers about 70% more if they lived in predominately African American communities than if they lived in predominately white communities.[179] CFA found that most insurance companies often charge higher rates for renters rather than owners, single rather than married drivers, drivers with less education

174. See Swedloff, *Regulatory Imperative, supra* note 18 at 2042; Schwarcz, *Civil Rights Approach, supra* note 4. The issues are very complex and getting definitive answers seems impossible. The 1997 collection, INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS (GREGORY D. SQUIRES, ED.1997) contains several in-depth articles. One, based on an investigation by the NAIC found "the effect of minority concentration on average premiums remained significantly positive even when controlling, to the extent possible, for risk-related factors." See Robert W. Klein, *Availability & Affordability Problems in Urban Homeowners Insurance Markets*, INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS at 73 (Greg D. Squires, ed. 1997). However, the research was "inconclusive as to whether inner-city residents may pay too much in premiums for the claims payments they receive." *Id.*

175. Schwarcz, *Civil Rights Approach, supra* note 4 at 674-83.

176. Letter from Maura Healey, Massachusetts Attorney General to Hon. James Eldridge, Feb. 2, 2018, Premium Disparities Affecting Minority and Low-Income Drivers.

177. *Id.* at 3.

178. Julia Angwin, Jeff Larson, Lauren Kirchner, Surya Mattu, *Minority Neighborhoods Pay Higher Car Insurance Premiums Than White Areas with the Same Risk,* PROPUBLICA, (Apr. 5, 2017) (co-published with Consumer Reports). James Lynch responded in the Insurance Journal, Insurance Information Institute, *Why ProPublica Auto Insurance Report Is Inaccurate, Unfair and Irresponsible,* INSURANCE JOURNAL April 5, 2017. ProPublica in turn responded, asking for more data, which the industry representative would not supply. Davide Bonazzi, *The Car Insurance Industry Attacks Our Story. Here's Our Response*. PROPUBLICA (Apr. 7, 2017).

179. Consumer Federation of America, *High Price of Mandatory Auto Insurance in Predominantly African American Communities* (Nov. 2015), https://consumerfed.org/wp-content/uploads/2015/11/151118_insuranceinpredominantlyafricanamericancommunities_CFA.pdf [https://perma.cc/WA6Z-CF4D].

rather than more education, and blue collar workers rather than white collar workers.[180] In the higher premium categories, African Americans are overrepresented.[181] Regulatory interventions like FAIR plans are not tools to challenge these practices.

Rather than blanket exclusions as in the 1950s and 1960s, credit scores and other measures are now generally used to set prices for homeowners and auto insurance.[182] The mechanism of using credit scores for financial decisions is often heralded as positive because it is claimed to be more objective than human decision-making.[183] Yet, scores such as credit scores that result in higher prices for lower income people in urban areas "can become self-fulfilling prophecies, creating the financial distress they claim merely to indicate[,]" according to law and technology scholars Danielle Citron and Frank Pasquale.[184] Their use is controversial. They have little or no causal or intuitive link with one's driving history (unlike one's driving safety record for example) and in that way seem arbitrary and unfair to use for pricing insurance.[185] Some studies have found that use of credit scores in connection with homeowners insurance and auto insurance likely has a disparate impact on minority and low income people who often have

lower credit scores than white people do, resulting in minorities paying

180. Consumer Federation of America, *Systemic Racism in Auto Insurance Exists and Must be Addressed by Insurance Commissioners and Law Makers*, CFA (June 17, 2020), https://consumerfed.org/press_release/systemic-racism-in-auto-insurance-exists-and-must-be-addressed-by-insurance-commissioners-and-lawmakers/ [https://perma.cc/P4SR-VZVK]; INSURIFY, THE INSURIFY ANNUAL REPORT 38 (2020) https://insurify.com/report/auto-insurance/2020/ [https://perma.cc/866B-PELR] (the 2020 annual report from Insurify confirms many of these factors affect prices).

181. Consumer Federation of America, *supra* note 179*; See* Eve Kessler, *U.S. Auto Industry Admits Systemic Racism*, STREETSBLOG (Oct. 23, 2020), https://usa.streetsblog.org/2020/10/23/u-s-auto-insurance-industry-slowly-admitting-systemic-racism/ [https://perma.cc/4XJR-LWUF] (summarizing data).

182. *See* INSURIFY, *supra* note 180, at 39*;* Ojo v. Farmers Group, 356 S.W.3d 421, 424 (Tex. 2011) (using credit scores for pricing homeowner's insurance not illegally discriminatory even though had disparate impact on minority homeowner).

183. *See* Citron & Pasquale, *supra* note 18, at 1, 4 (noting that advocates claim automated systems are superior to systems where humans make decisions because they rate everyone the same way thus "averting discrimination.").

184. Citron & Pasquale, *supra* note 18, at 18. (they argue that scores should be subject to licensing and audit for critically important areas like insurance.); *See also Id.* at 21-2.

185. *See, e.g.*, Swedloff, *Regulatory Imperative***,** *supra* note 15, at 2042; Schwarcz, *Civil Rights Approach, supra* note 4, at 665-6, 686.

more for insurance; other studies have found these concerns unwarranted.[186]

Moreover, the use of credit scores is only the beginning. Insurance companies are using ever more complex algorithms and artificial intelligence to calculate risk and make decisions about pricing and underwriting.[187] Increasingly sophisticated statistical analysis is used to make decisions about underwriting and prices.[188] It is now common and likely soon to be universal for insurers to develop their statistical models through machine learning.[189] These models involve statistical analysis of publicly available data about the applicant (i.e. scraping the web for data) and are driven by the AI rather than human analysis. The statistical models used for pricing, developed by AI, often cannot

---

186. *See, e.g.*, FEDERAL TRADE COMMISSION, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE (2007), https//www/ftc.gov/sites/default/files/documents/reports/cred-based-insurance-scores-impacts-consumers-automobile-insurance-report-congress-federal-trade/p044-804facta_reportcredit-based-insurance-scores.pdf; BIRNY BIRNBAUM, INSURERS' USE OF CREDIT SCORING FOR HOMEOWNERS INSURANCE IN OHIO: A REPORT TO THE OHIO CIVIL RIGHTS COMMISSION 2 (2003) ("Based upon all the available information, it is our opinion that insurers' use of insurance credit scoring for underwriting, rating, marketing and/or payment plan eligibility very likely has a disparate impact on poor and minority populations in Ohio."); Brent Kabler, STATE OF MISSOURI DEPT OF INSURANCE, Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri 5 (2004) ("The use of individuals' credit histories to predict the risk of future loss has become a common practice among automobile and homeowners insurers. The practice has proven to be controversial not only because of concerns about how reliably credit scores may predict risk. Many industry professionals, policymakers, and consumer groups have expressed concern that the practice may pose a significant barrier to economically vulnerable segments of the population in obtaining affordable automobile and homeowners' coverage. This study finds evidence that justifies such concerns."). Some studies find the concerns are unwarranted, e.g., TEXAS DEPT. OF INS., Report to the 79th Legislature, Use of Credit Information by Insurers in Texas 18 (2004) (credit scores strongly correlate with likelihood of making a claim in homeowners and auto insurance contexts); Letter of Jose Montemayor to the Hon. Rick Perry (January 31, 2005) TEXAS DEPT. OF INS. (the Texas Commissioner of Insurance noted "Unlike other risk-related factors, credit scoring does not have that readily discernable, causal link to risk, such as driving record. As a result, credit scoring has earned the outward appearance of being a surrogate for something sinister."); *See generally* Latonia Williams, *African-American Homeownership and the Dream Deferred: A Disparate Impact Argument against the Use of Credit Scores in Homeowners Insurance Underwriting,* 15 CONN. INS. L.J. 295 (2008); Ray Lehmann, *Why 'Big Data' Will Force Insurance Companies to Think Hard About Race*, INS. J. (Mar. 27, 2018), https://www.insurancejournal.com/blogs/right-street/2018/03/27/484530.htm [https://perma.cc/T3WY-JDWK].

187. Prince & Schwarcz, *supra* note 18, at n. 1 (Artificial Intelligence comprises "a broad array of computational techniques for predicting future outcomes based on analysis of past data" collected from different sources.).

188. *See generally* Prince & Schwarcz, *supra* note 18; Schwarcz, *Civil Rights Approach*, *supra* note 4, at 665.

189. Schwarcz, *Civil Rights Approach*, *supra* note 4, at 665; *Id.* at 665-6 (with machine learning, AI actually develops algorithms using "training datasets for which the outcome of interest is known. Training datasets generally include external data that insurers acquire from third-parties, rather than directly from the insurance applicant. Unlike traditional statistical models, machine-learning models are not driven by human's intuition or hypotheses regarding cause and effect. Instead, they use raw computing power to identify attributes that predict their programmed outcome of interest.").

be explained intuitively–and no disclosure of the models is required.[190] There is no causal or intuitive link between the pricing and the insured's conduct.[191] If the statistical mechanism for setting prices or underwriting cannot be explained, it cannot be challenged, even if it results in members of protected groups being charged more for the same coverage than others, for example.[192] Crucially, AI-influenced insurance pricing practices are not all related to risk—one example is that many insurers now price insurance based in part on how likely it is that the insured will shop around and leave to buy insurance from another company—a practice that obviously is not related to the insured's risk.[193] The use of AI and machine learning may result in insurance ratemaking and underwriting that unintentionally relies on race or income in setting rates or underwriting in ways that are so complex and attenuated that they are almost impossible to trace.[194]

Insurance companies defend these practices by saying that their pricing and underwriting is simply linked with risk and that it is best and cheapest for customers overall to charge based on that risk.[195] It is

---

190. *Id.* at 666.

191. Swedloff, *Regulatory Imperative,* supra note 16, at 2042-5, 2057-66.

192. *See generally* Prince & Schwarcz, *supra* note 18.

193. Swedloff, *Regulatory Imperative, supra* note 16, at 2064-9 (describing these price discrimination practices in detail and arguing that reasons specific to insurance call for investigation and possible regulation of these practices); Schwarcz, *Civil Rights Approach, supra* note 4, at 680-1. (These practices are also known as price optimization.*)*.

194. One of the risks of these new practices is "proxy discrimination." Proxy discrimination is "a particularly pernicious subset of disparate impact…It involves a facially neutral practice that disproportionately harms members of a protected class. But a practice producing a disparate impact only amounts to proxy discrimination when a second condition is met. In particular, proxy discrimination requires that the usefulness to the discriminator of a facially neutral practice derives, at least in part, from the very fact that it produces a disparate impact. This condition can be met … when a legally-prohibited characteristic is predictive of the discriminator's goals in ways that cannot be captured more directly by non-suspect data." Prince & Schwarcz, *supra* note 18, at 1260-1.

195. NAMIC, *Our Position*, https://namic.org/issues/underwriterfreedom [https://perma.cc/7QG7-RFWU] (An instructive example is a document entitled 'Underwriter Freedom' currently on the website of the National Association of Mutual Insurance Companies (NAMIC): Our position: "Insurance consumers benefit from increased choices and lower costs when insurers have the ability to use a wide range of factors to assess the risks faced by insured individuals or businesses. Some states restrict underwriting freedom by limiting the ability of insurers to use factors that, in other states, are proven to effective measures of risk. When insurance companies are restricted in how they can underwrite their business, they may find offering certain coverages or doing business in certain states is not viable. Such a determination can result in fewer options available to consumers, and likely at higher prices. Generally speaking, states that permit the most underwriting freedom have more insurance companies competing for business, which results in not only more choices of insurance but lower costs for it. Therefore, NAMIC supports legislative and regulatory action to preserve and expand the freedom of insurance companies to use underwriting practices that facilitate widespread product availability, fairness in pricing, and prudent conduct derived from meaningful risk assessments. We oppose efforts by state and federal authorities to curtail such practices.").

not a problem that there is no intuitive or causal link between insured's conduct and the risk they calculate, in their view.[196] They argue in resisting calls for change that discrimination on the basis of race in insurance is already illegal everywhere.[197] This is not true.[198] The industry's ongoing unwillingness to provide data about its practices, despite calls for more disclosure that go back at least to 1987, makes it impossible to know how insurance practices affect minority and low income communities.[199] Advocates for reform in recent years have put forward important reform ideas that build on past proposals.[200] Their arguments have not yet succeeded, but as Part III argues, their time has come.

---

196. Swedloff, *Regulatory Imperative, supra* note 16, at 2042-2045, 2057-2066; Schwarcz, *Civil Rights Approach, supra* note 4, at 665-666, 686; Some enthusiasts of big data seem untroubled by how hard and sometimes impossible it is to show causal links between big data and outcomes and are excited by how easy it is to find correlations in big data. "Instead of obsessing about the accuracy, exactitude, cleanliness, and rigor of the data, we can let some slack creep in. We shouldn't accept data that is outright wrong or false, but some messiness may become acceptable in return for capturing a far more comprehensive set of data . . . . Because correlations can be found far faster and cheaper than causation, they're often preferable . . . . For many everyday needs, knowing *what* not *why* is good enough . . . . These quick correlations let us save money on plane tickets, predict flu outbreaks . . . and may enable health insurance firms to provide coverage without a physical exam and lower the cost of reminding the sick to take their medication." VICTOR MAYER-SCHONBERGER AND KENNETH CUKIER, BIG DATA 191 (2013); But as Schwarcz, Swedloff, and others point out, big data and AI can find correlations that burden members of protected groups in ways that could be impossible to discern and that result in higher insurance prices and skimpier coverage for those members; this is deeply problematic particularly given the unique qualities of insurance. *See* Schwarcz, *Civil Rights Approach*, *supra* note 4, at 673-683; *See also* Swedloff, *Regulatory Imperative, supra* note 16, at 2058-2059.

197. Redlining: Fact or Fiction, *supra* note 153, at 21-22 (this idea that discrimination is already illegal, so no reforms are necessary has been reiterated decade after decade by the insurance industry. One example is the testimony of David Farmer, representative of the Alliance of American Insurers in a 1993 hearing on a bill that would have required disclosure of factors used to assess risk. At that hearing he asserted, that redlining and racial discrimination in insurance already are against the law and if they happen they should be reported investigated and appropriate action taken.); *See* Schwarcz, *Civil Rights Approach*, *supra* note 4, at 669-70 (By redlining and racial discrimination he seemed to mean intentional, purposeful discrimination such as overcharging a customer because of their race.); *See generally* H.R. 1188, 103rd Cong. (1993) (The bill passed the house but died in the Senate. H.R.1188 was a Bill to provide for disclosures of insurance in interstate commerce. H.R. 1188 passed the House and died in Committee in the Senate. Versions of it were introduced throughout the 1990s and always strenuously, successfully opposed by the insurance industry. A similar bill was introduced in the 104th Congress (1995-1996), the 105th Congress (1997-1998), and the 106th Congress (1999-2000).); *See also supra* note 91.

198. Avraham, Logue & Schwarcz, *supra* note 22, at 201 (discussed in more detail at *infra* Part II.B.2.a.).

199. *See, e.g.*, Gregory D. Squires and William Velez, *Insurance Redlining and the Transformation of an Urban Metropolis,* 23 URBAN AFFAIRS Q. 63-83 (1987); *See generally* Gregory D. Squires, *Racial Profiling, Insurance Style: Insurance Redlining and the Uneven Development of Metropolitan Areas,* 25 J. OF URBAN AFFAIRS 391 (2003).

200. *See infra* Part III, Schwarcz, *Civil Rights Approach*, *supra* note 4, at 686-97; Schwarcz, *Public Utility Style, supra* note 21, at 979-84; Squires, *supra* note 199, at 405; Squires and Velez, *supra* note 199.

2. *The Limitations of Insurance Antidiscrimination Law*

(a) State Antidiscrimination Laws are Limited, Outdated, and Not Aimed in the Right Direction

Having shown that the UPPRA and FAIR plans helped urban insurance markets become robust, but that issues about urban insurance coverage have persisted (for both cars and property), the next part examines insurance antidiscrimination laws. Could they provide an opportunity for courts to review practices that unfairly burden racial minorities? This section looks at existing legislation and its limitations. As noted earlier, insurance is largely state-regulated, and there is no comprehensive federal law banning race discrimination in the business of insurance, so much of the focus will be on state regulation.[201] Some federal law including the Fair Housing Act (FHA)[202] is relevant and its application will be discussed. As we will see, the concept of "discrimination" in insurance is inadequate. Specifically, the limitations of the insurance concept of "unfair discrimination" need to be recognized and addressed, particularly in light of AI and machine learning.

The insurance industry for decades has argued that race discrimination and redlining are already illegal in all states, therefore no new measures are necessary.[203] However, until 2014, no publicly available source or article had systematically reviewed all states' insurance antidiscrimination laws. The comprehensive 2014 article, *Understanding Insurance Antidiscrimination Laws*, systemically examined all states' insurance laws and found that not all states forbid discrimination *even on the basis of race* in insurance.[204] In fact, seventeen states do not ban the use of race in homeowners' coverage.[205] Only a few states ban the use of zip codes or credit scores in property/casualty insurance (which includes homeowners) and auto insurance.[206] Thus, the claim that race discrimination in insurance and redlining already are universally outlawed is just false.

---

201. See *supra* notes 20-23. Mary Heen, *Nondiscrimination in Insurance: The Next Chapter*, 49 GA. L. REV. 3, 65 (2014).

202. *See generally* Fair Housing Act, 42 U.S.C. §§ 3601-3614 (2018).

203. *See, e.g.*, *House Financial Services, Drivers of Discrimination: An Examination of Unfair Premiums, Practices, and Policies in the Auto Insurance Industry*, CONGRESS.GOV (Mar. 4, 2020), https://www.congress.gov/event/116th-congress/house-event/110631?s=1&r=47 [https://perma.cc/CBG9-WU56]; Demerjian et al., *supra* note 13; Testimony of David Farmer, Redlining: Fact or Fiction, *supra* note 153, at 174-80.

204. Avraham et al., *supra* note 22, at 239 (only ten states forbid use of race, national origin, and religion across all lines of insurance).

205. *Id.* at 201. More than half of states do not ban the use of race in disability, health, and life insurance. *Id.*

206. *Id.* at 265. Given residential racial segregation, zip codes are a measure that draws distinctions based on race even if not explicitly on the surface.

Even if all states banned race discrimination in insurance, it would make very little difference because of the nature of state insurance laws and insurance itself. State insurance antidiscrimination laws are very narrow, and when it comes to race, they are aimed at explicit, specific intentional barriers like redlining that are no longer used.[207]

Further, these laws are based on a concept of discrimination that is very different from the common meaning and principles used in other areas of law. In insurance, the word 'discrimination' is often synonymous with risk classification.[208] Outside insurance, the word 'discrimination' often refers to unfair treatment.[209] Insurers are in the business of discriminating by classifying individuals into different groups for pricing and other aspects of insurance based on the insurers' analysis of the insured's risk.[210] Insurers discriminate, for example, between younger people and older people in life insurance pricing to reflect that older people are at higher risk of dying sooner.[211]

State insurance laws define 'unfair discrimination' in quite specific and constricted ways.[212] They define 'unfair discrimination' as an unfair trade practice.[213] If an insurance company charges different rates

---

207. Schwarcz, *Civil Rights Approach*, *supra* note 4, at 669-70.

208. Avraham, Logue, & Schwarcz, *supra* note 22, at 198.

209. In a March 4, 2020, Congressional hearing on H.R. 1756 which would have prohibited use of credit reports in auto insurance pricing, Erin Collins, the witness for the National Association of Mutual Insurance Companies (NAMIC) was asked, "what's the evidence regarding discrimination in coverage decisions and pricing of auto insurance?" She consistently responded, "there is no evidence that I am aware of that there is any unfair discrimination in underwriting or auto insurance[,]", (emphasis added), using the insurance concept of discrimination to answer, as opposed to the broader commonly understood concept. U.S. House Committee on Financial Services, *Drivers of Discrimination: An Examination of Unfair Premiums, YOUTUBE (Mar. 4, 2020)*, https://www.youtube.com/watch?v=JgkgHpl5icc [https://perma.cc/JR7L-KDDA].

210. Avraham, Logue & Schwarcz, *supra* note 22, at 195; Schwarcz, *Civil Rights Approach*, *supra* note 4, at 659.

211. Insurance companies have good reasons to draw distinctions on the basis of risk. Doing so can combat adverse selection and moral hazard, as well as ensuring that markets will function and that insurance companies will make a profit. *See generally*, KENNETH ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW & REGULATION (6th ed. 2015); Important public policy issues arise from pricing solely as to risk. However, insurance is not always priced solely based on risk. For example, even though life expectancies for African Americans are and have long been shorter than for whites, insurance companies no longer charge African Americans more for life insurance. *See* Heen, *supra* note 69, at 390; *See generally,* ABRAHAM, DISTRIBUTING RISK *supra* note 114, at 64-100 (discussing efficiency-based and distributional impacts of risk classification).

212. *See, e.g.*, National Association of Insurance Commissioners (NAIC) Model Unfair Trade Practices Act (2004).

213. *See generally*, BAKER & LOGUE, *supra* note 20, at 645. The NAIC Unfair Trade Practices Act, which is based in part on laws passed by the states, reflects the narrowness of the concept of discrimination in insurance law. Here are some excerpts from the NAIC Model Unfair Trade Practices Act: "(1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any

for life insurance to people, "of the same class" and equal expectation of life, that would be an unfair trade practice.[214] Basically, this means that distinctions in pricing (for example) must be based on sound actuarial[215] data so that if an insurer distinguishes between different policyholders, the company, "must have a reasonable and empirically grounded basis for believing that such discrimination reflects differences in risk levels."[216]

---

other of the terms and conditions of such policy. (2) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner. Drafting Note: In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes, this paragraph should be omitted. (3) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to insure, refusing to renew, canceling or limiting the amount of insurance coverage on a property or casualty risk solely because of the geographic location of the risk, unless such action is the result of the application of sound underwriting and actuarial principles related to actual or reasonably anticipated loss experience." National Association of Insurance Commissioners (NAIC), *Unfair Trade Practices Act*, NAIC Model Laws, Regulations, Guidelines and Other Resources (Jan. 2004), https://www.naic.org/store/free/MDL-880.pdf.

214. *Id.*

215. "Actuarially fair" insurance has been used by economists to refer to insurance that is priced at expected cost, taking into account risk. Avraham, Logue, & Schwarz, *supra* note 22, at 203.

216. Schwarcz, *Civil Rights Approach, supra* note 4, at 666; *See generally*, BAKER & LOGUE, *supra* note 20, at 645; Yet risk is never the whole story -- The use of some classifications is outlawed, simply not done, or seen as unacceptable, even if differences may be "actuarially" justified. Schwarcz, *Civil Rights Approach*, *supra* note 4, at 669; One example is that some states ban the use of age and gender in homeowners and auto coverage even though it might be actuarially justified to use those factors. *Id.* An example of insurance not being priced solely according to risk is the Affordable Care Act's rule that women cannot be charged more for health policies, even if the expected price of insuring women is more than men. Tom Baker, *Health Insurance Risk and Responsibility After the Affordable Care Act*, 159 U. PA. L. REV. 1577, 1600 (2011); Another example is that insurance companies no longer offer differently priced life insurance policies based on race, even though African Americans generally have shorter life expectancies than whites and so different pricing by race would be "fair" under the "actuarial'" framework that is widely used in insurance. Alec Soth, *The Great Divide*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/09/05/opinion/inequality-life-expectancy.html?searchResultPosition=1 [https://perma.cc/NM2J-42WW] (Sept. 5, 2020). This illustrates the problematic nature of the phrase 'actuarially fair.' Economists have long used the term 'actuarially fair' to refer to insurance that is priced at expected cost. Avraham, Logue, & Schwarcz, *supra* note 22, at 203. 'Actuarially fair' later was widely used, and still is, by supporters of risk classification. *Id.* at 203; The term, 'actuarially fair,' can be used to refer to practices that are not fair in any other sense. Most people probably would agree that it would not be fair to charge African Americans more for life insurance due to shorter life expectancies, although the reasons might vary and certainly are not consistent across other insurance products and practices. Yet insurance companies used to charge African Americans more because of their shorter life expectancies. The history of race discrimination in life insurance is complex. Challenges were first made to race-based rates in the 1880s and resisted by insurance companies for decades. The practice of offering differently priced life insurance policies based on race is generally illegal but insurance companies stopped doing it even before it was widely illegal as historical scholarship explains. Heen, *supra* note 69, at 363; J. Gabriel McGlanacy, *Race-Based Underwriting and the Death of Burial Insurance,* 15 CONN. INS. L. J. 531, 550-51 (2019). This shows that rates are not

The NAIC Model Unfair Trade Practices Act, similar to many state laws, defines "[u]nfair [d]iscrimination" in homeowners' policies as:

> Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to insure, refusing to renew, canceling or limiting the amount of insurance coverage on a property or casualty risk [*solely]* because of the geographic location of the risk, unless such action is the result of the application of sound underwriting and actuarial principles related to actual or reasonably anticipated loss experience.[217]

A bit of reflection shows how narrow this definition is. An insurance company would be unlikely to refuse to insure a property solely because of the geographic location, and as long as there is some other additional reason, the refusal to insure would not be illegal discrimination. Further, even discrimination entirely based on a property's location is acceptable as long as it is actuarially justified under these definitions.

These definitions are aimed at making sure insurers do not charge "excessive" or "unfairly discriminatory" rates and stem from the early twentieth century when there was a widespread sense that insurance markets for property and casualty insurance had important characteristics of natural monopolies.[218] As a result, states, supported by the federal government, adopted a "public utility oriented version of rate regulation."[219] There was a notion that insufficient competition resulted from insurers collectively setting their rates and as a result state laws focused on "unfair discrimination" and "'excessive' rates."[220] However, this concept of actuarial discrimination is based on a regulatory problem that no longer exists because insurance companies no longer collectively set rates so that the prior concerns about lack of competition are now invalid.[221] Thus, the current state insurance anti-discrimination regime aims its sights in the wrong direction. It does

always based just on risk and that other important values and public policy concerns are at stake in these, as well as many other, contexts. Insurance pricing according to risk raises critically important public policy and normative issues that are not answered by the mantra that pricing according to risk is best for everyone. *See* Swedloff, *Regulatory Imperative, supra* note 16, at 2042.

217. NAIC Model Unfair Trade Practices Act § 3, https://www.naic.org/store/free/MDL-880.pdf [https://perma.cc/L9ZR-YUD4] (emphasis added).

218. Schwarcz, *Civil Rights Approach*, *supra* note 4, at 671-73; Schwarcz, *Public Utility Style*, *supra* note 21, at 988.

219. Schwarcz*, supra* note 4, at 667-68.

220. *Id.*

221. Schwarcz, *Civil Rights Approach*, *supra* note 4, at 671-72; Solvency regulation has taken the place of concern for 'inadequate' rates and competition ensures rates will not be 'excessive.' ABRAHAM & SCHWARCZ, *supra* note 211, at 75.

little or nothing to challenge practices that may actually be unfairly discriminatory and hinder social mobility and in addition is inefficient and impractical.[222]

Even when state insurance laws forbid discrimination on the basis of factors like race or income, the laws are interpreted very narrowly.[223] Insurance companies generally can use any tools to classify risk even if they have a disproportionate impact on racial minorities, as long as they do not classify explicitly on the basis of race or intentionally use substitutes for race in their models.[224] For example, the Texas Supreme Court upheld the use of credit scores in increasing the price of a Black man's homeowner's policy as not "unfairly discriminatory" and therefore legal.[225] Despite the lack of an intuitive or obvious causal connection between credit scores and homeowner risk, and despite the fact that credit scores tend to be lower for people of color, the court held that they could be used for pricing.[226] To win, the plaintiff would have had to prove intentional discrimination– a tall and impossible order.

Existing state insurance antidiscrimination law, reflecting the narrowness of its antidiscrimination concept, provides no way of reviewing facially neutral insurance practices that have a disproportionate impact on racial minorities and low-income people, whether they be credit scores or the use of AI to create statistical models.[227] The next section turns to federal law.

(b) The Federal Fair Housing Act and Property Insurance

i. The Fair Housing Act and Property Insurance – Intentional Discrimination Claims Covered (Eventually)

Although Congress outlawed racial discrimination in housing in 1968, insurers fought the idea that they were not allowed to intentionally discriminate on the basis of race for years. The Federal Housing Act of 1968 ("FHA") makes it illegal to refuse to "negotiate for the sale or rental of . . . a dwelling to any person because of race" and further

---

222. Schwarcz, *Civil Rights Approach, supra* note 4 at 661, 671-73; *See, e.g.*, Schwarcz, *Public Utility Style*, *supra* note 21. Also, enforcement of these laws is weak. Schwarcz*, Civil Rights Approach*, *supra* note 4, at 669.

223. Schwarcz, *Civil Rights Approach, supra* note 4, at 659.

224. The same is true for other characteristics such as gender and age. *Id* at 685.

225. Ojo v. Farmers Union, 356 S.W.3d 421, 424 (Tex. 2011) (Using credit scores was not "unfairly discriminatory" under Texas law even though it had a disproportionate negative impact on racial minorities). *But see* Dehoyos v. Allstate, 345 F.3d 290 (5th Cir. 2003) (credit scoring had disparate impact, applying federal law); NFHA v. Prudential Ins. Co., 208 F. Supp. 2d 46, 63 (D.D.C. 2002) (disparate impact used to analyze refusal to insure landlords that rented to tenants under section eight of the Housing and Urban Development program).

226. Ojo v. Farmers Union, 356 S.W. 3d at 424. *See supra* note 17 and 179 (regarding use of credit scores).

227. *See* Lehmann, *supra* note 186.

makes it unlawful to discriminate in the provision of services or facilities in connection therewith.[228] Insurance is essential for getting a mortgage and owning property, and discrimination in property insurance on the basis of race deprives people of housing on the basis of race.[229] However, insurance companies argued that the FHA did not outlaw redlining and intentional race discrimination in insurance.[230] Dispute about whether a disparate impact theory can be applied to insurers under the FHA continues.[231]

One example of the insurance industry's position that the FHA did not apply to intentional redlining is *Dunn v. Midwestern Indemnity*.[232] In that 1979 Ohio case, a Black couple claimed that their homeowners insurance was terminated on the basis of race, in violation of the FHA, and defendant, Midwestern Indemnity Co., filed a motion to dismiss—the company claimed that the FHA did not forbid their actions.[233] The Ohio federal district court denied the motion to dismiss, holding that the FHA might outlaw insurance redlining.[234] By contrast, the Fourth Circuit held in 1984 that the FHA definitely did not forbid insurance redlining.[235] Although scholars critiqued its reasoning, it was not until 1992 that a different appeals court, the Seventh Circuit, held that the FHA applied to the insurance business.[236]

The facts and discussion in *Dunn v. Midwestern Indemnity* illustrate broader issues of urban insurance access. Black homeowners, the Dunns, in a predominately Black Ohio neighborhood, had purchased property insurance through Borchers Insurance Agency from Mid-

---

228. 42 U.S.C. § 3604; See Edward Dence, *Equal Opportunity Initiatives Affecting Home Ownership-Recent Legal Developments Affecting Property and Casualty Insurers*, 17 ANN. REV. BANKING L. 341 (1998).

229. *See* HUGHES REPORT, *supra* note 4, at 5.

230. *See, e.g. Mackay v. Nationwide Ins. Co.*, 724 F.2d 419, 420 (4th Cir. 1984). In Mackay, the Fourth Circuit Court of Appeals held that the FHA did not outlaw "arbitrary refusal to underwrite the risks of persons residing in predominantly black neighborhoods." The court reasoned that since the FHA does not mention insurance, the legislative history does not mention insurance, insurance is different from other aspects of housing because by definition it is about risk, and when Congress enacted the FHA that same year it enacted the UPPRA so that if it had intended to take action on insurance redlining it would have done so under the UPPRA, that the FHA did not cover discrimination in insurance. *Id.* at 423-424. The court also found significant that insurance is primarily state regulated per the 'insistent position of the Congress' and attempts to amend the FHA to specifically mention insurance since its passage have failed. *Id.* Although scholars critiqued its reasoning, it was not until 1992 that a different appeals court, the Seventh Circuit, held that the FHA applied to the insurance business. *See generally,* Avraham et al., *supra* note 22, at 241-242.

231. *See infra* at Part II.C.

232. Dunn v. Midwestern Indemnity, 472 F. Supp. 1106 (S.D. Ohio 1979).

233. *Id.*

234. *Id.*

235. Mackay v. Nationwide Ins. Co., 724 F.2d 419, 420 (4th Cir. 1984). *See supra* note 228 (describing Mackay reasoning).

236. NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992).

western Indemnity Company. They lost their insurance when Midwestern Indemnity terminated its relationship with Borchers Agency and told the policyholders to seek insurance under the Ohio FAIR plan.[237] The plaintiffs alleged that the termination was on the basis of the race of the policyholders and that it violated the FHA. The defendants moved to dismiss, arguing that even if true, this was legal under the FHA.[238] The FHA did not prohibit insurance redlining, they argued, and Congress had dealt with the problems of redlining by passing the Urban Property Protection and Reinsurance Act (UPPRA).[239] In denying the motion to dismiss, the court found that the UPPRA "was enacted to protect private insurance companies from the risk of catastrophic losses which resulted from riots or civil disorders[,]" not to outlaw discrimination.[240] The decision quoted the Hughes Report on the importance of insurance and the FHA's broad language aimed against segregation in housing.[241] We do not know more detailed facts about the case, which presumably settled after the court's denial of the motion to dismiss. But if the alleged facts are accurate, they are an example of the widespread systematic disinvestment in African American neighborhoods through actions of insurance companies terminating relationships with brokers as described in the Hughes Report[242] and later Congressional testimony.[243]

In 1989, twenty-one years after the Fair Housing Act's passage, HUD adopted a regulation that prohibited race discrimination in connection with "property or hazard insurance[.]"[244] Courts generally have since held that liability and property insurance are services linked to the rental or sale of a dwelling under sec. 3604(b) of the FHA and that denying such insurance makes the dwelling unavailable under FHA sec. 3604(a); therefore race discrimination in property insurance is illegal.[245] The logic of needing insurance for there to be nondiscrimination on the basis of race in housing is impeccable. In 1995, American Family Mutual Insurance agreed to settle a case involving alleged race

237. See Dunn, *supra* note 232, at 1109.

238. *Id.*

239. *Id.*

240. *Id.* at 1111.

241. HUGHES REPORT, *supra* note 4, at 25-27.

242. *Id.*

243. Redlining: Fact or Fiction, *supra* note 153.

244. 24 CFR § 100.70(d)(4)(1989). There has also been dispute about whether the McCarran-Ferguson Act precludes the application of the FHA to insurance discrimination. *See,* Avraham et al., *supra* note 22, at 242. *See generally,* Sarah L. Rosenblush, *Fair Housing Act Challenges to the Use of Consumer Credit Information in Homeowners Insurance Underwriting: Is the McCarran-Ferguson Act a Bar?* 46 COLUM. J. L. & SOC. PROBLEMS 49 (2012) (arguing that courts interpret the McCarran-Ferguson's preemption provisions to allow FHA disparate impact claims to go forward).

245. *Not-so-sudden impact: Insurers Face a New Breed of Claim under the Fair Housing Act,* LEXOLOGY, (Aug. 3, 2015).

discrimination in the sale of homeowners insurance in a case brought by the NAACP.[246] Eventually the majority of courts held that the FHA indeed did outlaw intentional redlining in insurance, as the HUD regulation provided.[247]

But this makes little if any difference now. The force of a rule forbidding intentional redlining and clear race-based pricing is minimal as insurance companies have shifted away from explicit redlining to more subtle and opaque practices such as use of credit scores and models created by AI for pricing and underwriting. Instead, the question of whether a rule that allows review of practices that result in disproportionate impact on racial minorities and low-income people becomes more and more pressing. This question — whether a rule of disparate impact should apply to property insurance — is hotly disputed, as the next section discusses.

ii. The Fair Housing Act and Property Insurance – Claims of Disparate Impact Discrimination Disputed

a. The Discriminatory Effects Test in Employment and Housing Discrimination Law

For fifty years, court decisions in the realm of employment have recognized that actions may be illegally discriminatory if they have a discriminatory effect on a protected group.[248] These decisions make clear that a practice with a discriminatory effect may still be legal if justified by a business necessity.[249] In 2015, the Supreme Court decided that a discriminatory effects test does apply to cases under the Federal Housing Act (FHA).[250] The broad insight behind the discriminatory effects theory, which is also known as the disparate impact theory, is that illegal discrimination and disadvantage can be caused by practices that are discriminatory in application even if they are not discriminatory on their surface.[251] While the disparate impact theory has been controversial, there is little dispute that it has created incentives for employers to look closely at their employment practices to see

---

246. *NAACP v. American Mutual*, 978 F.2d 287 (7th Cir. 1992), Consent decree, No. 930-C-0759 (E.D. Wisc. 1995).

247. Avraham et al, *supra* note 22, at 132.

248. *See, e.g.,* Griggs v. Duke Power, 401 U.S. 424 (1971); McDonnell-Douglass v. Green, 411 U.S. 792 (1973); Wards Cove v. Atonio, 490 U.S. 642 (1989).

249. *See* McDonnell-Douglass v. Green, 411 U.S. 792 (1973) (explaining business necessity defense); *Griggs v. Duke Power,* 401 U.S. 424 (1971).

250. Texas Dept. of Community Affairs v. Inclusive Communities, 576 U.S. 519 (2015) (disparate impact theory applies to actions covered by Federal Housing Act). HUD has taken the position since 1979 that a discriminatory effects test should apply to housing discrimination claims. Fair Housing Amendments Act of 1979: Hearings before the Subcom. On Civil and Constitutional Rights of the H. Comm. On the Judiciary, 96th Cong. 79 (1979) (statement of Patricia Roberts Harris, Sec'y of HUD).

251. Griggs v. Duke Power, 401 U.S. 424 (1971); McDonnell-Douglass v. Green, 411 U.S. 792 (1973).

if they inadvertently discriminate on the basis of race or other factors and overall has improved employment fairness in the U.S. A disparate impact cause of action has been available against mortgage lenders under the Equal Credit Opportunity Act and the FHA for decades.[252] A number of large banks in the summer of 2020 asked the Department of Health and Human Services to keep a disparate impact rule that applied to them in effect, explaining that it helped them examine their practices rigorously to see if their practices had unintended but harmful discriminatory effects.[253]

b. The Discriminatory Effects Test, Insurance Decisions, Industry Responses

The relationship between insurance decisions and a discriminatory effects test is complicated. This is because insurance itself is founded on the business of discrimination in the sense of classifying according to risk as explained above.[254] Insurance companies, when making decisions about price and who to insure, classify individuals into different groups and sub-groups for homeowner and auto insurance.[255] These classifications have huge practical consequences, yet insurance law does very little to prevent insurance companies from engaging in practices that harm low income and minority people or to require disclosure of data that might reveal the impacts of company practices.[256] The Department of Housing and Urban Development (HUD) first proposed the idea that a discriminatory effects test applied to property insurance practices in 1979.[257] After considerable delay and other action, HUD issued a more specific rule in 2013 that applied a discriminatory effects test to property insurance entitled *Implementation of the Fair Housing Act's Discriminatory Effects Standard*.[258] Insurance industry groups have fought this rule in court ever since; they have raised technical objections under the Administrative Procedure Act and have argued that state laws govern in this area because of the

252. Dana L. Kaersvang, *The Fair Housing Act and Disparate Impact in Homeowners Insurance,* 104 MICH. L. REV. 1993, 2018 (2006); Mathew J. Cochran, *Fairness in Disparity: Challenging the Application of Disparate Impact Theory in Fair Housing Act Claims Against Insurers*, 21 GEO. MASON U. CIV. RTS. L. J. 160 (2011); Schwarcz, *Civil Rights Approach, supra* note 4, at 695.

253. Emily Flitter, *Big Banks' 'Revolutionary' Request: Please Don't Weaken this Rule,* N. Y. TIMES, July 16, 2020, https://www.nytimes.com/2020/07/16/business/banks-housing-racial-discrimination.html [https://perma.cc/2HUW-W5ND].

254. *See supra* Part II.B.2.a, Schwarcz *Civil Rights Approa*ch, *supra* note 4, at 659.

255. *Id.* at 659.

256. *Id.*

257. Fair Housing Amendments Act of 1979: Hearings before the Subcom. On Civil and Constitutional Rights of the H. Comm. On the Judiciary, 96th Cong. 79 (1979) (statement of Patricia Roberts Harris, Sec'y of HUD).

258. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. sec. 100.500). The legal history surrounding that rule is sketched in Part II.B.2.c.

McCarran-Ferguson Act.[259] The cases have been complicated by the Supreme Court's 2015 decision that a disparate impact theory applied to FHA discrimination claims.[260] Another complication has been that the past presidential administration attempted to revise the 2013 HUD rule, but a court issued a nationwide injunction staying HUD's revised rule in 2020.[261] The legal status of the industry's challenges is thus somewhat up in the air.

Focusing instead on the insurance industry's general policy arguments against a disparate impact rule, the industry repeats the same arguments decade after decade.[262] The first argument centers on the meaning of "discrimination." Insurance company representatives accept the concept of "unfair discrimination" in existing state laws, enforced by state insurance superintendents.[263] What is illegal is "unfair discrimination"-—when people who should be in one risk group are treated as if they are in another, as discussed above.[264] But the industry view is that there is nothing wrong with assessing risk in any particular way, using any factors and any data, unless it is explicitly based on race. Additionally, because the factors and data used are not explicitly based on race anymore, there is no problem with anything they are doing. 'Underwriter freedom' should be the overriding principle; allowing insurance companies virtually unfettered and opaque risk classification makes insurance cheaper for all, they assert.[265] The second argument is simply the less federal intervention the better; insurance

259. *See generally*, John L. Ropiequet, HUD Proposes a New Disparate Impact Rule, 73 CONSUMER FIN. L. Q. REP. 293 (2019). The industry filed two challenges. First, American Insurance Association (AIA) v. HUD, 74 F. Supp. 3d 30, 40-44 (D.D.C. 2014); Am Ins. Ass'n (AIA) v. HUD, 74 F. Supp. 3d 30 (D.C. Cir. 2014)(citing Texas Dept. of Community Affairs v. Inclusive Communities, 576 U.S. 519 (2015)); AIA v. HUD, 74 F. Supp. 3d 30, (D.C. Cir. 2014), *vacated*, D.C. Cir. 14-5321 (2015). Second, Property Casualty Insurers Association (PCIAA) v. Donovan, 66 F. Supp. 3d. 1018 (N.D. Ill. 2014). That case resulted in HUD releasing an additional explanation of its rule, *Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance: A proposed Rule by the Housing and Urban Development Department* on Oct. 5, 2016, 81 FR 69012. PCIAA responded with a motion to dismiss which was granted in part and denied in part. 2017 WL 2653069 (2017).

260. *Texas Dept. of Community Affairs v. Inclusive Communities,* 576 U.S. 519 (2015).

261. *HUD's Implementation of the Fair Housing Act's Disparate Treatment Standard*, 85 Fed. Reg. 60288 (Sept. 24, 2020) to be codified at 24 CFR 100.500 (effective Oct. 26, 2020), stayed by Massachusetts Fair Housing Center et al v. Carson, Civil No. 11765-MGM, Memorandum and Order Regarding Plaintiffs' Motion for Preliminary Injunction under 5 USC 705 to Postpone the Effective Date of HUD's Unlawful New Rule, Oct. 25, 2020 (D. Mass. 2020).

262. Fair Housing Act: Hearings before the Subcom. On Civil and Constitutional Rights of the H. Comm. On the Judiciary, 95th Cong. 20, 614, 616 (1978) (statement of the Am. Ins. Ass'n).

263. *See, e.g.*, Testimony of David Farmer, Redlining: Fact or Fiction, *supra* note 153, at 710.

264. *See* Part 2(a).

265. *See supra* note 209; *NAMIC Issue | Underwriter Freedom*, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, https://www.namic.org/issues/underwriterfreedom [https://perma.cc/P6LH-LXW5].

should be governed by states.[266] Third is an assumption about the insurance market – the idea that it operates rationally and fairly with classifications based on risk; its decisions should be left alone except for the very narrow "unfair discrimination" concept.

The National Association of Mutual Insurers (NAMIC),[267] for example, showcases these arguments. A statement on its website about the "disparate impact rule" reads:

> While NAMIC vehemently opposes illegal discrimination, the [disparate impact] rule is not supported by any existing cases, is duplicative of current state prohibitions, ignores the basic mechanisms of pricing and providing insurance, and would seriously disrupt the ability of property and casualty insurance companies to assign risk on objective and relevant factors.[268]

Some parts of this statement are clearly untrue—first, some existing cases actually do support disparate impact.[269] Second, such a rule clearly would not be duplicative of current state prohibitions, some of which do not even ban explicit race discrimination in some forms of insurance.[270] The rest of the statement reflects the NAMIC's desire to continue underwriter freedom, regardless of the effects of industry risk classification practices on individuals and groups including members of racial minorities.[271]

What would a discriminatory effects test as related to insurance look like? One example is the 2013 HUD rule.[272] It states that there

---

266. The Dodd-Frank Bill instituted a federal insurance office with limited power. *See* Home.Treasury.gov. A recent publication from the National Association of Mutual Insurance Companies (NAMIC) states that the Federal Insurance Office has been a failure and should be shut down. Jon Bergner, *Our Positions | Federal Insurance Office*, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, http://www.namic.org/issues/federal-insurance-office [https://perma.cc/Y4A9-CX72].

267. The National Association of Mutual Insurers is a membership organization of mutual insurers which lists its purpose as to "[s]erve and unite members by advancing their interests and shaping our mutual future." *NAMIC Purpose & Mission & Vision*, NAMIC, https://www.namic.org/aboutnamic/visionmission [https://perma.cc/JPW2-DK5V].

268. Disparate Impact Rule, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, https://www.namic.org/Issues/disparate-impact-rule [https://perma.cc/9KUA-SJAR].

269. For cases that support use of disparate impact, in addition to the Supreme Court's *Texas Dept. of Community Affairs v. Inclusive Communities*, 576 U.S. 519 (2015), see *Dehoyos v. Allstate*, 345 F.3d 290 (5th Cir. 2003) (credit scoring had disparate impact, applying federal law); *NFHA v. Prudential Ins. Co.*, 208 F. Supp. 2d 46 (D.D.C. 2002) (disparate impact used to analyze refusal to insure landlords that rented to tenants under section 8 of the Housing and Urban Development program).

270. For comprehensive analysis of state antidiscrimination law which shows that a disparate impact rule would not be duplicative of existing state laws, see *supra* Part II.B.2.a; *See* Avraham, Logue & Schwarcz, *supra* note 22, at 200-01.

271. *NAMIC Issue: Underwriter Freedom*, NAMIC, https://www.namic.org/issues/underwriterfreedom. One wonders what they mean by "relevant" factors. *See supra* note 265.

272. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500).

may be a FHA violation based on discriminatory effects of a practice, "even if the practice was not motivated by a discriminatory intent."[273] According to the rule, a practice has a discriminatory effect "where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color [or other factors.]"[274] The rule goes on to make clear that practices with discriminatory effects can still be legal. The practice may be lawful if necessary to achieve substantial, legitimate nondiscriminatory interests of the defendant which could not be served by a less discriminatory alternative.[275] This rule does not specifically mention insurance but clearly would apply to homeowners' insurance because of its connection to housing.[276] The same principles could be applied to auto insurance. Other approaches to a disparate impact rule are discussed in Part III.

(c) Auto Insurance and Federal Law

Federal nondiscrimination statutes do not generally apply to auto insurance. It is treated as even more deeply a state matter than some other types of insurance. One reason that Congress has rarely gotten involved may be that auto accidents and insurance are diffuse; there are many accidents but no discrete group of defendants who face combined large auto liability costs and who, therefore, invest heavily in reform efforts at the federal level.[277] Congress occasionally has had hearings on auto insurance related matters, as we saw earlier, but the insurance industry generally has persuaded Congress not to take action.[278] Matters involving auto insurance rarely reach federal court, although the constitutionality of auto insurance mandates and assigned risk plans was litigated to the Supreme Court in the 1920s, and upheld.[279]

3. Conclusion

The property insurance reforms of the 1960s were an important intervention with significant, yet partial, success. Issues with higher prices and access to property and auto insurance have continued alt-

---

273. *Id.* at 11482.

274. *Id.* at 11463, 11467-68, 11482.

275. *Id.* at 11460, 11472-73. The rule laid out a specific burden-shifting framework.

276. *See supra* Part II.B.2.b.i for an explanation of how the FHA applies to insurance practices, because insurance is essential to property ownership.

277. *See* ABRAHAM, LIABILITY, *supra* note 4, at 70 (making a similar point about why tort reform has not focused on auto insurance).

278. *See supra* Part I.B.2. The first Bush administration proposed automobile insurance reform, but the proposal was defeated in Congress. JERRY III & RICHMOND, *supra* note 12, at section 132, at 932.

279. Wriggins, *Mandates, Markets & Risk, supra* note 5, at 310-321.

hough data is lacking. Further, existing antidiscrimination law on insurance is weak and not aimed at current issues such as the use of facially neutral practices to set prices and underwrite insurance. The increased use of AI and technological changes make it even more likely that complex and untraceable practices will lead to disproportionately negative impacts on protected groups without any way to determine whether these practices are justifiable--unless reforms are made.

III. REFORMS: THE TIME IS NOW

A. *Introduction*

Reforms are needed to property and auto insurance practices. A three-part suite of reforms will be outlined in this section, aimed to begin to correct some of the issues outlined in the previous sections.

There is some reason for optimism. The increased widespread public awareness of structural racism may lead to actual changes in insurance practices—or not. The NAIC's Special Committee on Race and Insurance is working to make recommendations in several areas such as property & casualty insurance and diversity in the insurance industry workforce, but no firm date has been set for these recommendations to be made.[280] In August 2020, it published a multipage memo, *Milestones in Racial Discrimination within the Insurance Sector*, detailing some history of the industry and including the statement "historically there are numerous examples where the insurance industry has discriminated against people of protected classes such as race."[281] It further acknowledges that "[w]hile many forms of direct unfair discrimination have been eliminated, subtle, less obvious forms of discrimination remain in access to insurance and risk classification."[282] NAIC also has an AI Working Group, which adopted guiding principles in the summer of 2020 stressing the importance of accountability, compliance, transparency, and safe, secure, and robust outputs. [283] Importantly, it included a principle urging industry members to actively avoid indi

280. *See NAIC Announces Special Committee on Race and Insurance*, NAT'L COMM'N OF INSURANCE COMM'RS (July 23, 2020), https://content.naic.org/cipr_topics/topic_race_insurance.htm [https://perma.cc/GRX2-4EVL].

281. *Milestones in Racial Discrimination within the Insurance Sector*, NAT'L COMM'N OF INSURANCE COMM'RS (Aug. 2020), https://content.naic.org/sites/default/files/inline-files/HistoricalContextOutline_Final_0.pdf [https://perma.cc/N9QV-KZ6G].

282. *Id.*

283. *NAIC Unanimously Adopts Artifical Intelligence Guiding Principles*, NAT'L COMM'N OF INSURANCE COMM'RS (Aug. 20, 2020), https://content.naic.org/article/news_release_naic_unanimously_adopts_artificial_intelligence_guiding_principles.htm [https://perma.cc/QTS7-SXHE].

rect discrimination against protected classes when using AI.[284] These are promising developments, but concrete recommendations have not been made public.

State insurance antidiscrimination laws are ineffective when it comes to practices that disproportionately affect racial minorities, and insurance regulation has long been recognized as weak.[285] Increasing use of AI and machine learning to price and underwrite insurance has huge potential to lead to results with untraceable disproportionate impact on racial minorities.[286] As Professor Daniel Schwarcz has written, "[i]t is past time for [state anti-discrimination law] to evolve by directly targeting the primary public policy justification for continuing to regulate discrimination in these markets: that such discrimination may unfairly target low-income or minority populations."[287] The research supporting these reforms is sophisticated, balanced, and compelling; much of it is recent.[288] It is time for the insurance industry to stop resisting these reforms, some of which were first proposed decades ago, and embrace them.[289]

B. *Disclosure Requirements*

The proposed agenda has three parts. First is a uniform federal disclosure regime whereby insurance companies would disclose the impacts their practices have by race, modeled on the Home Mortgage Disclosure Act (HMDA).[290] Insurance companies (homeowners and auto) would annually report data to a government entity information including number of policies issued and not issued, amount of insurance per policy, amount of losses, number of paid claims, and race of policyholder. Although studies such as the 2018 Massachusetts car insurance price study[291] mentioned above can find broad racial disparities, data on insurers' losses and payouts at a level of specificity necessary to draw definitive conclusions is not available.[292] Without data, it is not

---

284. *Id.; See also* Prince & Schwarcz, *supra* note 18, at 1260-64.

285. *See* French, *supra* note 20, at 30, 36-37, 58-65. Recall that the Hughes Report in 1968 comments on the weakness of insurance regulation. HUGHES REPORT, *supra* note 4, at 51.

286. *See supra* Part II.B.1.

287. *See* Schwarcz, *Civil Rights Approach*, *supra* note 4, at 686.

288. *See, e.g.*, Abraham et al., *supra* note 22; Prince & Schwarcz, *supra* note 18; Schwarcz, *Public Utility Style, supra* note 21.

289. *See* Squires, *supra* note 199, at 403-407 (proposing disclosure regime analogous to HMDA); Squires & Velez, *supra* note 198, at 75-79 (suggesting more disclosure of insurance decisions and other reforms).

290. Schwarcz, *Civil Rights Approach*, *supra* note 4, at 688-95. State law reforms could also make these changes.

291. Schwarcz, *Civil Rights Approach, supra* note 4, at 674-83

292. *See* Healy, *Premium Disparities Affecting Minority and Low-Income Drivers*, *supra* note 172; Da Lin, *Missing Data and Anti-Discrimination Laws*, HARVARD LAW REVIEW BLOG

possible to pinpoint practices that harm members of protected groups in unreasonable ways. This data should be publicly available.

This idea was first proposed in 2003 and has gone nowhere.[293] The HMDA requires mortgage lenders to collect and report specific data on loans that may be useful in discerning practices that might be discriminatory.[294] Data includes identity of lender, whether the loan was approved or denied, specific characteristics of the loan, location of the property, pricing information for the loan, applicant's membership in a protected group, and other details.[295] The data has been invaluable in studies of mortgage lenders, litigation, and other actions addressing discriminatory lending.[296]

An analogous disclosure regime for insurance would likely lead to similar benefits.[297] The requirements of such a regime would not increase compliance costs much as a good deal of the data is already reported.[298] But key data such as policyholders' membership in protected groups is not collected, nor is other relevant information like policy applications, renewals, and cancellations.[299] The insurance industry's argument that data is a trade secret is contradicted by the fact that the HMDA requires similar data collection and fierce competition remains in the mortgage domain.[300]

C. A Disparate Impact Rule

Second, a disparate impact theory should be applied to rating practices or factors that disproportionately negatively impact low income and minority property and auto insurance applicants. It could be modeled on the 2013 HUD rule discussed above,[301] or take other approaches. For example, a rule could provide that rating practices or

---

(Apr. 2, 2018), https://blog.harvardlawreview.org/missing-data-and-anti-discrimination-laws/ [https://perma.cc/TV4T-SB7R].

293. *See* Squires, *supra* note 41, at 403-07 (2003).

294. Schwarcz, *Civil Rights Approach, supra* note 4, at 689.

295. 12 U.S.C. sec. 2803 (2012); 12 CFR 1003 (2013); KRIS D. KULLY, *CFPB issues Final Guidance on Public Disclosure of HMDA Data*, CONSUMER FINANCIAL SERV. REV. (Jan. 12, 2019)) https://www.cfsreview.com/2019/cfpb_issue_final_guidance_on_public_disclosure_of_hmda_data/.

296. *See* Schwarcz, *Civil Rights Approach, supra* note 4, at 689. It has not solved all issues. *See, e.g.*, Michelle Aronowitz, Edward L. Golding, Jung Hyun Choi, *The Unequal Costs of Black Homeownership* GOLUB CTR. FOR FIN. AND POLICY (Oct. 1, 2020) https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf [https://perma.cc/7AT7-XKMC], but the HMDA has improved the mortgage discrimination landscape since it was passed.

297. Schwarcz, *Civil Rights Approach, supra* note 4, at 690.

298. *Id.* at 691; Schwarcz, *Public Utility Style supra* note 19.

299. Schwarcz, *Civil Rights Approach, supra* note 4, at 692.

300. *Id.* at 693.

301. See *supra* Part II.B.2.(b)ii.

factors that result in or predictably result in a disparate impact on a protected group may be considered illegal discrimination. Insurance companies could defend by showing that the rating practice or factor is necessary to achieve a substantial legitimate nondiscriminatory interest and there was not an alternative available to result in less disparate impact while achieving the same legitimate interest. This law could apply to homeowners and auto insurance. It could be worded differently, but the basic idea is that the current regime which bans discrimination explicitly based on race does not go nearly far enough given that insurance company practices do not explicitly discriminate on the basis of race anymore. But as the NAIC itself has acknowledged, and advocates have argued for many years, "subtle, less obvious forms of discrimination remain in access to insurance and risk classification."[302] Disparate impact is the tool the legal system has developed for situations such as this. Other industries are subject to this rule and there is no reason why the insurance industry should be allowed to continue without it.

D. Repeal Outdated Laws on Rate Regulation

Third, the current state regulatory regime which regulates insurance rates and analyzes whether they are "inadequate[,]" "excessive[,]" or "unfairly discriminatory" (in the actuarial sense)[303] should be repealed. This proposal may seem unrelated to the others, but it recognizes the fact that insurance regulation takes time and resources and not all of it adds value. The existing regime is based on outdated assumptions about insurance markets that no longer exist and adds costs without much benefit given current practices.[304] Repealing this regime would relieve insurance companies and regulators of time-consuming and inefficient analyses that do not make sense given current practices. It would also make time and room for the first two reforms.

The three proposed reforms do not take over the field and have government underwrite risks.[305] Instead they are targeted, focused, and practical. Current technological capabilities mean that underwriting and pricing are increasingly dependent on AI and algorithms which

---

302. National Association of Insurance Commissioners (NAIC), *Milestones of Racial Discrimination within the Insurance Sector* (Aug. 2020), https://content.naic.org/cipr_article/milestones_racial_discrimination_within_insurance_sector.htm [https://perma.cc/59MB-DH9V].

303. *See supra* Part II.B.2.a.

304. *See supra* Part II.B.2.a.*;* Schwarcz, *Civil Rights Approach, supra* note 4*,* at 687-688; Schwarcz, *Public Utility Style*, *supra* note 21.

305. For a huge contrast, consider the flood program. *See supra* note 148. (*supra* Part II.A.5)

can easily create and perpetuate discriminatory actions that are impossible to discern without a disclosure requirement.[306] Insurance remains incredibly important for economic and social mobility. The lack of it hobbles or prevents economic stability and growth; insurance is deeply implicated in the public welfare.[307] There is no reason why insurance companies should continue to be given a pass in terms of disclosure requirements, in sharp contrast to lending institutions. Comprehensive research on insurance antidiscrimination law has revealed how narrow and outdated it is, and how it fails to provide any means to review current practices.[308] Studies continue to come out showing disparities.[309] Cases like Ojo have illustrated just how narrow the concept of unfair discrimination is.[310] The contemporary energy towards a reckoning on race and racism needs to include a shift in the conceptualization of discrimination in insurance to include a disparate impact rule. Unnecessary regulation of rates can be jettisoned. These proposals are overdue and would be steps in the right direction.

CONCLUSION

Property and auto insurance are essential to communities and individuals in many ways; stability, security, transportation to work and school and credit are three important aspects of what they provide. Having a competitive insurance market is important for all communities, including urban communities. Insurance companies played an active role in segregating urban communities by refusing to insure certain areas, creating incentives or requirements for agents to avoid urban areas, and adding exclusions for riot damage. Insurance companies refused to insure urban property risks despite lacking data showing those areas were not insurable in the mid-twentieth century. They charged auto customers more in urban areas often insisting that African American customers participate in the more expensive assigned-risk auto plans. They intentionally discriminated against hundreds of thousands of African Americans in their underwriting practices, contributing to the racial wealth gap that persists today. Insurance companies created a void in cities when African Americans moved in and were an important force supporting racial segregation.

306. Schwarcz, *Civil Rights Approach, supra* note 4, at 685; Prince & Schwarcz, *supra* note 18.

307. *See supra* note 6.

308. Avraham, Logue, & Schwarcz, *supra* note 22.

309. *See supra* Part II.B.1; *supra* note 176; Letter from Maura Healey, Massachusetts Attorney General to Hon. James Eldridge, Premium Disparities Affecting Minority and Low-Income Drivers (Feb. 2, 2018).

310. *See supra* notes 182 & 225., Part II.B.2.a, Schwarcz, *Civil Rights Approach*, *supra* note 4, at 669-670.

Congress initially ignored the harmful void property in insurance markets although states and localities worked on it starting in 1960.[311] Congress finally took steps to confront the problem in 1968 when it passed the UPPRA. This law had benefits such as successfully encouraging private companies to insure in urban areas, encouraging state variation, and not miring the federal government in directly ensuring massive risks it did not understand. From the perspective that insurance regulation should be limited in order to avoid perverse incentives, huge government expenditures, and encourage competition, the federal UPPRA was a success.

The UPPRA helped bring property insurance and competition to urban areas. Yet its shortcomings and limitations are significant. Its limited focus has left in place structural mechanisms that continue to contribute to racial inequality. In its wake, redlining continued. State insurance antidiscrimination laws are narrow, uneven, and weak. Federal oversight is minimal to nonexistent. Insurance companies remain free to use factors for pricing and underwriting that disproportionately impact minority communities with minimal scrutiny. Using insurance credit scores for pricing and underwriting property insurance, which most states allow, is an example of a factor that is neutral on its face but has a disparate impact on minority individuals and communities. Now, using AI and algorithms based on publicly available data, companies are developing ever more complex and opaque algorithms to price and sell insurance.[312] While companies claim these are simply objective ways to measure risk, the danger of heightened and difficult- or impossible-to-detect practices that have a disparate impact is quickly increasing. Insurance companies continue to contribute to undermining economic mobility for people in urban, minority communities. Regulators continue to look the other way.

The historical context of insurance practices strengthens the already strong case for affirmative reforms. First, a disclosure regime needs to be enacted analogous to the HMDA for property and auto insurance. Second, a disparate impact rule for property and auto insurance should be instituted. While insurance companies continue to fight this idea, it is worth pointing out that some banks recently said that having a disparate impact rule forced them in a positive way to look more critically at their own practices.[313] If insurance companies are indeed sincere about wanting to scour their practices, a disparate impact rule is an excellent place to start. Third, the regulatory regime applied to insurance companies, requiring them to show their rates are

311. See *supra* note 110-111.

312. Schwarcz, *Public Utility Style, supra* note 21.

313. Emily Flitter, *Big Banks' 'Revolutionary' Request: Please Don't Weaken this Rule*, N.Y. TIMES July 16, 2020), https://www.nytimes.com/2020/07/16/business/banks-housing-racial-discrimination.html [https://perma.cc/HA8F-U9NW].

actuarially justified is outdated and based on conditions that no longer exist, should be repealed.[314] Competition will ensure that rates are actuarially justified, and government regulation of rates does not add anything in that context.

Still, we need to use a broader lens and take into account that there was never a reckoning for the past decisions that helped create an insurance crisis in the cities and contributed to the racial wealth gap. The three-part suite of reforms would markedly improve insurance practices but could and should be a first step to an even deeper reckoning with the past, perhaps through more affirmative measures.

314. Schwarcz, *Public Utility Style*, *supra* note 21 at 966-7.