

AUTOMOBILE INSURANCE PREMIUM PRICE DISCRIMINATION: SEX/GENDER

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I. INTRODUCTION

Discrimination in automobile insurance premium pricing is not a new concept. In fact, “fair discrimination” is viewed by many as an actuarially sound practice that maintains market stability and provides for a useful insurance product. However, because sex/gender¹ is no longer considered on a binary framework and can be understood as fluid and existing along a spectrum, automobile insurance premium rate-making decisions based on an outdated gender binary system are no longer defensible. The basis for using sex/gender as risk classification differentials is even more suspect because it is not consistently applied across states or insurance companies. Because sex/gender is being used as an indirect substitute for other easily measurable factors of risk, previous justifications for its use are diminishing in their validity. Further, the use of sex/gender in premium pricing should be prohibited because it constitutes prejudicially unfair discrimination. This note explains why discriminating on the basis of sex and/or gender is not a meaningful way to determine automobile insurance premium costs, analyzes why the elimination of sex/gender premium pricing from automobile insurance has not yet been successful, and provides recommendations for why and how to remedy its current use.

II. BACKGROUND

Automobiles are one of the most commonly acquired major purchases in the United States.² Most American states require some type of automobile insurance coverage for individuals who wish to drive.³ When purchasing automobile insurance, an insurance company determines the premium that an individual will pay based on how the company evaluates the individual’s risk of submitting a claim, which is correlated to their

¹ In this paper, the author will use sex/gender as shorthand for sex and/or gender.

² David B. Abramoff, *Rating the Rating Schemes: Application of Constitutional Equal Protection Principles to Automobile Insurance Practices*, 9 CAP. U. L. REV. 683, 684–85 (1980).

³ Carrie Schroll, *Splitting the Bill: Creating a National Car Insurance Fund to Pay for Accidents in Autonomous Vehicles*, 109 NW. U. L. REV. 803, 813 (2015); Harvey Rosenfield, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 70 (1998); Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Towards a Universal Framework for Insurance Anti-Discrimination Laws*, 21.1 CONN. INS. L.J. 1, 26 (2014) (“Automobile drivers, of course, are legally required to carry a minimum amount of liability insurance in virtually every state.”).

likelihood of being involved in an accident.⁴ When making premium calculations, automobile insurers will often consider factors such as location, age, gender, marital status, previous insurance coverage, the purpose for which the vehicle is being used, prior driving and accident experience, and vehicle specifications.⁵

In order to provide coverage to a large number of policyholders and to create policies that provide sufficient coverage at a cost that is affordable to purchasers and profitable to the insurance company, insurers use an underwriting tool known as risk classification.⁶ Actuarial fairness is the idea that individuals are charged premiums that reflect their inherent risk of loss.⁷ Although the insurance industry must also consider other factors in pricing such as an individual's presumption of their own risks, cross-subsidizations, and market competition strategies, this paper focuses on choosing the specific rating factors themselves.

Basing premium costs proportionally to an individual's probability of loss theoretically minimizes adverse selection risk.⁸ Adverse selection is a theory in insurance that high-risk individuals will be the most likely to be interested in purchasing insurance.⁹ However, when an insurance company can accurately assess the expected loss that a policyholder will cause the company, then the company can set premiums that prevent market collapse.¹⁰ Adverse selection is often viewed as an information disparity

⁴ *Auto Insurance*, NAT'L ASS'N OF INS. COMM'RS., <https://content.naic.org/cipr-topics/auto-insurance> (Jan. 26, 2023); Mihaela David, *Auto Insurance Premium Calculation Using Generalized Linear Models*, 20 *PROCEDIA ECONS. & FIN.*, 147, 155 (2015).

⁵ *Auto Insurance*, *supra* note 4; David A. Cather, *Reconsidering Insurance Discrimination and Adverse Selection in an Era of Data Analytics*, 45 *GENEVA ASS'N* 426, 430 (2020); Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 *Ohio St. L.J.* 835, 849 (1986); Yu-Luen Ma, Xiaoyu Zhu, Xianbiao Hu & Yi-Chang Chiu, *The Use of Context-Sensitive Insurance Telematics Data in Auto Insurance Rate Making*, 113 *Transp. Rsch. Part A Pol'y & Prac.*, 243, 244 (2018).

⁶ Anya E.R. Prince, *Insurance Risk Classification in an Era of Genomics: Is a Rational Discrimination Policy Rational?*, 96 *NEB. L. REV.* 624, 626 (2017); *INS. INFO. INST.*, *TRENDS AND INSIGHTS: RISK-BASED PRICING OF INSURANCE 1* (2022); Karen A. McCluskey, *Ending Sex Discrimination in Insurance: The Nondiscrimination in Insurance Act*, 11 *J. LEGIS.* 457, 459–60 (1984).

⁷ Prince, *supra* note 6, at 628.

⁸ *Id.* at 639; *INS. INFO. INST.*, *supra* note 6 at 1–2.

⁹ Katrien Antonio & Emiliano A. Valdez, *Statistical Concepts of A Priori and A Posteriori Risk Classification in Insurance*, 96 *ASTA ADVANCES STAT. ANALYSIS* 187, 189 (2011); Alma Cohen & Peter Siegelman, *Testing for Adverse Selection in Insurance Markets*, 77 *J. RISK & INS.* 39, 39–40 (2010).

¹⁰ Antonio & Valdez, *supra* note 9, at 189.

problem whereby the insured individual is aware of a risk factor and the insurance company is not.¹¹ To address this disparity, an insurance company will collect information from the potential policyholder to compare to its statistical data of the likelihood of risk of loss to determine appropriate policy premiums.¹²

In automobile insurance, the use of sex/gender is a non-driving-related variable that is often considered in policy pricing.¹³ Traditionally, women have been viewed as having fewer and less severe automobile accidents, and that idea has frequently been used to justify charging women lower automobile insurance rates.¹⁴ The use of sex/gender as a rating variable in insurance first began to garner pushback in the United States during the 1980s, as social anti-discrimination efforts gained support.¹⁵ This note discusses why the use of sex/gender is likely an unsound basis for determining automobile insurance premium costs and why automobile insurance industry decision-makers should stop using sex/gender in premium-setting policies.

III. SEX AND GENDER ARE NOW UNDERSTOOD DIFFERENTLY

Understanding the current realizations of sex/gender makes the use of antiquated binary sex/gender designations problematic in automobile insurance. In previous decades, the terms ‘sex’ and ‘gender’ had frequently been used interchangeably.¹⁶ Current conceptions, however, hold that the two terms have distinct definitions.¹⁷ The Gender Equality Law Center defines sex as “a combination of bodily characteristics including

¹¹ Richard E. Just, Linda Calvin & John Quiggin, *Adverse Selection in Crop Insurance: Actuarial and Asymmetric Information Incentives*, 81 AM. J. AGRIC. ECON. 834, 836–37 (1999).

¹² Antonio & Valdez, *supra* note 9, at 189–90.

¹³ Lorilee A. Medders, Jamie A. Parson & Matthew Thomas-Reid, *Gender X and Auto Insurance: Is Gender Rating Unfairly Discriminatory?*, 40 J. INS. REGUL. 1, 10 (2021) (“Gender is one variable that has long been used by insurers in most states to derive auto insurance rates.”).

¹⁴ *Id.* at 10–11.

¹⁵ Jill Gaulding, Note, *Race, Sex, and Genetic Discrimination in Insurance: What's Fair?*, 80 CORNELL L. REV. 1646, 1661 (1995) (“The debate over the legitimacy of sex discrimination in insurance which took place in the 1980s was highly polarized, with one side advocating the efficient discrimination view and the other advocating the anti-discrimination view.”).

¹⁶ Adam R. Chang & Stephanie M. Wildman, *Gender In/Sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 45 (2017).

¹⁷ *Id.* at 46, 55–56.

chromosomes, hormones, internal and external reproductive organs, secondary sex characteristics, and gender identity. Most people are assigned male or female at birth based on the appearance of their external genitalia.”¹⁸ However, physical sex is also composed of a more varied chromosomal makeup given that there are more variations than just XX and XY; “biology is not a simple box of either one or the other (male or female).”¹⁹ The term intersex can be used to describe a “variety of situations in which a person is born with reproductive or sexual anatomy that [do not] fit the boxes of ‘female’ or ‘male.’”²⁰ Estimates suggest that “about 1–2 in 100 people born in the U.S. are intersex.”²¹ Though the reported numbers of individuals who are intersex are low, the low reporting numbers may be related to difficulty in compiling data—including sex/gender presentations that appear later in life, lack of knowledge, fear of bias and stigma, and infrequent and incongruent data compilations used to identify these individuals.²² Despite the difficulty in knowing how many individuals may be intersex, it is important to consider how existing policies and cultural frameworks, including those within the automobile insurance industry, may be affecting this population. This is supported by the fact that other countries have implemented protections against forms of discrimination for individuals who are born with intersex variations,²³ and

¹⁸ *Getting Our Definitions Right*, GENDER EQUAL. L. CTR. (last visited Oct. 6, 2023), <https://www.genderequalitylaw.org/lgbtqdefinitions>; Chang & Wildman, *supra* note 16, at 57 (“[S]ex only relates to biology, sex assigned at birth, genitalia, chromosomes, and hormones.”).

¹⁹ Chang & Wildman, *supra* note 16, at 58–59. *See also* Medders et al., *supra* note 13, at 4–5 (discussing the distinction between sex and gender and where individuals who are born with intersex variations fit into this analysis).

²⁰ *What's Intersex?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity/whats-intersex> (last visited Feb. 21, 2023). *See also* MYESHIA N. PRICE, AMY E. GREEN, JONAH P. DECHANTS & CARRIE K. DAVIS, THE TREVOR PROJECT, THE MENTAL HEALTH AND WELL-BEING OF LGBTQ YOUTH WHO ARE INTERSEX 3–6 (2021) (providing statistics on the rates of mental health and societal challenges facing individuals born with intersex variations and background information on what it means to be intersex).

²¹ *What's Intersex?*, *supra* note 20.

²² Tiffany Jones, *The Needs of Students with Intersex Variations*, SEX EDUC. 1, 2 (2016); *What's Intersex?*, *supra* note 20; PRICE ET AL., *supra* note 20, at 3–6.

²³ Jones, *supra* note 22, at 3; EUR. UNION AGENCY FOR FUNDAMENTAL RTS., PROTECTION AGAINST DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS IN THE EU 71–72 (2015).

the United States itself has adopted anti-discrimination efforts in other areas of public access based on sex status and characteristics.²⁴

Merriam-Webster Dictionary defines gender as “the behavioral, cultural, or psychological traits typically associated with one sex.”²⁵ “[G]ender also came to have application in two closely related compound terms: gender identity refers to a person's internal sense of being male, female, some combination of male and female, or neither male nor female; gender expression refers to the physical and behavioral manifestations of one's gender identity.”²⁶ Some terms related to gender identity include cisgender, transgender, drag, genderqueer, genderfluid, agender/gender neutral, sex assigned at birth, and pansexual, but even this list is not inclusive of the vast array of identities.²⁷ While gender identities beyond just male and female are not a new concept, current enhanced understanding and public engagement with the use of additional identification options within the United States is.²⁸ Because sex/gender is now being understood as fluid, unfixed, no longer binary, and existing along a spectrum, the justification of its use as a classification to base automobile insurance premium costs is drastically reduced.²⁹

²⁴ See generally EEOC Decision No. 0120120821, 2012 WL 1435995 (2012); Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989); *Section 1557: Protecting Individuals Against Sex Discrimination*, U.S. Dep’t Health and Hum. Servs., (2020), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html>; Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (“Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”).

²⁵ *Gender*, MERRIAM-WEBSTER ONLINE DICTIONARY <https://www.merriam-webster.com/dictionary/gender> (last visited Oct. 6, 2023).

²⁶ *Id.*; *Getting Our Definitions Right*, *supra* note 18; Chang & Wildman, *supra* note 16, at 54.

²⁷ Chang & Wildman, *supra* note 16, at 54–55.

²⁸ Nat Thorne, Andrew Kam-Tuck Yip, Walter Pierre Bouman, Ellen Marshall & Jon Arcelus, *The Terminology of Identities Between, Outside and Beyond the Gender Binary: A Systematic Review*, 20 INT. J. TRANSGENDERISM 138, 139 (2019).

²⁹ Raewyn Connell, *Gender, Health and Theory: Conceptualizing the Issue, In Local and World Perspective*, 74 SOC. SCI. & MED. 1675, 1677 (2012); Pawel Tacikowski, Jens Fust & H. Henrik Ehrsson, *Fluidity of Gender Identity Induced by Illusory Body-Sex Change* 1 SCI. REPS 1 (2020).

IV. SEX/GENDER TO JUSTIFY AUTOMOBILE INSURANCE PREMIUM PRICING IS ACTUARIALLY SUSPECT

A. INCONSISTENT USE OF SEX/GENDER AS A RATING

The wide discrepancy and difference in application to how ‘men’ and ‘women’ are priced for automobile insurance by state and by insurance company make the use of sex/gender as a qualifying factor suspect. It is commonly believed that women, when compared to men, pay lower automobile insurance premiums.³⁰ Studies have shown that, despite the persistent idea that women are a lower risk class for automobile accidents, in some instances, they still pay more than their male counterparts.³¹ “[A]ccording to the National Organization for Women, ‘women drive less than men on average, but pay about twice as much per mile as men for identical coverage.’”³² Even assuming arguendo that women are better

³⁰ Medders et al., *supra* note 13, at 10–11; Press Release, Consumer Fed’n of Am., Most Large Auto Insurers Charge 40 and 60-Year-Old Women Higher Rates Than Men, Often More Than \$100 Per Year (Oct. 12, 2017), https://consumerfed.org/press_release/large-auto-insurers-charge-40-60-year-old-women-higher-rates-men-often-100-per-year/#:~:text=In%2038%20instances%2C%20women%20with,solely%20because%20they%20were%20female (“Female motorists with perfect driving records often pay significantly more for auto insurance than male drivers with identical driving records and other characteristics the insurers use to price auto insurance, according to new research by the Consumer Federation of America (CFA) released today.”); Patrick Butler & Twiss Butler, *Driver Record: A Political Red Herring That Reveals the Basic Flaw in Automobile Insurance Pricing*, 8 J. INS. REGUL. 200, 226 (1989).

³¹ Elaine Povich, *What? Women Pay More Than Men for Auto Insurance?* (*Yup.*), STATELINE (Feb. 11, 2019, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/02/11/what-women-pay-more-than-men-for-auto-insurance> (“According to the 2017 Consumer Federation study, 40- and 60-year-old women with perfect driving records were charged more than men for basic coverage nearly twice as often as men were charged the higher rate.”); Nadine El-Bawab, *Women Pay More On Average Than Men for Car Insurance, Despite Getting into Fewer Accidents, Study Finds*, CNBC (Apr. 19, 2021, 4:39 PM), <https://www.cnbc.com/2021/04/19/women-pay-more-than-men-for-car-insurance-in-21-states-study-finds.html> (“Nationwide, women pay an average of 0.4% more than men for car insurance. And in 21 states and the District of Columbia, women are paying more despite getting into fewer accidents.”).

³² Lisa A. Gardner & David C. Marlett, *The State of Personal Auto Insurance Rate Regulation*, J. INS. REGUL. 39, 49 (2008). *Cf.* Julia Matseikovich, *Does Car Insurance Cost More for Men or Women?*, AGILERATES (Aug. 7, 2023), <https://www.agilerates.com/car-insurance/does-car-insurance-cost-more-for->

drivers, “[o]n average, women pay \$10 more than men on their annual car insurance premiums.”³³

Additionally, different states and different insurance companies charge men and women inconsistent prices, which reduces support for the actuarial soundness of basing insurance premium costs on sex/gender.³⁴ Further, there is much more diversity in accident rates within sex/gender classifications than has historically been acknowledged.³⁵ Similarly, in claims to support marketability, in some instances men are given subsidies to their ‘actuarially’ justified cost of premiums in order to promote purchase.³⁶ This data makes the use of gender as a factor less reasonable because the cost of premiums does not always reflect the supposition that females are safer drivers.

women-or-men/ (“By 2018, men paid more than women in 21 states, and women paid more than men in 25 states.”).

³³ Taylor Covington, *Men Are More Confident Drivers, but Data Shows Women Are Safer*, THE ZEBRA (Dec. 20, 2022), <https://www.thezebra.com/resources/driving/gender-driving-confidence-survey/>.

³⁴ Press Release, Consumer Fed’n of Am., *supra* note 30 (“The inconsistent pricing decisions of these insurance companies illustrates CFA’s concern that tying auto insurance rates to factors that a customer cannot control and have nothing to do with their driving safety record – such as one’s biological sex – leads to unfair discrimination and indefensible claims of actuarial soundness.”); Povich, *supra* note 31.

³⁵ Butler & Butler, *supra* note 30, at 215 (“Even state driver records classified by sex, however, demonstrate that there is broad variation among individuals of the same sex in annual accident probability with considerable overlap in the annual probabilities of women and men drivers.”); Cather, *supra* note 5, at 431 (“[W]hile female and male drivers on average have significantly different probabilities of suffering losses, there is a wide range of risk levels within each gender category.”); Wanda A. Wieggers, *The Use of Age, Sex, and Marital Status as Rating Variables in Automobile Insurance*, 39 U. TORONTO L.J. 149, 160 (1989) (“Some statistical evidence suggests that high-risk groups as presently constituted, such as that of young single males, may be more heterogeneous with respect to risk than low-risk classes.”).

³⁶ Patrick Butler, Twiss Butler & Laurie L. Williams, *Sex-Divided Mileage, Accident, and Insurance Cost Data Show That Auto Insurers Overcharge Most Women*, 6 J. INS. REGUL. 243, 407 (1988).

In California's decision to prohibit the use of gender in determining automobile insurance premiums, the legislature explains:

Gender's relationship to risk of loss no longer appears to be substantial, and the logical justification for the statistical relationship to risk of loss has become suspect because:

- Company experience has come to vary widely, with some companies finding females to be a higher risk while other companies find similarly situated males to be a higher risk.
- Insurers routinely combine gender with other, more predictive factors like years driving experience.
- Gender's effect on rate appears to vary widely by location.³⁷

Delaware legislators, in their decision to ban the use of gender in automobile insurance, cite similar reasons:

Rating factors should be meaningfully related to drivers' risk of loss and should not be disproportionately harmful to customers based on protected classes. Though used by many insurers, gender does not meet these critical tests. With several companies setting prices that suggest women are inherently riskier, another company rating as though men are riskier drivers, and two companies considering it unnecessary to consider the gender of the driver, it is clear that this factor does not meaningfully or accurately capture a driver's risk of loss. The inconsistency of gender's usage reveals that carriers' claims of correlation to risk are deeply flawed. . . .³⁸

Differences are noted by companies as well. GEICO and Progressive have been cited as charging women more than men for automobile insurance, but Allstate, Liberty Mutual, and Farmers more often

³⁷ CAL. DEP'T OF INS., INITIAL STATEMENT OF REASONS: GENDER NON-DISCRIMINATION IN AUTOMOBILE INSURANCE RATING 2 (Oct. 19, 2018) (discussing the amendment of CAL. CODE REGS. tit. 10 §§ 2632.5, 2632.11 to eliminate the use of gender in private passenger automobile insurance rating in California).

³⁸ *Delaware Regulator Urges Ban on Gender-Based Auto Insurance Rating*, INS. J. (Mar. 3, 2022), <https://www.insurancejournal.com/news/east/2022/03/03/656589.htm>.

charged men higher rates.³⁹ If there was an actuarially valid justification for pricing women and men differently based on their risk of loss, there should not be dissimilar application when correcting for other variables.⁴⁰ “The inconsistent pricing decisions of these insurance companies illustrates the Consumer Federation of America’s concern that tying auto insurance rates to factors that a customer cannot control and that have nothing to do with their driving safety record—such as one’s biological sex—leads to unfair discrimination and indefensible claims of actuarial soundness.”⁴¹

B. INCONGRUENT CLASSIFICATION

The utility of sex/gender in insurance premium cost determinations loses validity because there is great heterogeneity within the classification groups themselves. For a factor to be useful to base automobile insurance premium prices on, there must be uniformity in the class.⁴² It is suggested that a risk class should be homogenous and not ambiguous.⁴³ Although there is no absolutely perfect classification grouping according to these principles, there exist more accurate and easily attainable classifications under these standards than sex/gender.⁴⁴ As will be discussed in Section

³⁹ Press Release, Consumer Fed’n of Am., *supra* note 30 (“Female motorists with perfect driving records often pay significantly more for auto insurance than male drivers with identical driving records and other characteristics the insurers use to price auto insurance, according to new research by the Consumer Federation of America (CFA) released today. This finding contrasts with the public perception that men pay more than or the same as women for auto insurance.”).

⁴⁰ *Id.* (““If sex were an actual risk factor, we wouldn’t see companies using it in such divergent ways. . . . If these large insurance companies are abiding by actuarial principles, you would not find one insurer granting a 21% price break for female drivers while another company sees a need for a 32% surcharge on those same drivers,” said Hunter. ‘Also, how can a company think that the women of Tampa are very high risks, but women of Cleveland are very low risks relative to men? A woman moving from Tampa to Cleveland does not magically become a better driver. What this really tells us is that either some companies are ignoring the data or that gender is not a good indicator of risk and should not be used.’”).

⁴¹ *Id.*

⁴² Michael A. Walters, *Risk Classification Standards*, 68 PROC. CAS. ACTUARIAL SOC’Y, 1, 7–8 (1981).

⁴³ *Id.*; FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES at 5–6 (2003) (“But the insurance company is stunningly uninterested in providing me the opportunity to demonstrate that the generalizations about Massachusetts drivers and sports car owners do not apply to me.”).

⁴⁴ SCHAUER, *supra* note 43, at 30, 36.

IV.d., *infra*, when a groupage is of a suspect classification, justification for its use should be even stronger than for non-suspect classifications.⁴⁵

Many automobile insurance applications will request information about an individual's sex or gender, but these terms are often unspecified and conflated.⁴⁶ Some insurance companies request information about an individual's sex at birth, others require gender to match that of the state driver's license, and still others allow individuals to self-classify.⁴⁷ With respect to nonbinary sex and gender classifications, there is a great disparity between the phraseology used, and even as to how individuals are legally permitted to identify.⁴⁸ Recently, some insurance companies have allowed for a third gender option such as "unknown," "unspecified," "X," "nonbinary," or "other," but this is not done consistently across companies.⁴⁹ In light of the fluidity, variability, and nonbinary

⁴⁵ *Id.* at 215 (“[A] principle of antidiscrimination, itself operating as a generalization, mandates the exclusion of even relevant characteristics, treating different cases similarly precisely because of the generalization on which the antidiscrimination principle is based.”); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV. 135, 137 (2011) (“Here, the government must demonstrate a compelling purpose for the distinction drawn and prove that such a classification is necessary to achieve that purpose.”); Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Understanding Insurance Antidiscrimination Law*, 87 S. CAL. L. REV. 195, 216 (2014) (“Although these Constitutional principles obviously do not apply to insurers who are not public actors, and thus not subject to the Equal Protection Clause—they describe broad principles that could be applied to insurers via state antidiscrimination law.”).

⁴⁶ Kayda Norman, *Car Insurance for Transgender or Nonbinary Drivers*, NERDWALLET (May 13, 2022), <https://www.nerdwallet.com/article/insurance/car-insurance-transgender-nonbinary>; Cate Deventer, *Car Insurance for Transgender Applicants*, BANKRATE (Mar. 9, 2022), <https://www.bankrate.com/insurance/car/auto-insurance-for-trans-applicants/>. See also Appendix A.

⁴⁷ Norman, *supra* note 46; Deventer, *supra* note 46. See *infra* Section IX (organizing automobile insurance sex/gender term usage into an Appendix).

⁴⁸ NAT'L CTR. FOR TRANSGENDER EQUAL. THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 81 (2016); Claire E. Lunde, Rebecca Spigel, Catherine M. Gordon & Christine B. Sieberg, *Beyond the Binary: Sexual and Reproductive Health Considerations for Transgender and Gender Expansive Adolescents*, 3 FRONTIERS IN REPROD. HEALTH 1, 3 (2021).

⁴⁹ Ray Prince, *What You Need to Know About Transgender Car Insurance*, COMPARE.COM (Nov. 11, 2022), <https://www.compare.com/auto-insurance/resources/transgender-car-insurance>; Michael Evans, *Do You Have to Identify as Male or Female When Getting Car Insurance?*, THE BALANCE (May 16, 2022), <https://www.thebalancemoney.com/do-you-have-to-identify-as-male-or-female-when-getting-car-insurance->

understanding of sex and gender, these classifications are neither homogenous nor unambiguous.

Some states have worked to compel insurance companies to recognize gender options beyond just male and female.⁵⁰ Other states have simply eliminated sex and gender as factors for determining automobile insurance premium costs,⁵¹ yet many states still have not addressed this issue and continue to use the traditional system of binary male and female designations.⁵² The continued use of a system that does not grasp all of its applicants by claiming actuarial soundness, when in fact, applied statistics and classifications do not actually represent the individuals enrolled in the automobile insurance plan, is of little utility.

Further, the way that insurance companies determine premium costs for individuals whose sex or gender identity falls outside of traditional male and female classifications is not uniform.⁵³ Some insurance companies assign anyone who falls outside of a male/female gender classification the cheaper insurance cost, while others average the price of male and female insurance and use that as the cost for gender-diverse individuals.⁵⁴ This would cause someone who is neither male nor female to pay discordantly depending on which company they choose.⁵⁵ This arbitrary payment structure for individuals who are not male or female does not reflect their likelihood of risk and, therefore, is not justifiable within the

5078356#:~:text=Changing%20your%20gender%20marker%20may,decrease%2C%20according%20to%20the%20NCTE; Deventer, *supra* note 46.

⁵⁰ DFR, 2018-3 Or. Bull. 2 (Apr. 16, 2018) (A bulletin issued in 2018 in Oregon directs that auto insurers who require gender disclosures must include a “not-specified” gender option. Rating systems in Oregon that do not allow for that gender option will be found to be unfairly discriminatory on the basis of sex and will be disapproved in form review processes.).

⁵¹ Ellen Lichtenstein, *Which States Ban Gender-Rating in Insurance Premiums*, AGENTSYNC (Mar. 28, 2022), <https://agentsync.io/blog/state-regulatory-change/which-states-ban-gender-rating-in-insurance-premiums>.

⁵² *Id.*

⁵³ Norman, *supra* note 46; Deventer, *supra* note 46.

⁵⁴ Isabel Slone, *Should Gender Still be a Factor Used to Set Car Insurance Rates?*, LOWESTRATES.CA (Mar. 23, 2022), <https://www.lowestrates.ca/blog/auto/should-gender-still-be-factor-car-insurance-rates>; Surina Nath, *What Do Auto Insurance Rates Look Like for Genderless Drivers?*, INS. BUS. (Mar. 18, 2022), <https://www.insurancebusinessmag.com/ca/news/auto-motor/what-do-auto-insurance-rates-look-like-for-genderless-drivers-399167.aspx>; Deventer, *supra* note 46.

⁵⁵ Medders et al., *supra* note 13, at 26.

current automobile insurance premium cost justification framework.⁵⁶ Costs should be correlated to individual risk, and in the current application of sex/gender-based automobile insurance premium calculations, this is not so. Although not every insurance company uses the exact same classification systems or ratings, considering the availability of alternative and more accurate and just risk classifiers, continuing to use a binary sex/gender classification is an inferior choice.⁵⁷

A risk classification should be statistically credible and reliable and have a reasonable relationship between the factor selected and the expected loss and cost.⁵⁸ Data on the automobile risk for individuals whose sex/gender is anything other than male or female has not yet been studied in a meaningful way and is not recommended.⁵⁹ The incongruity of the definitions of these different sex and gender options likewise compounds the difficulty in obtaining useful data on risk. If automobile insurance companies are allowed to continue to use sex/gender as a classification, much further research would need to be conducted to justify the pricing of individuals who are nonbinary. However, because of the fluidity and variability of sex/gender, it is likely that even these efforts would fall short of providing meaningful actuarial value and would be suboptimal when compared to other available alternatives.

It is further suggested that to be a useful categorization, the “insured should not be easily able to misrepresent or manipulate his classification.”⁶⁰ However, with respect to sex/gender in automobile insurance, there has been abuse and false manipulation within this system.⁶¹

⁵⁶ SCHAUER, *supra* note 43, at 19–20 (“Thus to make decisions on the basis of the characteristics of particular events or particular individuals, rather than on the basis of the characteristics of the groups or classes of which the particulars may be members, is often thought to be a moral imperative.”).

⁵⁷ *Id.* at 20, 152 (“[M]aximum particularity is a characteristic of both justice and wisdom, and reliance on nonparticular categories or principles is at best a necessary evil, at worst an injustice, and all too often a demonstration of stupidity. . . . Rather, in order to compensate for the observed tendencies to overuse gender-based generalizations, we treat the use of gender-based generalizations as wrong even when those generalizations are statistically relevant and thus despite the fact that they are statistically relevant.”).

⁵⁸ Walters, *supra* note 42, at 8.

⁵⁹ Sarah George, *Male vs. Female Insurance Rates: Who Pays More and Why*, FINDER (Mar. 17, 2022), <https://www.finder.com/car-insurance-rates-by-gender>; Slone, *supra* note 54.

⁶⁰ Walters, *supra* note 42, at 8.

⁶¹ Natalie O’Neill, *Man Legally Changes Gender to Get Cheaper Car Insurance: Report*, N.Y. POST, (July 30, 2018, 1:16 PM), <https://nypost.com/2018/07/30/man-legally-changes-gender-to-get-cheaper-car-insurance-report/>; Justin Hughes, *Redditior Changes Gender, Saves More Than*

Some individuals have taken advantage of the insurance companies' flawed sex/gender classification systems in order to attain lower premium costs. In many instances, an individual is able to change the sex/gender they choose on an automobile insurance policy even if they do not truly identify in that way.⁶² Without considering the prolonged prejudicial and harmful sociologic effects that these actions have on sex/gender-diverse individuals, it also negatively impacts automobile insurance costs.⁶³ Using sex/gender as a basis for automobile insurance premiums is nonsensical if a person can simply misrepresent the sex/gender they apply with to manipulate their cost. The idea that an insured should not be able to easily manipulate their classification group may seem at odds with concepts of uncontrollability that are used to advocate for why sex/gender are not sound classification groupings. The idea of controllability is a separate conceptualization that relates to the idea of being able to change classification groups by way of implementing safer practices.⁶⁴ Here, the idea of mere manipulation or misrepresentation represents a nefarious augmentation that fails to embody the adoption of safer practices but instead merely perverts a risk factor classification label.

C. SUBSTITUTE OR PROXY FOR OTHER MEASURABLE FACTORS

Sex/gender are not direct measures of an individual's risk of having an automobile accident.⁶⁵ The prevalence of accidents is unattributable to

\$1,000 on Car Insurance, THE DRIVE (June 11, 2018, 6:30 PM), <https://www.thedrive.com/news/20579/redditor-changes-gender-saves-more-than-1000-on-car-insurance>.

⁶² O'Neill, *supra* note 61; Hughes, *supra* note 61.

⁶³ *The Impact of Insurance Fraud on the U.S. Economy*, COALITION AGAINST INS. FRAUD (2022) ("Insurance fraud is the crime we all pay for, whether through higher premiums, law enforcement expenses, court costs, and in medical care."); Christine G. Barlow, *Material Misrepresentations in Insurance Policies*, PROPERTYCASUALTY360 (Oct. 25, 2019, 12:00 AM), <https://www.propertycasualty360.com/2019/10/25/insurance-policy-material-misrepresentations/> ("When application or claim information is materially misrepresented, it costs the carriers and other insureds financially.").

⁶⁴ See *infra* Section V.a.

⁶⁵ Anne C. Cicero, *Strategies for the Elimination of Sex Discrimination in Private Insurance*, 20 HARV. C.R.-C.L. L. REV. 211, 215 (1985) ("Behind this extensive industry reliance on a cost justification for sex-differentiated insurance prices is only questionable empirical support."); Gaulding, *supra* note 15 at 1661 ("As with race, it is not clear that the biology of sex causes any of these risks, although the biological differences between men and women are far greater than those dividing the various races. Insurers have used these statistical differences as the basis for sex discrimination with respect to underwriting, rating, and

the individual's sex/gender as the *cause*, but instead to other "exposure" factors, such as the amount of driving that is done.⁶⁶ There is no *inherent* risk based in being a man, but in fact, the men that have been cited in studies to suggest actuarial basis were merely driving more than the women, at a younger age, for longer distances, or more frequently than women.⁶⁷ When adjusting for other more direct variables, such as the amount of miles driven, the outcomes in accident rates between men and women are not significant.⁶⁸ Even if credence was given to these suspect 'actuarial' justifications, insurance companies are relying on old data that is not reflective of current driving practices and instead follows the historical practice of applying antiquated sex/gender-based premium pricing.⁶⁹ Following this line of thought, sex/gender-based automobile insurance

coverage."); Abramoff, *supra* note 2, 690 n.30; *see generally* Avraham, *supra* note 3.

⁶⁶ Guohua Li, Susan P. Baker, Jean A. Langlois & Gabor D. Kelen, *Are Female Drivers Safer? An Application of the Decomposition Method*, 9 EPIDEMIOLOGY RES. INC. 379, 383 (1998); Gaulding, *supra* note 15.

⁶⁷ McCluskey, *supra* note 6, at 467–69; Cicero, *supra* note 65, at 215–17 n.23 (citing Fair Insurance Practices Act: Hearings on S. 372 Before the Comm. on Commerce, Science, and Transportation, 98th Cong., 1st Sess. 2-16 (1983), statement of Jasper J. Jackson, Deputy Public Advocate for the Division of Rate Counsel, N.J. Dep't of the Public Advocate: "there is no difference in the accident rates of men and women, even in the teenage years, when the data are adjusted to include the difference in miles driven. If so, the use of sex, rather than the more accurate proxy of driving habits and commuting needs, has an adverse impact on those women who do not drive frequently."); Butler et al., *supra* note 36, at 398.

⁶⁸ Butler & Butler, *supra* note 30, at 226; Aaron S. Edlin, *Per-Mile Premiums for Auto Insurance* 17 (Nat'l Bureau of Econ. Rsch., Working Paper No. 6934, 1999); Li et al., *supra* note 65, at 383; Cather, *supra* note 5, at 433 ("Pricing based on gender instead of miles driven can result in sizable pricing errors, especially for drivers whose mileage is atypical of their gender."). *But cf.* SCHAUER, *supra* note 43, at 100 ("Each of these debates turns out to be about the advantages and disadvantages of relying on nonspurious but nonuniversal generalizations, and each of these debates then turns out to compel a focus on the advantages and disadvantages of relying on generalizations compared to relying on seemingly more individualized assessments.").

⁶⁹ Pierluigi Cordellieri, Francesca Baralla, Fabio Ferlazzo, Roberto Sgalla, Laura Piccardi & Anna Maria Giannini, *Gender Effects in Young Road Users on Road Safety Attitudes, Behaviors and Risk Perception*, 7 FRONTIERS IN PSYCH. 1, 8 (2016). Commonly cited sources for gender-based insurance premiums costs include: Federal Highway Administration 2009 National Household Travel Survey; National Highway Traffic Safety Administration, *Traffic Safety Facts 2008: A Compilation of Motor Vehicle Crash Data from the Fatality Analysis Reporting System and the General Estimates System*, U.S. DEP'T OF TRANSP. (2008).

premium calculations have been suggested as merely a substitute/proxy factor for other more direct factors⁷⁰ (such as miles driven or driving habits), having developed that way because studies distinguishing risk by sex/gender were simple and low cost to conduct and review.⁷¹ Because of its ease, sex/gender was a “useful” measure for risk stratification.⁷² With broad technological advancements however, more appropriate and much more direct, quantifiable, and actuarially sound risks such as miles driven and/or driving patterns (factors that the industry refers to as “pay-as-you drive” factors) are now easily available and should be adopted instead.⁷³ There is little sense in continuing to use sex/gender as a crude proxy instead of other finer measures that can be used that are based on actual driving behavior.⁷⁴

⁷⁰ Cicero, *supra* note 65, at 212; John D. Hatch, *Should Insurance Be Blind to Sex?*, 12 BRIEF 9, 9 (1983); Butler et al., *supra* note 36, at 401.

⁷¹ Cather, *supra* note 5, at 432 (“[G]ender-based pricing was adopted by auto insurers as a proxy for mileage driven, noting that males tend to drive more than females, but that insurers at that time could not devise a reliable, low-cost way to track a driver’s mileage. . . . However, despite the correlation between gender and mileage driven, using gender as a proxy for mileage can result in considerable pricing heterogeneity.”); Medders et al., *supra* note 13, at 10; Wiegers, *supra* note 35, at 152; SCHAUER, *supra* note 43, at 187 (“[R]ace, gender, and age, and often ethnicity, unlike many other attributes, have a visibility and a consequent salience that makes them stand out more than other factors. Such attributes thus have a tendency to be utilized more than their actual predictive contribution would justify. Because these attributes, unlike other personal characteristics and attributes, are “visually accessible, culturally meaningful, and interactionally relevant,” such factors occupy more of the decisionmaking space than their empirical role would support.”).

⁷² Cather, *supra* note 5, at 432; Medders et al., *supra* note 13, at 10; Wiegers, *supra* note 35, at 152.

⁷³ Mercedes Ayuso, Montserrat Guillen & Ana María Pérez Marín, *Telematics and Gender Discrimination: Some Usage-Based Evidence on Whether Men’s Risk of Accidents Differs from Women’s*, 4 RISKS 1, 1 (2016) (explaining that technology today makes it possible to monitor a driver’s speed, miles driven, time of day driven, and use this sort of data to base pricing options); Jean Lemaire, Sojung Carol Park & Kili C. Wang, *The Use of Annual Mileage as a Rating Variable*, 46 ASTIN BULL. 39, 39 (2015) (“Auto insurers, in order to remain competitive in risk selection and pricing, are constantly seeking better ways to measure risk. To this end, they adopt numerous rating variables—and, when unavailable, proxy variables—to better gauge how risky each particular customer is.”).

⁷⁴ Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1279 (2020) (“Returning to the example of sex and auto insurance, insurers are increasingly generating more direct data about driver care levels through techniques like

D. CORRELATION VERSUS CAUSATION

Some regulators argue that correlative relationships are not enough to support the use of a classification in automobile insurance underwriting.⁷⁵ This is even more strongly supported when the factor at issue is a legally suspect classification system.⁷⁶ When a classification treats people differently on the basis of sex/gender specifically, a merely correlative relationship can be considered unfair discrimination.⁷⁷ In the case *Hartford Accident and Indemnity Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania*, the Supreme Court of Pennsylvania upheld the Insurance Commissioner's decision that the use of gender for automobile insurance rates was unfairly discriminatory and contrary to public policy.⁷⁸ Justice Hutchinson's concurrence in that case supported the holding that the use of gender was unfairly discriminatory and that

[a]bsent at least a causal relation between sex and accident incidence a difference in auto insurance rates between men and women is plainly an unfair discrimination based on sex. No causal connection is shown on this record. What does appear is only a statistical correlation between sex

telematics. As this data becomes more widely available, may shift from proxy discriminating based on sex to discriminating based on non-suspect and more direct measures of driver care, like frequency of sudden stops.”).

⁷⁵ Cather, *supra* note 5, at 430 (“Some regulators prefer insurers to use pricing variables that are causally related to insured losses—e.g., charging drivers more if they drive fast or have high mileage because the chance of having an accident increases with greater driving exposure—because such pricing relationships are easier for the public to accept and control. However, some pricing variables are not causally linked to losses but instead are correlated to expected loss. Recently, regulators and insurers have disagreed about whether the standard for including a pricing variable in a risk classification system should be causation or correlation.”). *See also id.* at 432; McCluskey, *supra* note 6, at 469.

⁷⁶ Lemaire et al., *supra* note 73, at 44 (“Any classification variable that perpetuates or reinforces social inequalities can be considered as suspect, as well as any characteristic associated with historical discrimination. The Supreme Court specifically characterized race, religion and national origin as definitely suspect factors, and gender and illegitimacy of birth as quasi-suspect. While not going as far as prohibiting the use of age, gender or marital status, the Canadian Supreme Court has requested insurers to at least explore whether better, non-discriminating, variables exist.”) (internal citations omitted).

⁷⁷ *See* Cather, *supra* note 5, at 428.

⁷⁸ *Hartford Accident & Indem. Co. v. Ins. Com’r of Com. of the Commonwealth of Pa.*, 482 A.2d 542 (Pa. 1984) (This case provides another example of the historical conflation of the terms sex and gender).

and incidence of auto accidents. This correlation simply provides a convenient measuring rod for setting rate differentials occasioned by other factors not so easily identified or quantified. Such considerations of convenience are not enough to stand in the face of our ERA [Pennsylvania Constitution Equal Rights Amendment].⁷⁹

A causal relationship between the use of a suspect classification factor and the risk of making a claim should be a prerequisite to using the factor as a determinant of the price of automobile insurance premiums.⁸⁰ A causal relationship standard—as compared to a mere correlation—would also better prevent adverse selection and moral hazard concerns. A causal connection would more appropriately identify the actual risk that a policyholder poses so that costs could be calculated more accurately.⁸¹

⁷⁹ *Id.* at 550 (The ERA being referenced in this case is the Pennsylvania Equal Rights Amendment that includes protections against “sex discrimination.” The Insurance Commissioner of Pennsylvania, when evaluating the use of gender in automobile insurance premium costs, found it unfairly discriminatory); PA. CONST. art. I, § 28 (“Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”).

⁸⁰ Cicero, *supra* note 65, at 212; Leah Wortham, *Insurance Classification: Too Important to be Left to the Actuaries*, 19 UNIV. MICH. J.L. REFORM 349, 380 (1986); Prince & Schwarcz, *supra* note 74, at 1317 (“[A] causality requirement has the ability to limit proxy discrimination and increase perceptions of fairness in predictive models.”).

⁸¹ Cather, *supra* note 5, at 428 (“One such innovation is usage-based insurance (UBI), an increasingly popular pricing innovation in many auto insurance markets. . . . Telematics also offers the promise of reducing insurance discrimination related to age- and gender-based pricing.”); Manda Winlaw, Stefan H. Steiner, R. Jock MacKay & Allaa R. Hilal, *Using Telematics Data to Find Risky Driver Behaviour*, ACCIDENT ANALYSIS & PREVENTION 131, 131 (2019) (explaining that telematics can be used to better assess a driver’s risk and influence policy pricing, which in turn would incentive drivers to perform more safely”); Robert D. Helfand, *Big Data and Insurance: What Lawyers Need to Know*, 21 J. INTERNET L. 1, 5 (2017). *See also id.* at 3 (“In the near future, insurers will have integrated Big Data into every facet of their operations, from marketing and underwriting to claims handling and investment.”); Rachel C. Adams, Petroc Sumner, Solveiga Vivian-Griffiths, Amy Barrington, Andrew Williams, Jacky Boivin, Christopher D. Chambers & Lewis Bott, *How Readers Understand Causal and Correlational Expressions Used in News Headlines*, 1 J. EXPERIMENTAL PSYCH. 1, 5 (2017); Anton Kok, *Motor Vehicle Insurance, the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act*, 18 S. AFR. J. HUM. RTS. 59, 75 (2002).

Because sex/gender is not causally linked to automobile accident likelihood, it unduly punishes individuals to whom those generalizations do not apply.⁸² Instead of using a factor such as sex/gender as a convenient and relatively easy-to-use classification for risk of loss, insurers could replace sex/gender with more accurate factors—such as driver experience, mileage driven, and accident and drunk driving records⁸³—which have an actual causal link to automobile accident risk thereby bolstering trust, utility, and social acceptability in the metrics employed in pricing policies.⁸⁴

E. PREVIOUS JUSTIFICATIONS ARE OUTDATED

Many of the studies that have considered sex/gender-based differences in driving may not reflect current driving patterns and likelihood of risk.⁸⁵ The supposed gap between historical male and female automobile accident risk is no longer accurate. Newly emerging data is in opposition to historical findings of men being a riskier classification group for automobile insurance.⁸⁶ Over time, female drivers have begun to drive more often and to adopt more traditionally male-perceived driving habits

⁸² Paula Sharp, *Insurance as a Public Accommodation: Challenging Gender-Based Actuarial Tables at the State Level*, 15 COLUM. HUM. RTS. L. REV. 227, 256 (1984) (“Gender, like race, is not causally [sic] linked to longevity, auto accident rate or propensity to illness. Insurance classification schemes which link gender or race to these kinds of risk are necessarily dependent on generalizations which unduly penalize individuals to whom such generalizations do not apply.”); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J.L. & GENDER 437, 473 (2013). (“Moreover, not all women or men are alike; generalizations are unwise.”); Anthea Natalie Wagener, *Motor-Vehicle Insurance and Discrimination: A Comparative Analysis of the Acceptability of Actuarial Evidence*, 23 S. AFR. MERCANTILE L. J. 376, 387–88 (2011).

⁸³ Sharp, *supra* note 82, at 229–30.

⁸⁴ Kok, *supra* note 81, at 76; Wagener, *supra* note 81, at 387–88 (“Although age and gender are simplistic, stable and easily verifiable rating variables, this should not outweigh the need for a causal link. Alternative rating variables exist which do show a causal link between themselves and the risk of loss, such as mileage.”); Stephen R. Ryan, *Elimination of Gender Discrimination in Insurance Pricing: Does Automobile Insurance Rate Without Sex?*, 61 NOTRE DAME L. REV. 748, 758–59 (1986).

⁸⁵ Cordellieri et al., *supra* note 69, at 8. Commonly cited for gender-based insurance premiums costs include: U.S. DEP’T. OF TRANSP., 2009 NATIONAL HOUSEHOLD TRAVEL SURVEY, *supra* note 69, and U.S. DEP’T OF TRANSP., TRAFFIC SAFETY FACTS 2008, *supra* note 69.

⁸⁶ Eduardo Romano, Tara Kelley-Baker & Robert B. Voas, *Female Involvement in Fatal Crashes: Increasingly Riskier or Increasingly Exposed?*, 40 ACCIDENT ANALYSIS & PREVENTION 1781, 1786 (2008).

(e.g., alcohol use, speeding), and thus, any previously believed difference in risk of an accident compared by sex/gender is no longer significant.⁸⁷ Insurance companies that still promote men being riskier drivers are basing these premium decisions on old data that is not reflective of the newer female attitudes and driving practices that appear to contribute to their increasing risk of automobile injury and fatality.⁸⁸ Further, these historical assertions do not include projections for individuals who are nonbinary either.⁸⁹

V. UNFAIR SEX/GENDER DISCRIMINATION

A. FAIR/UNFAIR DISCRIMINATION

Even if basing automobile premiums on sex/gender were actuarially sound, the practice should still be prohibited because it is an unfair sex/gender discrimination practice. Discrimination in insurance is a necessary part of its structure.⁹⁰ Insurance discrimination can be categorized as either fair/efficient discrimination or unfair discrimination.⁹¹ Efficient discrimination is described as classifying individuals into groupings based on their risk of loss as supported by statistical data.⁹² Efficient discrimination based on actuarial validity is at odds with some social conceptions of fairness.⁹³ Most states have provisions that prohibit

⁸⁷ *Id.* at 1788; Dipan Bose, Maria Segui-Gomez & Jeff R. Crandall, *Vulnerability of Female Drivers Involved in Motor Vehicle Crashes: An Analysis of US Population at Risk*, 101 AM. J. PUB. HEALTH 2368, 2368 (2012).

⁸⁸ Bose et al., *supra* note 87, at 2371–72 (“Female motor vehicle drivers today may not be as safe as their male counterparts; therefore, the relative higher vulnerability of female drivers (approximately 50% or higher odds of sustaining injuries) when exposed to moderate and serious crashes must be taken into account.”); Medders et al., *supra* note 13, at 11 (“Some of the controversy relates to a narrowing of the loss/claims gap between males and females and thus instability in gender as a rating factor over time. This potential instability in the distinct male-female risk differential may owe both to societal changes over time, as well as within-insured changes over time.”).

⁸⁹ See *supra* Section IV.b.

⁹⁰ Rosenfield, *supra* note 3, at 109.

⁹¹ Gaulding, *supra* note 15, at 1674.

⁹² Cicero, *supra* note 65, at 218 (“Under the industry view, fair discrimination permits the use of group classifications legitimized by data establishing that those classifications correlate strongly with insurable risks.”); Daniel Schwarcz, *Towards a Civil Rights Approach to Insurance Anti-Discrimination Law*, 69 DEPAUL L. REV. 657, 666 (2020).

⁹³ Ryan, *supra* note 84, at 749.

“unfairly discriminatory” insurance rates.⁹⁴ Most often, states try to define unfair discrimination as that which is not actuarially supported.⁹⁵ However, other states support another definition of unfair discrimination, as advocated here, which is discrimination based on specific protected characteristics, whether or not they are justified by actuarial science.⁹⁶ In other words, insurers should only be allowed to use characteristics that are “(a) causally connected to the risk measured, (b) controllable, and (c) not associated with historical or invidious discrimination—the anti-discrimination view.”⁹⁷ Commonly prohibited examples include race, ethnicity, and national origin.⁹⁸ For the purposes of this note, the application of this definition of unfair discrimination will be referred to as “prejudicially unfair discrimination” for clarity.

One area where the definitions of unfair discrimination from an actuarial standpoint and prejudicially unfair discrimination from a social justice perspective differ is whether a correlative relationship is enough to justify the use of a criterion or whether a stronger causal relationship is necessary.⁹⁹ To have a system that is fair to all participants, the insurance structure must balance actuarially efficient discrimination while prohibiting prejudicially unfair discrimination.¹⁰⁰ In more recent years, the complete elimination of sex-based classifications in insurance can be viewed as

⁹⁴ Schwarcz, *supra* note 92, at 667; Valarie K. Blake, *Ensuring an Underclass: Stigma in Insurance*, 41 CARDOZO L. REV. 1441, 1441 (2020).

⁹⁵ Cicero, *supra* note 65, at 217 (“While conceding that the use of sex as a risk factor is facially discriminatory, the industry propounds a standard of ‘fair discrimination’ against which to assess its rating and underwriting practices.”).

⁹⁶ Schwarcz, *supra* note 92, at 669; SCHAUER, *supra* note 43, at 17 (“But when such people describe as “prejudices” the statistically sound generalization about the propensity toward crime of ex-convicts, it is because they believe it is usually wrong to prejudge people even on the basis of statistically sound group characteristics.”).

⁹⁷ Gaulding, *supra* note 15, at 1647, 1657–58 (“[I]t would not be fair to charge them higher rates, because people do not choose their race, their sex, or their genes: these are non-causal, immutable factors, historically linked to unfair treatment.”). See Edward W. (Jed) Frees & Fei Huang, *The Discriminating (Pricing) Actuary*, N. AM. ACTUARIAL J. 1, 5 (2021) (suggesting the use of reviewing the following factors for fairness: 1) control/voluntariness, 2) mutability, 3) statistical discrimination, 4) causality, 5) Limiting or reversing the effects of past prejudice, and 6) inhibiting socially valuable behavior). See also Kok, *supra* note 83, at 71 (suggesting review of the following factors for fairness: 1) Homogeneity, 2) Separation, 3) Causality, 4) Social Acceptability, and 5) Incentive Value).

⁹⁸ Schwarcz, *supra* note 92, at 669.

⁹⁹ Cicero, *supra* note 65, at 219.

¹⁰⁰ Ryan, *supra* note 84, at 749; Avraham et al., *supra* note 45, at 214–16.

socially fair because it provides “equal treatment of the sexes.”¹⁰¹ Even if the use of sex/gender in automobile insurance premium pricing is statistically supported, it should be prohibited because it is socially unacceptable and prejudicially unfair discrimination to use as a basis for cost justification.¹⁰² Statistical association with loss is necessary to justify use as a premium cost factor, but statistical association alone is not *sufficient* proof that the factor should be permitted.¹⁰³ Though it is obvious that due to market stability and profitability, an insurance company’s financial concerns must be part of the consideration, that is not the end of the conversation when deciding whether a rating variable is appropriate.¹⁰⁴ It is unfair and objectionable to apply suspect sex/gender-based assumptions to individuals where the statistical correlation is a generalization and is not valid in that individual’s specific case.¹⁰⁵ When considering a person’s fundamental right to equal treatment, one must be considered as an individual and not just in their capacity as a member of a larger group.¹⁰⁶ Even if statistical generalizations may be found valid for a larger group, those generalizations should not be applied to an individual that it may not be true for, especially when those generalizations are based on a grouping that the individual has not chosen to belong in, as can often be the case with sex/gender.¹⁰⁷

¹⁰¹ Ryan, *supra* note 84, at 749.

¹⁰² Brian J. Glenn, *The Shifting Rhetoric of Insurance Denial*, 34 L. SOC’Y REV. 779, 782–83 (2000); Ryan, *supra* note 84, at 762 (“The abandonment of cost-based pricing cannot be tolerated when insurers can implement other factors to account for the loss of sex in classification; other factors which can achieve the actuarial validity of the sex classification without the social unfairness.”); SCHAUER, *supra* note 43, at 18 (“This primary concern, a concern that the definitional ambiguity between statistically sound and statistically unsound generalizations illuminates, is about the appropriate (and inappropriate) uses of statistically sound but nonuniversal generalizations.”).

¹⁰³ Wortham, *supra* note 5, at 883.

¹⁰⁴ Kok, *supra* note 81, at 84.

¹⁰⁵ Raghav Harini N, *Equality and Efficiency in the Economics of Insurance*, OXFORD POL. REV. (Aug. 24, 2022), <https://oxfordpoliticalreview.com/2022/08/24/equality-and-efficiency-in-the-economics-of-insurance/>.

¹⁰⁶ More recent interpretations of Equal Protection focus on the individual rather than just on effects to the entire group. *See e.g.*, *City of L.A., Dep’t. of Water & Power v. Manhart*, 435 U.S. 702 (1978). *See also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 497 n.15, 498–500, 552–54, 563 (2003).

¹⁰⁷ Yves Thiery & Caroline Van Schoubroeck, *Fairness and Equality in Insurance Classification*, 31 THE GENEVA PAPERS RISK & INS. 190, 192 (2006).

Control is viewed as whether or not an insured has the ability to manipulate the factor in a way that changes their likelihood of risk.¹⁰⁸ Historically, sex/gender has been viewed as a non-controllable trait and, therefore, it would be unfair to price insurance costs based on a trait that the individual could not control.¹⁰⁹ The purpose behind using controllable factors to base insurance costs is that an insured would be able to alter the risk factor class that they could be assigned to by modifying their behaviors and efforts. By being able to personally manipulate which class an insured belongs to, there is an incentive to change one's behaviors to fit into the lower-risk class grouping so as to pay lower premiums. For example, if an insurance company uses telematics to see how fast users drive their cars, and drivers know that speed is used to calculate premium costs, then drivers would have an incentive to drive at appropriate and safer speeds. Similarly, if insurance companies use miles driven as a factor to calculate premium costs, drivers would be able to control and adjust the amount that they drive in order to pay lower premiums. Altering one's own risk factors in this way would, in effect, reduce the policyholder's own costs and also the risk of loss within the entire insurance system.¹¹⁰

When a factor is unchangeable, however, as sex/gender traditionally has been viewed to be, it can be considered a suspect factor. In *Frontiero v. Richardson*, the United States Supreme Court described gender as a suspect factor similar to race and national origin because of its immutability and stated that it bears no relation to abilities and societal contributions.¹¹¹ Even in light of the current understanding of sex/gender, if these factors are considered controllable because they can change, it would still not be useful as a factor for basing insurance premium costs. The idea

¹⁰⁸ Frees & Huang, *supra* note 97, at 5.

¹⁰⁹ Harini N, *supra* note 105; Wiegers, *supra* note 35, at 167 (“As a rule, however, some of the variables generally considered in relation to automobile insurance are potentially or functionally more controllable than others. Mileage and the driver’s record (particularly the record of traffic convictions), for example, do make it possible for an applicant to improve his or her predictive assessment by curtailing discretionary driving or driving behaviour that is likely to increase the probability of an accident. By contrast, sex and race, much like height and eye colour, are fixed attributes.”); Kok, *supra* note 81, at 71.

¹¹⁰ Walters, *supra* note 42, at 10; Ayuso et al., *supra* note 73, at 9 (“Meanwhile, the advantages for customers are clear: they pay a lower premium if they drive fewer kilometers or drive more safely. In this regard, it has been shown that PAYD policies bring about changes in driving patterns among those who want to obtain a better premium under this pricing system. More specifically, PAYD has a positive effect on mileage reduction and also on speed reduction.”).

¹¹¹ See generally *Frontiero v. Richardson*, 411 U.S. 677 (1973). See also Thiery & Van Schoubroeck, *supra* note 107, at 197–98.

behind ‘controllability’ for the purpose of determining insurance premium costs is reflective of its purpose in promoting safer practices.¹¹² Even though sex/gender may now be understood on a more fluid and less concrete spectrum, it is still not controllable in the ways that factors which affect an individual’s driving risk are (e.g., miles driven, speed). Unfortunately, there have been a small number of cases of sex/gender fraud or misrepresentations on automobile insurance documentation to achieve cheaper premium pricing.¹¹³ However, marking a different designation does not actually affect the individual’s driving performance and their subsequent risk of an accident. The premise for the previous justification of insurance premium costs under this idea of controllability is different than fraudulent misrepresentation. Regardless of whether sex/gender is considered not controllable (from a historical perspective), or controllable (in light of modern understandings), in either framework sex/gender as a basis for premium costs is not a useful factor to influence safe driving practices. A suspect factor that is out of a person’s control imposes benefits and burdens that are not deserved and are “presumptively unjust.”¹¹⁴ For these reasons, sex/gender, especially as understood as a fluid and nonbinary concept, should be considered a suspect factor and, therefore, presumptively unjust as a determination for automobile insurance premium costs.

B. ANTI-DISCRIMINATION

From the perspective of a social definition of anti-discrimination, classifications that harm unprivileged groups should be prohibited. Classifications that involve “historically disenfranchised groups, such as people discriminated against on the basis of race or gender, should be off limits.”¹¹⁵ Continuing to use sex/gender as a determinant for automobile

¹¹² Lemaire et al, *supra* note 73, at 45 (“Mileage is a socially acceptable variable, mostly because of controllability: drivers have a strong incentive to affect their accident rate by reducing their driving. It improves fairness by shifting weight in pricing towards an individually controllable factor rather than based on involuntary membership in a group.”).

¹¹³ O’Neill, *supra* note 61; Hughes, *supra* note 61.

¹¹⁴ Wiegers, *supra* note 35, at 163; Amy Fontinelle, *Gender and Insurance Costs*, INVESTOPEDIA, (July 25, 2022), <https://www.investopedia.com/gender-and-insurance-costs-5114126>.

¹¹⁵ Blake, *supra* note 94, at 1453; Kent West, *Gender in Automobile Insurance Underwriting: Some Insureds Are More Equal Than Others*, 50 ALTA. L. REV. 679, 683 (2013) (“Western society has decided that race should not be used as a basis of distinguishing between individuals, even if it could be shown statistically that there is a relationship between a person’s race and his or her risk as an

insurance premium costs prolongs harmful sex/gender stereotypes and prejudices that support male aggression and female docility and ignores the existence of alternative identifications.¹¹⁶ It may seem counterintuitive to support prohibiting the use of sex/gender in automobile insurance premiums because the current system seemingly benefits the traditionally viewed marginalized female, but that is not necessarily correct.¹¹⁷ Women are not always charged less than their male counterparts for automobile insurance, and there are systemic problems inherent in continuing to differentiate insureds on the basis of sex/gender. It should be prohibited because of the “expressive harm associated with reaffirming the relevance of gender-based social patterns and practices.”¹¹⁸ Likewise, under this

insured.”); SCHAUER, *supra* note 43, at 186 (“Yet recall our discussion of gender, and of the possibility that at times we may wish to impose a compensatory underuse of a relevant factor in order to account for an expected overuse. Just as we may at times prohibit the use of gender even when it is statistically relevant in order to prevent it from being more of a factor than it actually is, so too might the same apply to race or ethnicity.”).

¹¹⁶ Butler et al., *supra* note 36, at 412.

¹¹⁷ *Id.*; West, *supra* note 115, at 695 (“For example, even if it could be proven that people of a certain race or religion were statistically more likely to be involved in an automobile accident, it is highly unlikely that society would approve of the use of such variables in setting premiums.”); *id.* at 694 (“One of the main philosophical underpinnings of anti-discrimination laws is that it is repugnant that people be judged based on presumptions which are associated with innate characteristics over which they have no control. In the insurance context, this means that factors such as ethnic origin, race, and gender should not be used to distinguish between applicants. Even if there is a correlative relationship between gender and average risk of loss, it seems unfair to judge the risk of an individual applicant based on the presence or absence of a Y chromosome.”); Hatch, *supra* note 69, at 10 (“Supporters of “sex-blind” insurance acknowledge that one result of eliminating sex as a rating factor would be increased rates for women, but they contend that, in the long run, women would be better off. Moreover, they say, higher insurance rates for women may simply be part of the price of equality.”); Avraham et al, *supra* note 3, at 16 (“First, insurers’ use of certain risk characteristics may reinforce or perpetuate broader social inequalities by making insurance less available or more expensive to historically disadvantaged groups. For instance, insurers who charged more to immigrant drivers would thereby perpetuate preexisting inequalities. Second, risk-classification schemes may be socially suspect because they cause some sort of expressive harm, even though they do not penalize with higher rates members of groups who are traditionally disadvantaged.”).

¹¹⁸ Avraham et al, *supra* note 3, at 17. See *supra* Section IV.a.

premise, the system does not account for inequities that occur beyond a binary understanding of sex/gender.¹¹⁹

A factor is more likely to be found prejudicially unfairly discriminatory if it impairs human dignity.¹²⁰ “If a prospective rating variable perpetuates negative stereotypes about a group or may result in disparate outcomes by group, it is understandably considered by many in society to be socially disadvantageous for use even if the economic connections are statistically valid.”¹²¹ The use of sex/gender as a category for differentiating treatment in insurance is socially suspect if it “reinforces or perpetuates broader social inequalities, or [] causes some sort of expressive harm by acknowledging and legitimating prior unfair treatment.”¹²² Insurance discrimination based on sex/gender is likely to impair human dignity because it equates a perception and a cost of unsafe driving onto a class of individuals that may not be representative of all the individual persons within the class.¹²³ Even if one believes that women are safer automobile drivers than men, the imposition of a class-based justification for insurance price would not provide justification for the use of a female premium to a member of the female group who was not a safer driver.¹²⁴ Although perfect homogeneity is an unattainable standard, in the face of finding the best classification groupings for automobile insurance premiums, easily attainable and more direct factors should be substituted for the suspect classification of sex/gender.

In other contexts, such as employment or housing, this type of delineation of characteristics has been held to be “explicit sex

¹¹⁹ Robert J. Carney and Donald W. Hardigree, *The Economic Impact of Gender-Neutral Insurance Rating on Women*, 13 J. INS. ISSUES & PRACS. 1, 6, n.14 (1990) (“The use of gender may not be intended to harm women, but given the prevalence of gender discrimination in society, there are many who are offended by it. Thus, even if the variable were used with the best intentions and with no direct economic harm to women, the use of gender as a classification, just as the use of race or religion, should not be acceptable in our society.”).

¹²⁰ Kok, *supra* note 81, at 70–72 (“The Court reasoned that ‘public policy’ or ‘social acceptability’ was reason enough to disallow sex discrimination.”).

¹²¹ Medders et al., *supra* note 13, at 15; SCHAUER, *supra* note 43, at 154 (“The truth is that it is because gender discrimination is wrong that gender-based generalization, even when statistically rational, is wrong as well.”).

¹²² Avraham et al., *supra* note 45, at 216–217.

¹²³ Kok, *supra* note 81, at 72.

¹²⁴ See e.g., *City of L.A., Dep’t. of Water & Power v. Manhart*, 435 U.S. 702 (1978). See also *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1174 (1971) (“Automobile insurance statistics show women to be safer drivers than men. Even assuming the validity of this statistic, a trucking company could not refuse to hire men on the theory that they are, on the whole, less safe drivers.”).

discrimination.”¹²⁵ In American jurisprudence and legislation the use of sex/gender as a classification has been prohibited in many different areas, including in employment, housing, credit, and healthcare, to name a few.¹²⁶ The same reasons that the public found the use of sex/gender unacceptable in those contexts, in the name of equal rights, could easily and should be spread to the automobile insurance realm as well. Using factors such as miles driven, speed driven, or other “pay as you drive” factors instead, insurance companies and policyholders would benefit not only financially but would also avoid unfairly prejudicial discrimination.¹²⁷

The Supreme Court has supported decisions that prohibit discrimination based on sex/gender regardless of which party benefits. In the case of *Craig v. Boren*, the Supreme Court rejected the use of sex as a classification in the prohibition of alcohol to men under the age of 21, in a situation where women over the age of 18 could purchase alcohol.¹²⁸ Even though statistics supported the use of sex as a means to differentiate between the groups, sex-based discrimination was found to deny males equal protection of the law.¹²⁹ In that case, women were seen as the group with the advantage, but the Court’s decision still disallowed the delineation

¹²⁵ *Id.* (“A ban on sex discrimination must mean that attributes of one sex cannot be used to burden any single employee who may not share that attribute. Since some men are safe drivers, and some women are not, this type of policy constitutes explicit sex discrimination. The employer is not, strictly speaking, hiring only safe drivers; he is hiring only women safe drivers.”); Blake, *supra* note 94, at 1454.

¹²⁶ *Equality Maps: Public Accommodations Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws/public-accommodations (last visited Nov. 26, 2022); *Housing Discrimination and Persons Identifying as Lesbian, Gay, Bisexual, Transgender, And/Or Queer/Questioning (LGBTQ)*, U.S. DEP’T OF HOUS. & URB. DEV., (Feb. 1, 2022), https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq#_Fair_Housing_Act; *HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity*, U.S. DEP’T OF HEALTH & HUM. SERVS., (May 10, 2021), <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html> [hereinafter *HHS Prohibition*].

¹²⁷ Ayuso et al., *supra* note 73, at 9; J.W. Bolderdijk, J. Knockaert, E.M. Steg & E.T. Verhoef, *Effects of Pay-As-You-Drive Vehicle Insurance on Young Drivers’ Speed Choice: Results of a Dutch Field Experiment*, 43 ACCIDENT ANALYSIS & PREVENTION 1181, 1182 (2011) (“PAYD entails that insurance premiums are directly based on the driving behavior of policyholders.”).

¹²⁸ *Craig v. Boren*, 429 U.S. 190, 199 (1976).

¹²⁹ *Id.* at 201; McCluskey, *supra* note 6, at 466–67.

based on sex. Even though adverse selection, moral hazard, and cross-subsidization are lesser risks when considered in the context of purchasing alcohol, the same prejudicially unfair anti-discrimination principles should be applied to prohibit the use of sex/gender classification systems in the automobile insurance context. There are many areas where discriminating on the basis of sex/gender is not permitted, and automobile insurance should not be any different.¹³⁰

The United States Department of Health and Human Services (HHS) announced that in light of the Supreme Court's decision in *Bostock v. Clayton County*, it will prohibit discrimination on the basis of sex to also include sexual orientation and gender identity.¹³¹ In that decision, HHS Secretary Xavier Becerra announced, "The Supreme Court has made clear that people have a right not to be discriminated against on the basis of sex and receive equal treatment under the law, no matter their gender identity or sexual orientation."¹³² The *Bostock* decision was based on prejudicially unfair discrimination in employment, where firing an employee for their sexual orientation or gender identity was seen as a violation of Title VII of the Civil Rights Act.¹³³ Though HHS's decision focused on unequal access to healthcare resources on the basis of gender identity, the underlying principles should be extended to other fields, including automobile insurance.

Social acceptability of a risk classification class is interconnected to its perceived fairness and legitimacy.¹³⁴ One of the factors that the American Academy of Actuaries suggests should be considered in risk classifications is that "[t]he system should be acceptable to the public."¹³⁵ Race, color, religion, sex, and national origin are often viewed as not socially acceptable risk classification groups.¹³⁶ Like the prohibition of the use of race and religion in the insurance context, using similar reasoning,

¹³⁰ Wortham, *supra* note 80, at 404 ("The federal government has seen fit to forbid the use of race, religion, sex, marital status, and national origin classification in credit.").

¹³¹ *HHS Prohibition*, *supra* note 126.

¹³² *Id.*

¹³³ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

¹³⁴ Linda J. Skitka, Christopher W. Bauman & Brad L. Lytle, *Limits on Legitimacy: Moral and Religious Convictions as Constraints on Deference to Authority*, 97 J. PERSONALITY & SOC. PSYCH. 567, 567 (2009).

¹³⁵ Robert L. Brown, Darren Charters, Sally Gunz & Neil Haddow, *Colliding Interests – Age as an Automobile Insurance Rating Variable: Equitable Rate-Making or Unfair Discrimination?*, 72 J. BUS. ETHICS 103, 107–08 (2007).

¹³⁶ Wortham, *supra* note 80, at 412.

surely sex/gender should be prohibited as well.¹³⁷ For instance, religion may be considered a factor that could be changed, but under American anti-discrimination standards, it is impermissible to treat classes of people differently based on their religion.¹³⁸ As the ideas about the roles of men, women, and those who identify outside of that binary are constantly evolving and changing, fairness weighs against discriminating on the basis of sex/gender classification systems.¹³⁹ When considering equity, social

¹³⁷ Wieggers, *supra* note 35, at 150; McCluskey, *supra* note 6, at 465; Prince, *supra* note 6, at 653–54 (“The further removed a characteristic is from the actual cause of loss, the more questionable its use becomes. In these cases, either a characteristic is a proxy factor for a variable that is much harder to identify or measure or insurers are using a characteristic as a measure of risk simply for convenience, both of which are problematic motivations from a social acceptability perspective.”).

¹³⁸ Ronen Avraham, *Discrimination and Insurance*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 340 (Kasper Lippert-Rasmussen ed., 2018) (“Sometimes, however, protection from discrimination is given even to mutable traits such as religion”); Avraham et al., *supra* note 45, at 216 (“According to the Court, suspect classifications can be identified by virtue of having four factors in common: (1) there is a history of discrimination against the group in question; (2) the characteristics that distinguish the group bear no relationship to the group members’ ability to contribute to society; (3) the distinguishing characteristics are immutable; and (4) the subject class lacks political power. Applying these criteria, the Court has identified three characteristics—race, religion, and national origin—that are considered suspect characteristics and thus receive the highest level of scrutiny, known as strict scrutiny. In addition, the Court has also identified a class of “quasi-suspect” characteristics (to date limited to gender and illegitimacy of birth) that receive an intermediate level of judicial scrutiny. Given the criteria cited above, these judicial categories appear to be meant to provide protection for groups who not only have been habitually and unjustifiably discriminated against, but who also lack the political power to do anything about it. Although these Constitutional principles obviously do not apply to insurers—who are not public actors, and thus not subject to the Equal Protection Clause—they describe broad principles that could be applied to insurers via state antidiscrimination law.”); Avraham et al., *supra* note 3, at 24–25 (“Correspondingly, gender – the next most heavily regulated characteristic in state insurance regulation – is subject to similar, though slightly less robust, federal anti-discrimination protections than the big three. Both Title VII and Title VIII prohibit discrimination on the basis of gender to the same extent that they prohibit discrimination on the basis of race, national origin, and religion.”).

¹³⁹ West, *supra* note 115, at 695; SCHAUER, *supra* note 43, at 153 (“For some the prohibition on gender-based generalizations is a product of a desire to prevent the subordination of women and to compensate for its past effects. For others the prohibition stems from the importance of guarding against dividing a society by

justice, and anti-prejudicial fairness, the use of sex/gender in auto insurance classifications does not comport with society's expectations of fairness and justice.¹⁴⁰

VI. BARRIERS TO IMPLEMENTING PRACTICES PROHIBITING THE USE OF SEX/GENDER

There have been many barriers influencing the reasons why banning the use of sex/gender in automobile insurance premium pricing has not yet been successful throughout the entire country. These include legislative avoidance, lobbyist actions, and misguided ideas about the cost of implementation.

A. LEGISLATIVE AVOIDANCE

Legislators may shy away from combating the use of sex/gender in automobile insurance premium pricing because of a lack of social support and fear that they may not be reelected or supported by constituents who do not support advocacy efforts for non-binary individuals.¹⁴¹ Persons who are transgender and nonbinary risk adverse reactions and even violence when

gender (and thus isolating the socially nondominant gender) in the same way we think it important to guard against dividing it by race.”).

¹⁴⁰ Christia Spears Brown & Rebecca S. Bigler, *Children's Perceptions of Gender Discrimination*, 40 DEV. PSYCH. 714, 714 (2004) (“As racial and gender biases have become less socially acceptable in this country, discriminatory actions have become increasingly subtle and ambiguous, requiring individuals to make attributions about the motivations of others on the basis of situational information.”).

¹⁴¹ Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RSCH. CTR. (Nov. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats/>; Ola Adebayo, *The contagion sweeping the nation: Anti-trans legislation*, WASH. U. ST. LOUIS INST. PUB. HEALTH (Apr. 25, 2022), <https://publichealth.wustl.edu/the-contagion-sweeping-the-nation-anti-trans-legislation/>; Matt Lavietes & Elliot Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 20, 2022, 6:00 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418>; Avraham et al., *supra* note 3, at 3–4 (“One would expect that much of the variation in state anti-discrimination laws depends on state-specific circumstances like the preferences of the constituents regarding questions of discrimination, the ideology of the legislature, the strength of the insurance lobby, and a host of other socio-economic factors that are unique to each state.”).

trying to voice their concerns, so advocacy and interests might be muted.¹⁴² Additionally, because of the lack of transgender and nonbinary representation in legislatures at both federal and state levels, there are few powerful players who personally identify with the need to advance this important concern.¹⁴³ Insurance companies themselves are reluctant to offer innovative products out of fear of attracting extra scrutiny from regulators.¹⁴⁴ Similarly, politicians may be reluctant to advocate for change out of fear of gaining a negative place in the political limelight.¹⁴⁵

B. LOBBYING

Many powerful lobbyists who are in favor of using sex/gender in automobile insurance premium costs have been successful at persuading legislators to maintain the current status quo.¹⁴⁶ Lobbyists claim that gender

¹⁴² Walter Liszewski, J. Klint Peebles, Howa Yeung & Sarah Arron, *Persons of Nonbinary Gender — Awareness, Visibility, and Health Disparities*, 25 NEW ENG. J. MED. 2391, 2391 (2018); *The Struggle of Trans and Gender-Diverse Persons*, U.N. HUM. RTS. <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons> (last visited Jan. 28, 2023).

¹⁴³ Jami Kathleen Taylor, *Transgender Identities and Public Policy in the United States: The Relevance for Public Administration*, 39 ADMIN. & SOC'Y 833, 836 (2007) (“Public policy toward transgender identity is incoherent for several reasons. Perhaps most important, there has been legislative avoidance of these issues.”).

¹⁴⁴ Jason E. Bordoff & Pascal J. Noel, *Pay-As-You-Drive Auto Insurance: A Simple Way to Reduce Driving-Related Harms and Increase Equity*, BROOKINGS INST. 1, 18 (2008).

¹⁴⁵ David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437, 2449 (1996) (discussing how using gender-neutral language in legislative drafting is highly politicized; “Drafting to eliminate gender-based references is an intensely ‘political’ issue for some commentators in the scholarly literature with strong opinions both for and against the proposition.”).

¹⁴⁶ Wortham, *supra* note 80, at 366 n.78; Sharp, *supra* note 82, at 235; An Act Limiting Private Passenger Nonfleet Automobile Insurance Underwriting Factors and Increasing the Motor Vehicle Minimum Amount of Proof of Financial Responsibility For Property Damage, H.B. No. 6866, (2015); An Act Prohibiting Insurance Companies From Using Sex or Gender Identity or Expression As A Factor in Underwriting or Rating Private Passenger Nonfleet Auto Insurance Policies, H.B. No. 7263, (2019); Nancy Egan, *Banning the Use of Gender in Auto Insurance Pricing Could Impact Women* | *Opinion*, DEL. ONLINE (Apr. 4, 2022), <https://www.delawareonline.com/story/opinion/2022/04/04/banning-gender-auto-insurance-pricing-could-raise-rates-women/7243060001/>; Ryan, *supra* note 84, at 762 (“The insurance lobby has maintained that sex-based distinctions are needed to ensure cost-based pricing.”).

and sex classifications should be permitted in automobile insurance pricing determinations, citing justifications such as greater market stability through presentations of suspect statistical evidence.¹⁴⁷ Other lobbyists that do not support gender-affirming legislative efforts do so to further conservative and religious interests.¹⁴⁸ Lobbyists on behalf of ill-informed insurance companies also advocate for not moving the needle on this hot-button topic.¹⁴⁹ Though statistical justifications may be cited as a reason to avoid reclassification, that statistical evidence is indeed suspect.¹⁵⁰ When considering the broader array of gender identities that are now understood, statistical justifications fall flat, and financial concerns alone should not be the only consideration.

C. MARKET COMPETITION

With respect to competition and market stability, these too are suspect justifications for retaining sex/gender as classification groupings. Competition with other insurance companies may actually be enhanced through the prohibition of sex/gender as classification groupings because companies could instead base premium costs on more accurate classifiers and compete more aggressively with other companies. By using risk factor classifications that the policyholder can counteract by implementing safer driving practices, the cost of insurance as a whole can be decreased by limiting individual risky behaviors.¹⁵¹ Some supporters of the use of

¹⁴⁷ Wortham, *supra* note 80, at 407 (“Promoting desirable competition requires not only eliminating barriers in the regulatory structure but also sufficient market information to enable insurance consumers to comparison shop.”); Sharp, *supra* note 82, at 252 (“During the outcry over the Fair Insurance Practices Act and employment-related cases, insurance lobbyists asserted that abandonment of gender-based actuarial tables would result in financial ruin of the insurance industry.”); Gaulding, *supra* note 15, at 1678 (“Guidelines written for underwriters contribute to the suspicion shared by anti-discrimination proponents that underwriters' "actuarial facts" are really just subjective opinions.”).

¹⁴⁸ Lavietes & Ramos, *supra* note 141 (“LGBTQ advocates and political experts say the uptick in state bills is less about public sentiment and more about lobbying on behalf of conservative and religious groups.”).

¹⁴⁹ Carney & Hardigree, *supra* note 119, at 14 (“In America today, the use of gender by insurance companies to discriminate is strongly defended by the insurance industry.”).

¹⁵⁰ See *supra* Section V.b.

¹⁵¹ Wieggers, *supra* note 35, at 167 (“As a rule, however, some of the variables generally considered in relation to automobile insurance are potentially or functionally more controllable than others. Mileage and the driver's record (particularly the record of traffic convictions), for example, do make it possible for an applicant to improve his or her predictive assessment by curtailing discretionary

sex/gender in automobile insurance claim that its use supports market stability.¹⁵² The claim suggests that if sex/gender were not used, it would cause unisex pricing that would end up costing women more and men less.¹⁵³ As a result, the theory goes, women would feel unfairly charged and would stop purchasing automobile insurance.¹⁵⁴ This would lead to an insurance market highly saturated with high-risk individuals not offset by lower risk individuals and would lead to market collapse.¹⁵⁵ However, this adverse selection risk is unrealistic because automobile insurance is compulsory for all legal drivers.¹⁵⁶ This concern is also unrealistic because it has not been supported by anything other than conjecture that does not take into account the many other variables at play that are and can be used to define insurance risk and costs.¹⁵⁷ The concerns that insurance companies and lobbyists have against changing a system that does not

driving or driving behaviour that is likely to increase the probability of an accident.”); Gardner & Marlett, *supra* note 32, at 59 (“When bad drivers are charged higher rates, they have an incentive to improve their driving.”).

¹⁵² Ryan, *supra* note 84, at 756 (“Critics of unisex insurance claim that prohibiting classification by sex disrupts economic efficiency.”).

¹⁵³ *Id.* (“In automobile insurance, for example, critics claim that imposition of unisex insurance will cause women’s rates to rise unnaturally in proportion to their risk.”).

¹⁵⁴ *Id.* (“Those who are under-charged will buy more, and those who are overcharged will buy less. This process would lead to further market distortions and force insurers to leave the market because of rising costs.”).

¹⁵⁵ *Id.*; Avraham et al., *supra* note 3, at 26 (“[Automobile insurance lines are] relatively less susceptible to adverse selection than other lines of coverage, giving the state more leeway to prohibit discrimination without triggering adverse selection.”).

¹⁵⁶ Wortham, *supra* note 5, at 888 (“If automobile insurance is mandatory, the adverse selection problem is likely less severe although studies show enforcement of mandatory schemes is difficult.”); Avraham et al., *supra* note 3, at 11 (“Third, risk-classification regulation is not likely to produce adverse selection when the purchase of minimum insurance policies is legally mandated. In these settings, low-risk individuals are legally compelled to remain within the insurance pool and cross-subsidize high-risk individuals.”).

¹⁵⁷ Blake, *supra* note 94, at 1488–89 (“Some worry that insurers overinflate concerns about adverse selection and moral hazard to advance whatever classification they want.”); Wiegers, *supra* note 35, at 179 (“It is not apparent that the private market for automobile insurance coverage would collapse if the use of the variables of age, sex, and marital status was proscribed”); Ryan, *supra* note 84, at 759 (“Likewise, the insurance argument of predicted market imbalances does not apply to automobile insurance because it fails to account for the substitution of other rating variables. If automobile rates were adjusted to reflect valid differences in insurable risk, rather than left artificially neutral, no unfair subsidization between classes would result.”).

allow the use of sex/gender in premium cost calculations are not as harmful as suggested.¹⁵⁸ Further, market stability would not be affected at all if all states and/or all insurance companies adopted the ban against the use of sex/gender in automobile insurance premium costs.¹⁵⁹

D. COST OF CHANGE

Many advocates for the use of sex/gender as a basis for automobile insurance premium costs often cite the cost of implementing this change as strong support for maintaining the current system. One aspect of this is that supporters of the use of sex/gender classifications incorrectly believe that women would be harmed by prohibiting the use of sex/gender. However, this is not always the case, and if other measures that more accurately reflect individual risk were used, it would be fairer to all drivers and would lower costs collectively.¹⁶⁰ Likewise, through subsidization and

¹⁵⁸ Blake, *supra* note 94, at 1456 (The law undergirds actuarial fairness for one primary reason—it thinks it is necessary to do so in order to protect insurers and their important role in society. But leading insurance scholars are not so sure that this is necessary. In a forthcoming article, Professor Tom Baker draws from the development of insurance runoff markets to suggest that insurers don't need as much safeguarding as the law allows. His work suggests that, in the face of great uncertainty in different times in history, insurers have found ways to make do.”).

¹⁵⁹ Cicero, *supra* note 65, at 266–67 (“The state legislatures are uniquely able to incorporate new standards of discrimination into existing insurance regulatory statutes, thereby minimizing the destabilization of the system. Even though multiple state bills can lead to a patchwork of inconsistent standards, once a few states with large insurance markets pass legislation eliminating sex discrimination in insurance, the industry may find it cheaper to adopt a consistent method of operation and resign itself to comprehensive national legislation.”).

¹⁶⁰ *Id.* at 263 (“Under current insurance practices, the lower-risk sex is now being rewarded for possessing a gender characteristic that it never actually earned. Similarly, under current practices, the higher-risk sex is not getting all the insurance it deserves solely because of the fortuity of belonging to the higher-risk sex. Furthermore, if unisex insurance leads to the replacement of sex classifications by sex-neutral factors within the control of the insured (such as smoking), then any gap between the price and cost of insurance should be narrowed. Precisely because these sex-neutral rating factors are controllable, their use provides an incentive to reduce risks, thereby reducing the costs of insurance for the entire society.”); Ayuso et al., *supra* note 73, at 9 (“Our results show that once we have information about a policyholder’s driving pattern and vehicle usage, then knowing whether the driver is a man or a woman becomes irrelevant. In other words, driving patterns and vehicle usage can substitute gender as a rating variable in the context of *PAYD* [*Pay As You Drive*] insurance.”); Edlin, *supra* note 68, at 5; Ryan, *supra* note 84, at 759 (“The substitution of rating factors would also refute the cost arguments of unisex insurance opponents.”).

incongruency in application within the insurance market, women are already forced to pay more than their share of risk.¹⁶¹ Therefore, this justification holds little weight. If banning the use of sex/gender in automobile insurance premium pricing was banned on a national level, this too would neutralize the cost concerns.¹⁶²

Another consideration regarding the cost of change is the idea that shifting to a different system would create increased costs due to logistical implementation changes.¹⁶³ However, the actual costs associated with the change in classification system are likely to be minimal in the long run, especially since changes are required in a growing number of states where national insurance companies do business.¹⁶⁴ Sex/gender has historically been an inexpensive way of classifying insurance policyholders.¹⁶⁵ Previously, it may have been cost-prohibitive to use certain metrics, such as miles driven or driving behaviors; however, now with the use of telematics and other technologic advances, those barriers are no longer salient.¹⁶⁶

¹⁶¹ Butler et al., *supra* note 36, at 408 (“Insurers who offer as a credible argument against unisex pricing that lowering men’s sex-divided prices to a unisex level would force women to subsidize men’s higher costs can hardly deny that this threatened subsidization already exists, as described above.”).

¹⁶² Avraham et al., *supra* note 3, at 12 (“Thus, larger and more comprehensive insurance mandates will tend to reduce the risk of adverse selection more than minimal insurance mandates.”).

¹⁶³ Ryan, *supra* note 84, at 756 (“The most controversial aspect of proposed unisex legislation is the costs of such a wholesale change in the insurance market.”); *id.* at 755 (“Insurers, for example, claim that gender-based classification schemes are actuarially valid, and that the proposed legislation will create adverse economic effects.”).

¹⁶⁴ Wieggers, *supra* note 35, at 186 (“Alternative variables will impose additional costs of usage and enforcement upon consumers of insurance, though these costs may not be significant in the long run.”); Bordoff & Noel, *supra* note 144, at 16 (“These monitoring costs are borne by firms and their customers, but the benefits spill over to other insurance companies, other drivers, and society as a whole. If an insurance company is able to reduce the driving of its insureds, substantial savings will accrue to other insurance companies too, insofar as their insureds are less likely to be involved in accidents if fewer vehicles are on the road.”); Edlin, *supra* note 68, at 33; Ryan, *supra* note 83, at 760 (“In addition, administrative costs of compliance with unisex legislation pose no obstacles to successful implementation of the law.”).

¹⁶⁵ West, *supra* note 115, at 683; Wieggers, *supra* note 35, at 182 (“Age and sex are generally the preferred criteria because they are easily identifiable at a low cost relative to other variables.”).

¹⁶⁶ Ma et al., *supra* note 5, at 244 (“Typical underwriting factors for auto insurance include driver characteristics such as age, gender, prior driving experience and information of vehicle, as data on those factors are easily available.”).

Likewise, because of the current understandings of sex/gender outside of the binary, the cost of additional research to cover these larger and more varied sex/gender classifications to determine the actuarial basis for costs for these individuals could instead be substituted for the cost to change to a different classification system. In the face of prejudicial anti-discrimination concerns, cost alone should not be the sole factor in consideration when the factor perpetuates the use of an unjust classification system.¹⁶⁷

VII. HOW THIS CHANGE COULD BE SUCCESSFUL

Effectuating a change where sex/gender would not be used as a factor to determine automobile insurance premium costs could take place through administrative agency action, adjudication, federal legislation, state legislation, or by insurance companies themselves.¹⁶⁸ To provide context, through various methods, at the time of this note, it is not permissible to use sex/gender in automobile insurance cost setting in California, Hawaii, Maine, Massachusetts, Michigan, North Carolina, and Pennsylvania.¹⁶⁹ Oregon allows gender-based pricing but requires insurers to offer a third

Driving habits, which are often key attributes to accidents, have not been incorporated into actuarial pricing until recently simply because such data is not available and/ or the cost of obtaining such information is too high.”); Bordoff & Noel, *supra* note 142, at 15 (“Some established companies are already using monitoring technology to offer mileage discounts on insurance premiums.”). *Cf.* Ayuso et al., *supra* note 73 (emphasizing that telematics can now easily be used in automobile insurance).

¹⁶⁷ Wieggers, *supra* note 35, at 184 (“Under anti-discrimination statutes, the treatment of economic concerns has rarely been fully and coherently articulated.”); Bordoff & Noel, *supra* note 144, at 17 (“The significant discrepancy between the social and private benefits suggests that even if the benefits to the firm and its insureds do not justify an insurance company’s incurring the monitoring and plan development costs, the full social benefits would justify the costs.”).

¹⁶⁸ See generally Cicero, *supra* note 65; Shengkun Xie, Rebecca Luo & Yuanshun Li, *Exploring Industry-Level Fairness of Auto Insurance Premiums by Statistical Modeling of Automobile Rate and Classification Data*, 10 RISKS 1, 4 (2022) (“Furthermore, regulation efforts have been made to improve fairness by restricting the use of some risk factors, such as gender, eliminating gender discrimination.”).

¹⁶⁹ Charles Megginson, *Bill Banning Use of Gender for Car Insurance Rates Passes Senate*, TOWN SQUARE DELAWARE (Apr. 5, 2022), <https://townsquaredelaware.com/bill-banning-use-of-gender-for-car-insurance-rates-passes-senate/#:~:text=States%20which%20ban%20gender%20as,Michigan%2C%20North%20Carolina%20and%20Pennsylvania>.

gender option.¹⁷⁰ Colorado and Delaware are in the process of prohibiting the use of sex/gender in determining automobile insurance premium costs.¹⁷¹

In other states and countries, banning the use of sex/gender in insurance premiums has been implemented effectively. “[T]he Court of Justice of the European Union ruled that all insurance contracts entered on or after December 21, 2012, cannot price males and females differently. The use of gender is also prohibited in ten U.S. states and limited in 22 others.”¹⁷² Recognizing that prohibitions on the use of sex/gender in insurance have been successful in these applications should strengthen support for implementing widespread change.

A. ADMINISTRATIVE AGENCY ACTION

The National Association of Insurance Commissioners (NAIC) and/or the state Insurance Commissioner could spearhead a change towards prohibiting the use of sex/gender in automobile insurance with recommendations or policy implications, respectively.¹⁷³ Currently, the NAIC functions to craft model state insurance laws and regulations, promote discourse among state regulators, and emphasize cohesion within the insurance industry.¹⁷⁴ The Supreme Court has established that an administrative agency has the authority to analyze and interpret statutes for compliance with public policy.¹⁷⁵ A recommendation from the NAIC would likely be promoted for adoption by the individual states through the advocacy of each state’s Insurance Commission/Regulator (because the members who make up the NAIC are each state’s Insurance Commissioner). Depending on the particular Insurance Commissioner and the state that the Commissioner operates in, whether or not a recommendation by the NAIC would be adopted could depend on political climate, social importance, and beliefs.¹⁷⁶ Insurance Commissioners can also independently advocate for this change because in their role they are tasked with regulating insurance company solvency and balancing that need with equity and fairness.¹⁷⁷

¹⁷⁰ Norman, *supra* note 46; Deventer, *supra* note 46.

¹⁷¹ Megginson, *supra* note 169.

¹⁷² Lemaire et al., *supra* note 73, at 42.

¹⁷³ Frees & Huang, *supra* note 97, at 10.

¹⁷⁴ Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, 25 CONN. INS. L.J. 197, 207 (2018).

¹⁷⁵ Cicero, *supra* note 65, at 230.

¹⁷⁶ *Id.* at 228.

¹⁷⁷ *Id.* at 227.

Likewise, although each state's Insurance Commissioner is a government official charged with supervising insurance practices and regulating within their state, they are bound by balancing and sometimes competing powers. As will be mentioned in Section VII.b., *infra*, an Insurance Commissioner's decision can be questioned and even overruled through adjudication or legislation. In 2019, California's Insurance Commissioner successfully passed the Gender Non-Discrimination in Automobile Insurance Rating Regulation, which mandated that all automobile insurance companies in the state submit a plan that eliminates the use of gender as a factor used to price insurance.¹⁷⁸ The NAIC or the Insurance Commissioner can independently take up the charge and advocate for these changes, or individual policyholders can also petition the NAIC or their state Insurance Commissioner to act on their behalf.¹⁷⁹

B. ADJUDICATION

Different litigation approaches can be taken to address sex/gender discrimination in automobile insurance. One approach could include an extension of the administrative route whereby one sues the Insurance Commissioner for their inaction in combating current sex/gender discrimination practices.¹⁸⁰ Another approach would be to challenge insurance regulation legislation for unconstitutionality. A third approach would be to directly sue the insurance company for violating public policy and not upholding constitutional rights.¹⁸¹ Litigation could be pursued under a theory of Equal Rights protections under the United States Constitution or similar provisions in individual State Constitutions, under a civil rights premise,¹⁸² or under state or federal public accommodations laws.¹⁸³ Some of these approaches, or similar methods, have already been observed in some jurisdictions.¹⁸⁴

The Supreme Court has not yet mandated the exclusion of sex/gender as a factor for discrimination in automobile insurance. However, in *City of L.A., Department of Water & Power v. Manhart* (a case about

¹⁷⁸ Press Release, Cal. Dep't of Ins., Comm'r Issues Reguls. Prohibiting Gender Discrimination in Auto. Ins. Rates (Jan. 3, 2019) <https://www.insurance.ca.gov/0400-news/0100-press-releases/2019/release003-19.cfm>.

¹⁷⁹ Cicero, *supra* note 65, at 234–35.

¹⁸⁰ *Id.* at 235–36.

¹⁸¹ *Id.* at 236–37.

¹⁸² McCluskey, *supra* note 6, at 460–61.

¹⁸³ Sharp, *supra* note 82, at 236–37.

¹⁸⁴ Cicero, *supra* note 65, at 235–37; McCluskey, *supra* note 6, at 460–61; Sharp, *supra* note 82, at 236–37.

female employees suing their employer for pension discrimination), the Supreme Court did express that classification on the basis of sex preserves “traditional assumptions about groups rather than thoughtful scrutiny of individuals,” and further, that characteristics used to differentiate a class do not apply to all individuals in that respective class.¹⁸⁵ Following the reasoning in *Manhart*, even if the generalization about a class of individuals is true, it is not appropriate to apply that generalization to all of its class members, especially those whom the generalization does not represent.¹⁸⁶ *Manhart* goes further to explain that fairness should be extended to the individual and not the class itself.¹⁸⁷ Though the *Manhart* case dealt with employment discrimination, the opinion seems to suggest that prohibiting the use of sex as a classification group is not limited to only employment insurance contexts.¹⁸⁸ The reasoning in this case could also be applied to advocate for banning the use of sex/gender in automobile insurance premium determinations as well.

Similarly, in *Arizona Governing Board v. Norris*, the Supreme Court held that a classification on the basis of being male or female in the context of employer insurance costs violated Title VII of the Civil Rights Act.¹⁸⁹ This was decided even though statistics supported that females lived longer than males because equality among men and women was paramount to statistically accurate generalizations that highlighted their differences.¹⁹⁰ The United States has already seen examples of how the use of sex/gender

¹⁸⁵ *City of L.A., Dep’t. of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978); Blake, *supra* note 94, at 1470–71.

¹⁸⁶ *Manhart*, 435 U.S. at 707–08; Cicero, *supra* note 65, at 223 (“In so doing, it [the *Manhart* Court] articulated a sweeping test for establishing that a sex classification is unlawfully discriminatory under Title VII: whether the use of the classification results in “treatment of a person in a manner which but for that person’s sex would have been different.”); Wiegers, *supra* note 35, at 157 (“Decisions of human rights tribunals are replete with references to the ‘basic premise’ that persons are to be treated on the basis of ‘individual merit,’ and not as members or components of a group.”).

¹⁸⁷ *Manhart*, 435 U.S. at 709; McCluskey, *supra* note 6, at 461 (“In *Manhart*, the Court recognized that the Civil Rights Act focuses on fairness to the individual and precludes treating individuals merely as components of a group. Justice Stevens, writing for the majority states that ‘even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.’ Thus, that women as a group outlive men cannot support using sex as the sole factor in a life expectancy determination. Instead, this determination should be based on individual factors.”).

¹⁸⁸ *Manhart*, 435 U.S. at 709.

¹⁸⁹ *See Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); Kok, *supra* note 81, at 70–71.

¹⁹⁰ *See generally Norris*, 463 U.S. at 1073; Kok, *supra* note 81, at 70–71.

in automobile insurance premium costs has been eradicated through adjudicatory affirmation. Most notable is the Pennsylvania Supreme Court case, *Hartford Accident & Indemnity Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania*, which upheld the State's Insurance Commissioner's decision to prohibit the Hartford Insurance Company's use of sex/gender in automobile insurance costs.¹⁹¹ In that case, the Pennsylvania Supreme Court upheld the Commissioner's ban on the use of sex in automobile insurance because it was unfairly discriminatory in light of public policy and "allegedly relied upon and perpetuated traditional stereotypical roles of men and women."¹⁹² The decision noted that although the insurance costs could be supported by actuarial science, the use of gender as a classification group was incongruent with the State's Rate Act which prohibited unfairly discriminatory insurance rates. Ultimately, the court held that the use of gender was unfairly discriminatory because it "failed to treat equals equally" and was invalid as a matter of public policy.¹⁹³ "To read the term 'unfairly discriminatory' as excluding sex discrimination would contradict the plain mandate of the Equal Rights Amendment to our Pennsylvania Constitution."¹⁹⁴

In contrast, in *State, Department of Insurance v. Insurance Services Office*, the Pennsylvania Supreme Court affirmed a lower court decision invalidating the prohibition of sex/gender, among other factors, in determining automobile insurance costs.¹⁹⁵ The court reasoned that sex was not the only factor being used to base insurance costs and supported the definition of unfair discrimination as that which is not supported by actuarial data. Seeing these two contrasting outcomes shows why judicial interpretation is not the most effective way to combat sex/gender discrimination in automobile insurance. Depending on a state's interests at any given time, sex/gender discrimination may not be interpreted in the way that this note supports. Likewise, states could have dissimilar outcomes that could even further complicate insurance regulation in our increasingly mobile country.

¹⁹¹ See *Hartford Accident & Indem. Co. v. Ins. Comm'r of Commonwealth of Pa.*, 482 A.2d 542 (Pa. 1984).

¹⁹² *Id.* at 548; Wiegers, *supra* note 35, at 168.

¹⁹³ *Hartford Accident & Indem. Co.*, 482 A.2d at 544.

¹⁹⁴ Richard A. Miller, *Discrimination by Gender in Automobile Insurance: A Note on Hartford Accident and Indemnity Co. v. Insurance Commissioner*, 23 DUQ. L. REV. 621, 623 (1985).

¹⁹⁵ *State, Dept. of Ins. v. Ins. Servs. Off.*, 434 So. 2d 908, 909–10 (Fla. Dist. Ct. App. 1983).

C. FEDERAL LEGISLATION

Federal legislation in this context has not yet mandated a ban on the use of sex/gender in automobile insurance premium price determinations. The Nondiscrimination in Insurance Act proposed in 1983 would have forbidden discrimination in insurance on the basis of race, color, religion, national origin, and sex.¹⁹⁶ Unfortunately, it was not successful at that time and still has not yet been adopted.¹⁹⁷ Following the premise that it is the federal government's obligation to intervene when a state refuses to legislate civil rights issues, because this issue can be properly classified as pertaining to civil rights, it would follow that federal legislation prohibiting the use of sex/gender in automobile insurance premiums should result.¹⁹⁸ With the current cultural focus on anti-discrimination efforts and the more comprehensive understanding of what sex/gender means, a bill such as the Nondiscrimination in Insurance Act may have more success in the present day. Currently, the only federal protections against sex/gender discrimination in insurance are in the health insurance realm, achieved through the Affordable Care Act.¹⁹⁹ A federal approach, as opposed to a state-based approach, would be desirable because it would create national cohesion, limit patchwork interpretations, and take a positive stance on combatting the national sex/gender-based discrimination problem.²⁰⁰ Federal legislation would also likely gain more favor from insurance companies who might otherwise feel disadvantaged by incongruous regulations affecting them differently across the states.²⁰¹ Because all insurance companies in the country would be required to follow the same rule eliminating the use of sex/gender in automobile insurance premium pricing across the board, all insurance companies would have an even playing field.²⁰² In contrast to the lack of political

¹⁹⁶ Sharp, *supra* note 82, at 233.

¹⁹⁷ *Id.*

¹⁹⁸ McCluskey, *supra* note 6, at 464 (“When the states refuse or neglect to legislate civil rights issues, the Federal Government is *obliged* to step in. The discrimination practiced by insurance companies limits social and economic opportunities for women to such an extent that a federal law is needed to correct the inequities which result.”).

¹⁹⁹ Blake, *supra* note 94, at 1454.

²⁰⁰ Cicero, *supra* note 65, at 258 (“A state-by-state approach would create a patchwork of regulations which would be ‘administratively unfeasible for the industry to operate under.’”).

²⁰¹ *Id.* at 265.

²⁰² *Id.* (“Federal legislation also reduces the significance of a major fear of insurance companies: self-selection out of the insurance market. . . . However, self-selection out of a market is much more likely to occur if sex classifications are eliminated state by state, rather than nationwide, because the insured can simply

support that has been evident thus far, by framing the matter as a civil rights issue, legislators may be more inclined to support a bill that would prohibit the use of sex/gender in automobile insurance policies. Regardless of political affiliation, it is unlikely that a politician would want to be viewed as acting in opposition to civil rights.²⁰³

D. STATE LEGISLATION

Up until the writing of this Note, most states have permitted the use of sex/gender as classifiers in automobile insurance, citing actuarial soundness as justification.²⁰⁴ Legislative change is one effective vehicle to promote altering this practice.²⁰⁵ Though there has been some back-pedaling, Montana, in 1983, was the first state to prohibit the use of sex-based automobile insurance pricing.²⁰⁶ Since then, Hawaii, Maine, Massachusetts, Michigan, and North Carolina have passed laws that

select out of the system that requires unisex rates into a system that offers lower rates for sex-based insurance. Whether, and to what extent, there would be similar self-selection out of a national market remains unclear. The broad sweep of the federal bill does have drawbacks, the most important of which is that it cannot overlay perfectly with each state's system of insurance regulation, because each state has its own standards and mechanisms for enforcement. Any gap created between the federal standard and a state standard might lead to the renewal of sex discrimination.”).

²⁰³ Hatch, *supra* note 70, at 12 (“Members of Congress can be expected to be attracted to the issue. No politician wants to be considered anti- woman or anti-civil rights, whatever his party or political persuasion. A member of Congress could anticipate that a vote for the bills would gain favor with important segments of the public.”); Avraham et al., *supra* note 3, at 4 (2014) (“State legislatures will be more inclined to *prohibit* risk classification based on a characteristic (like age) to the extent that doing so would help combat (or appear to combat) illicit discrimination.”).

²⁰⁴ Gaulding, *supra* note 15, at 1662.

²⁰⁵ Wieggers, *supra* note 35, at 188 (“Changes to classification schemes may be best effected through automobile insurance regulatory legislation.”); Avraham et al., *supra* note 3, at 51 (“At varying points in time, states prohibit specific forms of insurance discrimination, based on current insurer practices, insurance market realities, and social norms.”).

²⁰⁶ Sharp, *supra* note 82, at 235; Press Release, Consumer Fed’n of Am., Newly Signed Montana Law Will Raise Auto Insurance Rates for Women, Unmarried Drivers, and Widows, (Apr. 22, 2021), https://consumerfed.org/press_release/newly-signed-montana-law-will-raise-auto-insurance-rates-for-women-unmarried-drivers-and-widows/.

prohibit the use of sex or gender in automobile insurance rating,²⁰⁷ and other states could adopt similar legislation. States that have constitutions with Equal Rights Amendments that prohibit discrimination on the basis of sex, gender, or gender identity would likely have the most successful transition by citing these Amendments as support for the prohibition of sex/gender in automobile insurance premium rating.²⁰⁸

Insurance is primarily regulated at the state level, so any legislative initiative from this perspective would fit the current regulatory structure.²⁰⁹ Most, if not all, states have adopted the NAIC's Model Unfair Trade Practices Act, which prohibits unfair discrimination. However, individual states interpret what constitutes unfair discrimination differently.²¹⁰ Some states allow the use of sex/gender in automobile insurance premium classifications completely;²¹¹ others allow it only if it is actuarially sound;²¹² and still others prohibit it completely, whether or not supported by actuarial studies.²¹³ I would advocate that all states adopt the notion that

²⁰⁷ HAW. REV. STAT. ANN. § 431:10C-207 (West 2023); 211 MASS. CODE REGS. 79.04; ME. REV. tit. 24-A, § 2169-B; MICH. COMP. LAWS ANN. § 500.2111 (West 2023); N.C. GEN. STAT. ANN. § 58-3-25 (West 2023).

²⁰⁸ CONN. CONST. art. I, § 20 (“No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.”); Ryan, *supra* note 83, at 770 (“In *Marchiorov.Chaney*, the court held that the passage of the state ERA required that *no* sexual classifications would be tolerated regardless of the governmental interest involved. Such an interpretation of state equal rights provisions would clearly prohibit the current disparate treatment of men and women in automobile insurance. Furthermore, such a reading is correct since any other, more limited, interpretation does not do justice to the sweeping mandatory language of the majority of state equal rights provisions. Thus, additional state protection from gender-based distinctions, through the application of strict scrutiny or a more penetrating standard of review, would enhance the success rate of challenges to automobile insurance rating practices.”); *Hartford Accident & Indem. Co. v. Ins. Comm’r of Commonwealth of Pa.*, 482 A.2d 542, 550 (Pa. 1984).

²⁰⁹ Cicero, *supra* note 65, at 266.

²¹⁰ Gaulding, *supra* note 15, at 1656–57.

²¹¹ *Nat’l Org. for Women v. Mut. of Omaha Ins. Co., Inc.*, 531 A.2d 274 (D.C. App. 1987) (holding that Human Rights Act did not proscribe use of gender-based categories in setting insurance rates).

²¹² *State, Dep’t. of Ins. v. Ins. Servs. Off.*, 434 So. 2d 908, 913 (Fla. Dist. Ct. App. 1983); Wagener, *supra* note 82, at 380.

²¹³ HAW. REV. STAT. ANN. § 431:10C-207 (West 2023); 211 MASS. CODE REGS. 79.04; ME. REV. tit. 24-A, § 2169-B; MICH. COMP. LAWS ANN. § 500.2111 (West 2023); N.C. GEN. STAT. ANN. § 58-3-25 (West 2023).

sex/gender discrimination, whether actuarially supported or not, is prejudicially unfair discrimination and should be prohibited.

E. INSURANCE COMPANY POLICY

There are many reasons why insurance companies themselves may be interested in leading the effort to prohibit the use of sex/gender in automobile insurance premium calculations. Insurers can potentially reap many benefits by eliminating the use of sex/gender in automobile insurance cost ratings. One area that would likely improve by eliminating the use of sex/gender would be an insurance company's marketability. Also, by using other, more accurate markers, insurance companies could cut costs related to loss and accidents. Insurance companies would also be incentivized to implement this change themselves to avoid litigation with expensive payouts and bad publicity.²¹⁴ It would also be wise for insurance companies to act proactively to effectuate this change in a way that they can control rather than having to act post hoc in response to future possible legislative impositions.

1. Marketability

One reason that insurance companies may want to stand at the forefront of efforts to remove sex/gender as automobile insurance premium justifications would be to enhance the marketability of their brand. By acting to remove sex/gender as classifications to justify premium costs for automobile insurance, companies can be viewed as more inclusive.²¹⁵ Many companies have begun examining and changing their sex/gender policies and marketing to enhance their Diversity, Equity, and Inclusion (DE&I) initiatives and create more welcoming environments and company

²¹⁴ Avraham et al., *supra* note 3, at 8 (“Finally, the case for regulation is relatively strong if insurers are refraining from using problematic policyholder characteristics because they fear the potential reputational or regulatory consequences of doing so.”).

²¹⁵ *Creating Inclusive Forms*, PRINCETON GENDER & SEXUALITY RES. CTR., <https://www.gsrc.princeton.edu/creating-inclusive-forms> (last visited Jan. 10, 2023); *Asking About Gender and Sex on Web Forms*, WASH. U. IN ST. LOUIS DIVERSITY & INCLUSION (2023), <https://diversity.wustl.edu/framework/advisory-best-practice-groups/best-practices/> (last visited Jan. 12, 2023); Camilla Rydzek, *Gen Z Fashion Report Shows 65% Want “Gender Neutral” Search Option Online*, THE INDUSTRY, (Mar. 1, 2022), <https://www.theindustry.fashion/gen-z-fashion-report-shows-65-want-gender-neutral-search-option-online/> (“The Gen Z Fashion Report by UNiDAYS has revealed that almost two thirds (65%) of Gen Z's think their shopping experience would be improved if there was a ‘gender neutral’ search option online.”).

branding.²¹⁶ Consumers as a whole have become more interested in giving their business to companies that have inclusive advertising and campaigning,²¹⁷ and insurance companies could likely profit from taking advantage of this approach as well. Despite the enormous positive societal outcomes that an insurance company would foster by removing sex/gender from automobile insurance policy premium costs determinations, when focusing on just the financial incentives, there is evidence that consumers would be attracted to a more inclusive style of marketing.²¹⁸ Though

²¹⁶ Elena Prokopets, *Gender-Neutral Marketing: It's More Than A Trend*, LATANA (May 3, 2022), <https://latana.com/post/three-brands-gender-neutral/> (“The affinity for gender-neutral products and marketing is already prevalent in apparel, cosmetics, toys, and FMCG segments, among others.”); Imogen Watson, *The Future is Fluid: Is the Age of Gender Neutral Marketing Upon Us?*, THE DRUM (Jan. 11, 2021), <https://www.thedrum.com/news/2021/01/11/the-future-fluid-the-age-gender-neutral-marketing-upon-us>; *Start Using Inclusive Language with Your Team and Customers*, ZENDESK BLOG (Mar. 3, 2021), <https://www.zendesk.com/blog/start-using-inclusive-language/#:~:text=Inclusive%20language%20also%20builds%20stronger,products%20that%20address%20their%20needs>; Ashley Stahl, *What's To Come In 2021 For Diversity, Equity and Inclusion in the Workplace*, FORBES, (Apr. 14, 2021, 9:00 AM), <https://www.forbes.com/sites/ashleystahl/2021/04/14/whats-to-come-in-2021-for-diversity-equity-and-inclusion-in-the-workplace/?sh=73afde337f26>; Nora Zelevansky, *The Big Business of Unconscious Bias*, THE NEW YORK TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/style/diversity-consultants.html>.

²¹⁷ Christina Brodzik, Nathan Young, Nikki Drake & Sarah Cuthill, *Authentically Inclusive Marketing: Winning Future Customers with Diversity, Equity, and Inclusion*, DELOITTE INSIGHTS (Oct. 19, 2021), <https://www2.deloitte.com/us/en/insights/topics/marketing-and-sales-operations/global-marketing-trends/2022/diversity-and-inclusion-in-marketing.html> (“Consumers—especially the youngest generations—are expecting more from these messages than just details about the latest seasonal sale. Rather, they are questioning whether a brand supports diversity and inclusion both publicly *and* behind the camera—and this focus is becoming increasingly important to brands as well.”); Prokopets, *supra* note 213 (“48% of Gen Z consumers and 38% of consumers in other generations value brands that don’t classify products by gender.”).

²¹⁸ Brodzik et al., *supra* note 217 (“As the consumer population diversifies—by race and ethnicity, sexual orientation, or differences in ability, for example—it’s imperative for brands to authentically reflect a range of backgrounds and experiences within their messaging if they expect to effectively connect with future customers. In our survey of 11,500 global consumers, we found the youngest respondents (from 18 to 25 years old) took greater notice of inclusive advertising when making purchase decisions. . . . [H]igh-growth brands (defined as those with annual revenue growth of 10% or more) are more frequently establishing key

research is lacking specifically on automobile insurance marketing that is inclusive of all gender and sex identities, when reviewing data from other fields, it seems to follow that it would also be beneficial for the automobile insurance industry to implement more inclusive changes as well.²¹⁹ Some may advocate that a better marketing strategy than eliminating sex/gender altogether would be to allow applicants a broad array of options or write-in options to describe their own sex/gender.²²⁰ Though this might be supportive in a social sense, by affirming gender fluidity and the broad array of classifications beyond the male/female binary, using a wider sex/gender classification system for automobile insurance premium pricing would miss the mark completely. Because of the fluidity of gender,²²¹ the lack of clear definitions and understanding of the terms sex and gender,²²² heterogeneity in self-identification,²²³ and the continuing evolution of

performance metrics for diversity, equity, and inclusion (DEI) objectives than their lower-growth competitors.”); Quy Ma, *Why Brands Should Embrace Gender-Neutral Marketing*, MEDIUM (Oct. 10, 2020), <https://medium.com/swlh/why-brands-should-lean-in-to-gender-neutral-product-marketing-2f1bd0cef516> (“Savvy businesses that can tap into this growing market will be ahead of the competition or risk facing a future where news articles frequently detail which industries do Millennials and Gen Z kill.”).

²¹⁹ *Start Using Inclusive Language with Your Team and Customers*, ZENDESK BLOG (Mar. 3, 2021), <https://www.zendesk.com/blog/start-using-inclusive-language/#:~:text=Inclusive%20language%20also%20builds%20stronger,products%20that%20address%20their%20needs>; Andrew McCaskill, *Inclusive Language in Marketing Isn't Just Important – It's Essential*, LINKEDIN, (Sept. 28, 2021), <https://www.linkedin.com/business/marketing/blog/diversity/inclusive-language-in-marketing-isnt-just-important-its-essential>; Ma, *supra* note 218 (“These consumers will reward brands that are more gender-inclusive financially.”).

²²⁰ Alexander Lussenhop, *Beyond the Male/Female Binary: Gender Equity and Inclusion in Evaluation Surveys*, 43 J. OF MUSEUM EDUC. 194, 200 (2018); Schmitz, *supra* note 82, at 474. (“In contrast, other feminists highlight gender differences and warn that a focus on gender-neutrality may impede women’s advancement in the marketplace. They propose that the law should recognize gender differences and provide protections that address these differences.”).

²²¹ Xavier Sabastian, *Car Insurance for Transgender and Non-Binary Applicants*, WAY.COM (2023), <https://www.way.com/blog/car-insurance-for-trans-and-non-binary-applicants/> (“However, one component of the application — choosing a gender — might be particularly difficult for transgender or non-binary drivers. This is because non-binary and trans persons frequently lack the flexibility to choose whose gender they identify with, something that others take for granted.”).

²²² *See generally* Thorne et al., *supra* note 28.

²²³ *Id.* at 149 (“gender has come to be seen as heterogeneous in nature rather than a dichotomy of two opposites.”).

understanding of the many facets of the sex and gender spectrum,²²⁴ it would be nearly impossible to perform research that would justify actuarial distinctions based on a wider classification of sex/gender options.²²⁵ Though it may be useful in a marketing campaign for an insurance company to allow individuals the option to self-identify their sex or gender on an application for automobile insurance, because of its limited actuarial justification, I would not advocate its use to support price distinctions based on a wider variety of sex/gender options.²²⁶ Instead, automobile insurance applications should allow applicants to self-identify their sex, gender, and/or pronouns in a way that is personally affirming and inclusive, but this information should not be used to determine premium costs.

2. Financial Gain

By removing sex/gender classifications from premium cost determinations, automobile insurance companies could actually increase their financial gains. Insurance companies would be able to replace sex/gender with more actuarially justifiable classification systems that better anticipate risk and would, therefore, increase profits.²²⁷ Some

²²⁴ *Guide to Being an Ally to Transgender and Nonbinary Young People*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/resources/guide/a-guide-to-being-an-ally-to-transgender-and-nonbinary-youth/>; Thorne et al., *supra* note 28, at 139.

²²⁵ Will J. Beischel, Zach C. Schudson, Rhea Ashley Hoskin & Sari M. van Anders, *The Gender/Sex 3×3: Measuring and Categorizing Gender/Sex Beyond Binaries*, PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 1, 2 (Feb. 24, 2022).

²²⁶ Lauren Bishop, *Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society*, 30 WIS. J. L. GENDER & SOC'Y 131, 155 (2015) (“In the alternative, perhaps sex/gender designations should be scrapped altogether. We should ask: what purpose do they serve? If the purpose is to ensure that travelers are indeed who they portray themselves to be, alternative methods, such as photographs, can serve that function. Passport sex and gender designations are too constraining, not to mention long-lasting to be accurate, effective, and nondiscriminatory.”); Lussenhop, *supra* note 220, at 195 (“Thus, if there is no clear use for data, or if you have been collecting data and not using them, they are not necessary to collect.”); Avraham et al., *supra* note 3, at 7 (“Second, the case for regulation may be slightly stronger when the reason that carriers do not use a policyholder characteristic is because the cost of determining and verifying the characteristic outweighs the benefits of a more refined classification scheme.”).

²²⁷ Sharp, *supra* note 82, at 253 (“In areas such as automobile insurance where sex is only one of many risk predictors, eliminating sex as a factor would entail marginal expense. Some critics have argued that gender is at best a crude predictor

suggested alternatives would be to consider measures such as miles driven, years driven, driving history, or even using telematics to measure an individual's specific risk to justify premiums for automobile insurance.²²⁸

By using more direct risk classifications to calculate premium costs, insurance companies would be better able to calculate costs, thereby minimizing loss and adverse selection risks.²²⁹ This paper does not go so far as to decide which is the best replacement factor, but does identify that there are many reasonable alternatives. Rather than continue to use actuarially suspect sex/gender (indirect/proxy) classifications, insurance

of longevity, and that adjustment to other more relevant factors would be profitable to the industry. Abandoning the use of sex-based predictors might even act as a catalyst for new, more accurate methods of risk classification. Finally, consumers rather than insurers will bear a large portion of the costs incurred through such research and in shifting to new risk predictors.”); Larisa Yuzvovich, Elena Knyazeva, Elena Razumovskaya & Vadim Katochikov, *Vehicle Insurance Financial Mechanism*, 7 REV. EUR. STUDS. 99, 101 (2015) (“Financial mechanism directly affects the result of the enterprise work. To be exact, well-formed financial mechanism elements of the insurance company affect the economic performance of the company. One of the most important elements of insurance company’s financial mechanism, affecting the economic results of the enterprise, is well-chosen insurance premium rate for each individual insurant.”); Marianne Bonner, *How Insurers Perform a Risk Assessment*, THE BALANCE, <https://www.thebalancemoney.com/how-insurers-assess-your-risks-4159708> (Mar. 9, 2021) (“Loss prediction is an important part of the rate development process. Insurers need the ability to estimate losses accurately so they can develop rates that reflect the risks they’re insuring.”); Rosenfield, *supra* note 3, at 109 (“Instead, auto insurance premiums must be based primarily upon three rating factors in decreasing order of importance: a motorist’s driving safety record, the number of miles he or she drives each year, and the motorist’s years of driving experience.”); McCluskey, *supra* note 6, at 467.

²²⁸ Bordoff & Noel, *supra* note 144, at 20; Butler & Butler, *supra* note 30, at 200 (“Surcharges or discounts based on driver records are politically promoted as a substitute for classes such as sex and territory.”); Ayuso et al., *supra* note 73, at 1 (“We conclude that no gender discrimination is necessary if telematics provides enough information on driving habits.”).

²²⁹ West, *supra* note 115, at 694 (“In addition, this inter-company competition may result in the implementation of other factors, such as mileage, as discussed above, so that insurers create more accurate risk assessment and become more competitive in the marketplace. Historically, public markets have been first to effectively introduce genderless rating systems; however, private markets may ultimately be the best place to see this accomplished.”); Cem Dilmegani, *Insurance Pricing: Determination & New Methods in 2023*, AIMULTIPLE, <https://research.aimultiple.com/insurance-pricing/> (Feb. 9, 2023) (“The most important variable cost for insurance companies is the determination of the cost of risk.”); Antonio & Valdez, *supra* note 9, at 189.

companies could substitute factors that better predict risk and, therefore, would be able to more accurately price policies and minimize waste in revenue from unanticipated loss.²³⁰

Additionally, by using alternative classifications, such as miles driven or driving history, rather than sex/gender, policyholders would have the ability to manipulate their classification to provide for safer outcomes²³¹ and policyholders would have a financial incentive to engage in less risky behaviors because it would be reflected in lower premium costs. Insurance companies would also profit by not having to pay out for those accident-related losses. Although sex/gender identities are not as rigid as they once were believed to be, the ability to ‘control’ or ‘manipulate’ one’s own gender or sex does not decrease the risk of an automobile accident.²³² Alternatively, some individuals have taken advantage of systems that still use sex/gender to price automobile insurance premiums.²³³ By removing sex and gender as determinants of premium costs, applicants would not be able to modify their insurance applications in the hopes of “gaming the system” to get a cheaper policy.²³⁴ This would cut down on insurance companies’ losses due to misrepresentations and inaccurate label manipulations.

3. Litigation Risk

By removing sex/gender as a factor used to justify automobile insurance premiums, insurance companies would potentially limit their exposure to contentious litigation. Currently when applying for automobile

²³⁰ West, *supra* note 115, at 694 (“In addition, this inter-company competition may result in the implementation of other factors, such as mileage, as discussed above, so that insurers create more accurate risk assessment and become more competitive in the marketplace. Historically, public markets have been first to effectively introduce genderless rating systems; however, private markets may ultimately be the best place to see this accomplished.”); Medders et al., *supra* note 13, at 7–9.

²³¹ Rosenfield, *supra* note 3, at 109–10.

²³² Blake, *supra* note 94, at 1488–89 (“Insurance classification based on immutable traits like race or sex are particularly critiqued for efficiency reasons; such classifications do nothing to promote risk aversion. It’s not always clear that some of these classifiers do a very good job at predicting loss; there may be better metrics available. And some predictions may be flavored by stereotypes rather than objective measurements of risk.”).

²³³ See *supra* Section IV.b.

²³⁴ Medders et al., *supra* note 13, at 16 (“If instead gender remains a rating factor, and Gender X is allowed as a third gender option that is initially charged the female base rate, there would be an economic incentive for males to report as Gender X.”).

insurance with most companies, an individual will need to provide their driver's license.²³⁵ Many automobile insurance applications will request information about an individual's sex or gender, but as previously mentioned, these terms are often unspecified and conflated.²³⁶ Because premium rates often take a person's sex or gender into account when determining the cost, having incongruent documentation can be a problem.²³⁷ The policy enacted between an automobile insurance company and the policyholder is a contract that can be understood as the company's promise to indemnify the policyholder for loss in exchange for the policyholder's payment of premiums.²³⁸ In a dispute between the policyholder and the insurer, the insurance policy can become the basis of the legal dispute.²³⁹ If the driver's license information does not match the insurance application, that may cause problems down the road. The parties can argue as to the validity of the insurance policy under a contract theory such as material misrepresentation,²⁴⁰ which could invalidate the insurance

²³⁵ Rachel Bodine, *What Documents Do You Need to Get Auto Insurance?*, AUTOINSURANCE.ORG, (June 26, 2023) <https://www.autoinsurance.org/what-documents-do-i-need-for-car-insurance/>.

²³⁶ Norman, *supra* note 46; Deventer, *supra* note 46.

²³⁷ *The Effect of Material Misrepresentations When Applying for Auto Insurance*, BOONE & DAVIS (Jan. 29, 2016), <https://www.booneanddavislaw.com/the-effect-of-material-misrepresentations-when-applying-for-auto-insurance/> (2016); Greg Meckbach, *The Danger of Lying About Gender for Cheaper Auto Insurance*, CANADIAN UNDERWRITER (Aug. 1, 2018), <https://www.canadianunderwriter.ca/insurance/men-pretend-women-get-break-auto-insurance-1004135174/>.

²³⁸ Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 814 (2009).

²³⁹ Jeffrey W. Stempel, *Interpreting Insurance Policies*, 12 COMPLEAT LAW. 1 (1995).

²⁴⁰ *See* Mut. Ben. Life Ins. Co. v. JMR Elecs. Corp., 848 F.2d 30 (2d Cir. 1988) (affirming that “The Court of Appeals held that insured's misrepresentation about his history of cigarette smoking was material and justified rescission of policy under New York law; since insurer was induced to issue a nonsmoker, discounted premium policy precisely as result of misrepresentation, and even if insurer would have issued policy at higher smoker's premium rate that did not permit beneficiary to recover reduced amount of proceeds.”); *Nationwide Mut. Fire Ins. Co. v. Pascarella*, 993 F. Supp. 134 (N.D.N.Y. 1998) (holding that “Under New York law, an insurance company is entitled to the rescission of a policy if the company relied on a material misrepresentation made by the insured in his or her application by issuing the policy Rescission is available even if the material misrepresentation was innocently or unintentionally made A misrepresentation will be “material” if knowledge by the insurance company of the misrepresented fact would have resulted in a refusal to issue the same exact

coverage, depending on how the court interprets the inconsistency.²⁴¹ The outcome of the litigation could depend on the specific laws in the jurisdiction²⁴² or the judge's discretion.²⁴³ Further, it is possible that in the coming years, sex/gender identity may even become a federally protected classification or protected by even more state constitutions.²⁴⁴ Though few

policy.”). *But cf.*, *Direct Auto Ins. Co. v. Beltran*, 998 N.E.2d 892 (Ill. App. Ct. 2013) (holding that misrepresentations in application for auto insurance policy were not material); John Dwight Ingram, *Misrepresentations in Applications for Insurance*, 14 U. MIAMI BUS. L. REV. 103, 103 (2005)

(“When a misrepresentation is discovered, the insurer is presumably entitled to deny the claim under the policy and rescind the policy.”).

²⁴¹ Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 568 (2006).

²⁴² Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749, 750 (2010)

(“Traditionally, scholars of contract law have claimed that context based on categories of subordination such as race or gender does not matter. They have seen contract law as untouched by social hierarchies. They believe that contract rules have nothing to do with the construction or maintenance of inequality.”); Ingram, *supra* note 236, at 106 (“A misrepresentation in an application for insurance is ‘a statement of something as a fact which is untrue and affects the risk undertaken by the insurer.’ ‘Incomplete answers or a failure to disclose material information on an application for insurance may constitute a misrepresentation when the omission prevents the insurer from adequately assessing the risk involved.’”); *id.* at 104 (“In many states, any material misrepresentation is grounds for rescission or denial of liability. This is true whether the misrepresentation is made intentionally, knowingly, negligently, or innocently. There need not be any showing of fraud or intent to deceive.”).

²⁴³ Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict Considerations*, 21 HARVARD NEGOTIATION L. REV. 221, 223, 225 (2016).

²⁴⁴ Chang & Wildman, *supra* note 16, at 70 (“Many local jurisdictions are fighting over whether to include gender identity and gender expression under anti-discrimination laws. Consistent recognition that gender needs to be a protected category will further democratic inclusion in society.”); Risa Aria Schnebly, *Biological Sex and Gender in the United States*, THE EMBRYO PROJECT ENCYC. (June 13, 2022), <https://embryo.asu.edu/pages/biological-sex-and-gender-united-states-0> (“In 2020, the US Supreme Court case *Bostock v. Clayton County* (2020) was one of the first cases to rule that discrimination based on gender identity in employment is illegal across the US.”); JARED P. COLE & CHRISTINE J. BACK, CONG. RSCH. SERV., LSB10229, TITLE IX: WHO DETERMINES THE LEGAL MEANING OF “SEX”? 3–4 (2018) (“Though this case law continues to develop, several federal appellate courts have recently held or suggested that Title IX protects against discrimination based on gender identity, including transgender status, in light of the Supreme Court’s 1989 *Price-Waterhouse v. Hopkins* decision which

cases have been cited related to sex/gender discrimination, specifically in automobile insurance,²⁴⁵ there have been numerous and enormous lawsuits related to sex/gender discrimination in health insurance,²⁴⁶ employment practices,²⁴⁷ and in education.²⁴⁸ Insurance companies should avoid this sort of litigation that could welcome large payouts, and to avoid the bad

recognized “sex-stereotyping” as a method of proving sex discrimination under Title VII.”); Hatch, *supra* note 70, at 9 (“In the courts, the use of sex-based mortality data to calculate annuities is being attacked under federal civil rights laws.”).

²⁴⁵ See *supra* Section VII.b.

²⁴⁶ Brendan Pierson, *Case Against Blue Cross Over Gender-Affirming Care Certified as Class Action*, REUTERS (Nov. 9, 2022), <https://www.reuters.com/legal/litigation/case-against-blue-cross-over-gender-affirming-care-certified-class-action-2022-11-09/> (“A lawsuit accusing Blue Cross Blue Shield of Illinois of violating an anti-discrimination provision of the Affordable Care Act by refusing to cover a transgender teenager's gender-affirming care through an employer plan it administers can go forward as a class action, a federal judge has ruled.”); *Class Action Lawsuit Against Aetna Filed by Emery Celli Brinckerhoff Abady Ward & Mazel and NWLC Alleges LGBTQ Discrimination*, NAT’L WOMEN’S L. CEN. (Sept. 13, 2021), <https://nwlc.org/press-release/class-action-lawsuit-against-aetna-filed-by-emery-celli-brinckerhoff-abady-ward-maazel-and-nwlc-alleges-lgbtq-discrimination/> (“The suit alleges that Aetna’s fertility treatment reimbursement policy discriminates against LGBTQ individuals.”).

²⁴⁷ *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1001 (D. Nev. 2016) (“Transgender school police officer, who was born biologically female but who was in the process of formally transitioning to male, brought action against school district, alleging gender discrimination, harassment, and retaliation in violation of Title VII and state law after school district required that officer use gender-neutral restrooms until officer had a documented sex change, rather than the men's or women's restroom”); Edward Segal, *Walmart is Sued for Gender and Race Discrimination By EEOC*, FORBES (Feb. 11, 2022, 4:08 PM), <https://www.forbes.com/sites/edwardsegal/2022/02/11/walmart-is-sued-for-gender-and-race-discrimination-by-eoc/?sh=44bda13b5614> (“According to the U.S. Equal Employment Opportunity Commission, there were more than 21,000 filed charges of sex discrimination in fiscal year 2020, up by more than 31% from 2019.”).

²⁴⁸ See e.g., Mary Anne Pazanowski, *Nurse’s Obamacare Suit Over Transgender Care Exclusion Proceeds*, BLOOMBERG L. (Apr. 26, 2022, 10:00 AM), <https://news.bloomberglaw.com/litigation/nurses-obamacare-suit-over-transgender-care-exclusion-proceeds>; *Johnston v. U. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015); David W. Chen, *Sex Discrimination Case in Hawaii Could Change High School Sports Across the U.S.*, N.Y. Times (Oct. 22, 2022), <https://www.nytimes.com/2022/10/22/sports/title-ix-lawsuit-hawaii.html>.

publicity of a suit related to sex or gender discrimination because it could negatively affect how the public views their brand and thus its profits.²⁴⁹

4. Acting Proactively

As more states are passing legislation that prohibits the use of sex/gender in automobile insurance premium costs, it is likely that the practice may continue to spread to other states or even nationally.²⁵⁰ In light of other states' automobile insurance sex/gender bans, insurance companies should implement these changes now before they are forced to do so.²⁵¹ This would allow insurance companies to create a seamless transition and implement changes in a way that meshes with their current workflows

²⁴⁹ Segal, *supra* note 242 (“Several of those lawsuits created negative publicity for companies and organizations and hurt their image and reputation. . . . Employers hoping to avoid the negative effects of discrimination, which includes possible legal liability as well as damage to their reputation, should scrutinize their entire management structure and culture.”); Andrew Pettijohn, *Avoiding the (Albeit Rare) Claim of Male Sex Discrimination in the Workplace*, REMINGER (Feb. 2019), <https://www.reminger.com/publication-772> (“It is axiomatic that sexual discrimination lawsuits can be devastating to any company regardless of the outcome. Whether or not the claim is meritless, not only is its defense expensive and time-consuming, the embarrassment of a public scandal and the hidden cost of lost goodwill with consumers can be potentially crippling.”); Andrew Pettijohn, *Avoiding the (Albeit Rare) Claim of Male Sex Discrimination in the Workplace*, EMP. PRACS. LIAB. NEWSL. WINTER 2019 (Reminger), Feb. 2019, at 3 (“It is axiomatic that sexual discrimination lawsuits can be devastating to any company regardless of the outcome. Whether or not the claim is meritless, not only is its defense expensive and time-consuming, the embarrassment of a public scandal and the hidden cost of lost goodwill with consumers can be potentially crippling.”).

²⁵⁰ Hatch, *supra* note 70, at 9 (“In Congress, bills to eliminate gender distinctions in all insurance pricing and benefits are being promoted by a broad coalition of groups and the legislative proposals have recently enjoyed steady progress.”); Medders et al., *supra* note 13, at 1 (“[A]s diversity and inclusion continue to be a strategic initiative within the insurance market, the insurance industry and its regulatory environment have to navigate carefully between the business imperatives for adequate pricing and inclusion efforts.”); Carney & Hardigree, *supra* note 119, at 2 (“Although no federal legislation has been enacted, the gender-neutral insurance movement has targeted and achieved success at the state level. Michigan, North Carolina, Hawaii, Montana, and Massachusetts have all passed gender-neutral insurance laws affecting one or more lines of individual insurance. Many other states have proposed and are debating the merits of similar legislation.”).

²⁵¹ Avraham et al., *supra* note 3, at 7 (“Legal prohibitions on risk classification can therefore be justified as a mechanism for preventing potentially problematic insurer behavior in the future.”).

rather than be disrupted by a change in legislation that could jolt their infrastructure.²⁵² Rather than waiting to be told that their practices need to change, insurance companies could determine their best course of action for this change rather than be compelled to make changes in a rushed, less thought-out and orchestrated way. With changes in technology and cultural understandings of sex and gender, sex and gender-based pricing will likely become a thing of the past.²⁵³ Insurance companies could benefit from acting proactively rather than reactively.

VIII. CONCLUSION

The use of sex/gender to determine automobile insurance premium costs is not an effective basis. The current understanding in American culture of the terms sex/gender is no longer supported by a binary classification system. The incongruity and inconsistency in the use of sex/gender within the automobile insurance industry supports abandoning its use for more accurate and socially acceptable alternative factors. Legislative avoidance, influential lobbying, and misguidance have prevented this change from being effectuated thus far on a broad scale throughout the country. However, this change can be achieved through administrative agency action, adjudication, federal or state legislation, or by insurance companies themselves.

²⁵² Ryan, *supra* note 84, at 748 (1986) (“In the five states which have adopted statutes eliminating sex as a rating variable, insurers have adjusted to the legislation by implementing undifferentiated flat prices for drivers under twenty-five. Women's rates in these states have risen unnaturally to the level of men's, fulfilling insurance industry predictions of undesirable results from unisex legislation. Contrary to insurance industry contentions, however, these results are not the natural consequences of eliminating sex as a rating variable, but result from the failure of insurance companies to substitute other rating factors for the eliminated variable.”); Medders et al., *supra* note 13, at 16 (“If, however, gender is removed as a rating variable without replacement (via widespread introduction of unisex legislation) or is still used with the introduction of a self-reported, third gender identity (Gender X) option, market problems in auto insurance may be created, at least in the short term.”).

²⁵³ Medders et al., *supra* note 13, at 26 (“With the evolution of the insurance industry toward predictive analytics, gender-based pricing may be moot in the near future. Rather than continue to use an antiquated rating variable, it is timely for the insurance industry and insurance regulators to capitalize on the opportunity now for positive societal impact in pricing modernization.”).

IX. APPENDIX A

Automobile Insurance Sex/Gender Term Usage

Company	Verbiage Options on Application ²⁵⁴
State Farm	Gender: Male or Female ²⁵⁵
Geico	Gender: Female, Male, Unknown, Non-Binary ²⁵⁶
Progressive	Gender: Male or Female ²⁵⁷
Allstate	Does not ask about sex or gender on application ²⁵⁸
Allstate subsidiary (National General)	Gender: Male or Female ²⁵⁹
Farmers	Gender: Male or Female ²⁶⁰
Liberty Mutual	“What gender do you identify as?” Male or Female ²⁶¹

²⁵⁴ This information was obtained by mock-applying as a general user on the company’s website, using the zip code 06606 and age 31.

²⁵⁵ *Auto Quote*, STATEFARM, <https://auto.statefarm.com/quoteAndPurchase/customer/driver?conversationId=20edfee1-607d-4f60-99de-884ad35f3b9b> (last visited Mar. 15, 2023).

²⁵⁶ *Quote*, GEICO, <https://sales.geico.com/quote> (last visited Mar. 15, 2023).

²⁵⁷ *Policyholder Details*, PROGRESSIVE, <https://autoinsurance1.progressivedirect.com/0/UQA/Quote/DriversAddPniDetails> (last visited Mar. 15, 2023).

²⁵⁸ *Online Insurance Quoting and Bundling*, ALLSTATE INS., <https://purchase.allstate.com/onlineshopping/people/primary/1> (last visited Mar. 15, 2023).

²⁵⁹ *Adding a Driver*, NAT’L GEN., <https://customer.nationalgeneral.com/AutoInsurance/QuoteDrivers/DGPrimaryDriverInfo> (last visited Mar. 15, 2023).

²⁶⁰ *Who’s Driving*, FARMERS, <https://esales.farmers.com/fastquote/auto/drivers> (last visited Mar. 15, 2023).

²⁶¹ *Drivers*, LIBERTY MUT., <https://buy.libertymutual.com/shop/auto-quote/Q23-03160-05583/driver/6412893e4c636d7fe3d06820> (last visited Mar. 15, 2023).

Nationwide	Sex: Male or Female ²⁶²
Travelers	Gender: Male, Female, Not Specified ²⁶³

²⁶² *Nationwide Bundled Quote*, NATIONWIDE, https://multiproduct.nationwide.com/multi-quote/more-details?quoteType=initiateQuote&zipCode=06606&utm_medium=organic&utm_source=google&utm_campaign=PRS (last visited Mar. 15, 2023) (Note that within the last year, Nationwide had different selection options including: “Please select your gender as described on your driver’s license” Male or Female. Info box. “Generally speaking, women tend to get in fewer accidents than men. At the end of the day, your individual driving history will have a greater impact on your rate than whether you are a guy or a gal.” However, this information could not be recreated.)

²⁶³ *Tell Us a Little About Yourself*, TRAVELERS, <https://pijas.travelers.com/quickquote/TravelersQuote.ahtml#WELCOME> (last visited Mar. 15, 2023).