

# Insurance Discrimination Against Battered Women: Proposed Legislative Protections

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## INTRODUCTION

In the past thirty years, society has increasingly recognized the presence of domestic violence in the United States, due largely to the efforts of victims' advocates.<sup>1</sup> Although advocacy efforts have led to some legal reform,<sup>2</sup> all too often officers of the court and law refuse to enforce protective legislation due to paternalistic notions of the sanctity of a man's home as his castle.<sup>3</sup> The result is that the offender fears no punishment, the abuse continues unchecked, and domestic violence remains a private problem.<sup>4</sup> Each victim must bear alone her own misfortune.<sup>5</sup>

Activists working with domestic violence victims instigated legislative reform by emphasizing the twin objectives of educating the public about the breadth and severity of domestic violence and by encouraging women to leave abusive environments. As a result of these educational efforts, victims began to report abuse incidents to law enforcement officers, allowing for both documentation of the abuse and the procurement of restraining orders.<sup>6</sup> Furthermore, experts in the medical community encouraged primary health care providers to document

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1. Edward S. Snyder, *Remedies for Domestic Violence: A Continuing Challenge*, 12 J. AM. ACAD. MATRIM. LAW. 335, 337-38 (1994).

2. For a complete bibliography of national domestic violence legislation in the United States, see NATHAN A. ROSEN, *BATTERED WIVES: A COMPREHENSIVE ANNOTATED BIBLIOGRAPHY OF ARTICLES, BOOKS AND STATUTES IN THE UNITED STATES OF AMERICA* 77-84 (1988).

3. Snyder, *supra* note 1, at 338; Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1298-99 (1995); see also Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 277-80 (1995).

4. See, e.g., *Bruno v. Codd*, 393 N.E.2d 976 (N.Y. 1979).

5. This Note largely refers to victims of domestic violence as women. Department of Justice statistics indicate that women are the overwhelming victims of abuse, although battering does infrequently occur against men in relationships. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PUB. NO. 149259, *VIOLENCE BETWEEN INTIMATES* (1994).

6. Snyder, *supra* note 1, at 344. *But see* Browne, *supra* note 3, at 1298-99 (noting the failure of police departments and officers to make arrests in domestic violence situations).

suspicious injuries in medical records for evidentiary purposes and also to recognize, treat, and report suspected incidents of family violence.<sup>7</sup>

While the increased documentation of abuse-related injuries might have some ameliorative effect on domestic violence, it has also resulted in a discrete and extremely counterproductive form of discrimination. Some insurance companies use the documented evidence of domestic violence as an underwriting criterion upon which to deny an applicant insurance.<sup>8</sup> Simply stated, some insurers use the evidence of spousal abuse to discriminate against the victim by denying her access to all forms of insurance.

This discriminatory insurance practice results in an irresolvable dilemma for battered women. Victims realize that if they seek medical or police protection, the resulting records will jeopardize their insurability. As a consequence, victims may stop seeking help or reporting incidents of abuse in order to preserve necessary insurance coverage.<sup>9</sup> This insurance industry practice presents a serious problem: it threatens the progress that has been made against domestic violence in recent decades. Where the impetus has been toward heightened awareness and reporting, this practice ultimately discourages reporting, medical treatment, prosecution, and prevention.

This Note analyzes recently proposed legislation addressing the practice of insurance discrimination against victims of domestic violence. Part I examines the plight of battered women: the forces, both economic and otherwise, causing individual women to stay with abusers and the tremendous social costs of domestic violence. Part II defines the problem of insurance discrimination against battered women, advancing arguments from opponents of the practice as well as providing justifications given by insurance companies that condone it. Part III analyzes recent federal and state legislative proposals that prohibit insurance companies from underwriting on the basis of domestic violence. Finally, Part IV condemns underwriting on the basis of domestic violence as discriminatory and advocates regulation as an appropriate measure to prevent and defray the social costs of domestic violence.

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7. Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?*, 273 JAMA 1781, 1781-82 (1995); Antonia C. Novello et al., *A Medical Response to Domestic Violence*, 267 JAMA 3132 (1992).

8. Women's Law Project & Pennsylvania Coalition Against Domestic Violence, *Insurance Discrimination Against Victims of Domestic Violence* (Sept. 1995) [hereinafter *Insurance Discrimination*] (unpublished manuscript, on file with the Women's Law Project and the Pennsylvania Coalition Against Domestic Violence); see also, Anne Stein, *Will Health Care Reform Protect Victims of Abuse?: Treating Domestic Violence As a Public Health Issue*, HUM. RTS., Fall 1994, at 16, 16-17 (1994); *Insurance Benefits Denied to Battered Women*, NCADV VOICE, Winter 1994, at 19.

9. Monica C. Fountain, *Insurance Companies Hit Battered Women Too*, CHI. TRIB., June 4, 1995, § 6, at 1; Katharine Q. Seelye, *Insurability for Battered Women*, N.Y. TIMES, May 12, 1994, at A9; *Insurance Discrimination*, *supra* note 8.

## I. DOMESTIC VIOLENCE

Domestic violence is an all too common phenomenon in the United States. Estimates show that approximately four million women are beaten annually by their partners.<sup>10</sup> Moreover, experts in the domestic violence field all agree that the statistics of actually identified incidents vastly underestimate the frequency of domestic violence, due to the large incidence of underreporting associated with this particular crime.<sup>11</sup>

The United States Supreme Court acknowledged the danger and prevalence of domestic violence in *Planned Parenthood v. Casey*:<sup>12</sup>

[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault. . . . Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Returning to one's abuser can be dangerous. . . . Thirty percent of female homicide victims are killed by their male partners.<sup>13</sup>

A. *Why Battered Women Stay*

One major misconception often mentioned in public debate is that battered women have the freedom to leave their abusers, yet choose to stay. In reality, there are often insurmountable barriers which prevent abuse victims from escaping their violent surroundings. Battered women are frequently stuck in their abusive relationships because they have no money, no source of income, no affordable housing, and because they justifiably fear retaliation from their partners if they do leave.<sup>14</sup> Despite these obstacles, most battered women attempt

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10. OLA W. BARNETT & ALYCE D. LAVIOLETTE: IT COULD HAPPEN TO ANYONE, WHY BATTERED WOMEN STAY at xviii (1993); Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 *FORDHAM URB. L.J.* 1141, 1144 (1995); Stein, *supra* note 8, at 17; W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 *IND. L.J.* 577, 585 (1993).

11. BARNETTE & LAVIOLETTE, *supra* note 10, at xviii; Browne, *supra* note 3, at 1298; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 887-97 (1992). In *Casey*, the Court recounted the American Medical Association's view that most studies of domestic violence generate figures which are "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted." *Id.* at 891.

12. *Casey*, 505 U.S. 833.

13. *Id.* at 891 (citations omitted).

14. *Id.*; Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 *CLEARINGHOUSE REV.* 383, 386 (1994).

to escape the abuse: in one survey, fifty to ninety percent of the respondents reported that they had attempted to leave.<sup>15</sup>

### 1. Financial Strain

Many victims lack the requisite economic resources to flee an abusive mate. Most battered women are economically dependent on their abuser and, frequently as a result of the abusive relationship, have no funds of their own.<sup>16</sup> Economic deprivation typically accompanies domestic violence and represents another form of control abusers exert over their partners.<sup>17</sup>

In addition, escaping an abusive partner often requires flight, which may also involve leaving an established lifestyle including a job and a regular paycheck. Unfortunately, even if a woman does escape the immediately abusive situation and simultaneously maintains her job, it is not uncommon for the abuser to sabotage the victim's employment with his disruptive behavior.<sup>18</sup> This workplace harassment usually reflects the abuser's efforts to return the victim to the abusive environment.

### 2. Shelter Shortages

Battered women always face another major obstacle—locating adequate affordable housing. Permanent housing is difficult to locate and prohibitively expensive.<sup>19</sup> Of those women and children living on the street, homeless, fully fifty percent claim to be in flight from abusive partners.<sup>20</sup> In a recent survey of abuse victims staying in a battered women's shelter, forty-one percent specified adequate housing as a much needed resource.<sup>21</sup>

Temporary shelters offer another form of refuge for victims in flight from domestic abuse. However, abuse victims are lucky if they can find a vacancy in battered women's shelters, as shelters routinely turn women and children away

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15. Davis & Kraham, *supra* note 10, at 1146; Zorza, *supra* note 3, at 280 (citing a study finding that domestic violence victims went to enormous lengths to leave abusers and to protect themselves, but that their efforts were often unsuccessful).

16. *Casey*, 505 U.S. at 891-92; Davis & Kraham, *supra* note 10, at 1153.

17. Browne, *supra* note 3, at 1296; LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 28 (1984).

18. Davis & Kraham, *supra* note 10, at 1152; *see also* Zorza, *supra* note 3, at 277 (stating that 74% of battered women who work experience on-the-job harassment by their abusers and that 20% of all employed battered women lose their jobs due to workplace harassment, occurring over the telephone and in person, by their abusers).

19. Zorza, *supra* note 3, at 275.

20. *Id.* (citing *The Violence Against Women Act of 1990: Hearings on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d. Sess. 37 (1990)); *see also* Davis & Kraham, *supra* note 10, at 1154 (stating that battered women, with or without children, comprise a significant portion of the homeless population).

21. Davis & Kraham, *supra* note 10, at 1154 (citing Cris M. Sullivan et al., *After the Crisis: A Needs Assessment of Women Leaving a Domestic Violence Shelter*, 7 *VIOLENCE AND VICTIMS* 267, 272 (1992)).

due to limited capacity.<sup>22</sup> Furthermore, shelters usually only allow domestic violence victims to stay for a limited period of time, four to eight weeks maximum.<sup>23</sup> When victims have exhausted their time at a shelter they, and frequently their children, are literally out on the street. The remaining choices available to most victims are tragic: return to their abusive surroundings, locate another temporary shelter, or live poverty-stricken on the street.

### 3. Retaliatory Threats

Despite these economic hurdles, the majority of battered women who come forward and report the abuse do try to protect themselves and their children from violence by leaving.<sup>24</sup> Leaving an abusive mate, however, is no guarantee of safety. On the contrary, the violence frequently escalates after the woman flees her abusive surroundings.<sup>25</sup> Of the reported incidents, battered women who separate or divorce their partners are more frequently and more severely beaten than those who stay.<sup>26</sup> Estranged men, as opposed to those living with their mates, commit seventy-nine percent of all reported spousal violence.<sup>27</sup> Additionally, women who leave are fourteen times more likely to be severely beaten by their enraged abusers than those women who stay, "as batterers escalate their violence and harassment in an attempt to coerce the battered woman into reconciliation or to retaliate for her departure."<sup>28</sup> Women who leave their batterers face an elevated risk of assault which sometimes ends in death.<sup>29</sup> Both the justifiable fear for one's own safety, and risks associated with raising the level of conflict by flight, may explain why battered women stay.

Dismal choices entrap the abuse victim in a lose-lose situation: "[w]ithout access to the support necessary to survive at a minimal level, a victim of domestic violence and her children may be forced to choose between a life of abuse and a life of poverty."<sup>30</sup> All of the above factors—scarce economic resources, inability to secure affordable housing, shortages of temporary shelter space, and fear of retaliatory attacks by estranged partners—furnish a glimpse into the predicament of a battered woman and help explain the oppressive conditions a woman faces if she leaves. A denial of insurance coverage, solely because a woman is a victim of battering, only serves to exacerbate her economic and social difficulties.

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22. Zorza, *supra* note 3, at 276; Browne, *supra* note 3, at 1296.

23. Zorza, *supra* note 3, at 276.

24. *See* sources cited *supra* note 15.

25. *Planned Parenthood v. Casey*, 505 U.S. 833, 892 (1992).

26. Zorza, *supra* note 14, at 386.

27. Zorza, *supra* note 3, at 274.

28. Davis & Kraham, *supra* note 10, at 1146-47.

29. Zorza, *supra* note 14, at 387 (stating that three of four women killed in the United States are murdered by their current or former partners, usually when the women attempt to leave or have already left).

30. Davis & Kraham, *supra* note 10, at 1154.

### B. The Social Costs of Battering

The societal cost of domestic violence is staggering. The expenses generated by battering remain uncalculated,<sup>31</sup> primarily due to a lack of complete data which stems from the reluctance of the victims and the legal, medical, and law enforcement systems to intervene in the domestic domain.<sup>32</sup> As a result, society as a whole shoulders the enormous costs that flow from the "private problem" between the abused and the abuser.<sup>33</sup>

#### 1. Calculated Costs

Based on reported incidents, some of the costs related to domestic violence are quantifiable and the numbers are astounding. Domestic violence costs an estimated \$6.5 billion annually in the United States.<sup>34</sup> It is estimated that abuse-related medical treatment costs the nation approximately \$31 billion annually, or approximately \$124 per year for every person living in the nation.<sup>35</sup> A study sponsored by the Pennsylvania Blue Shield Institute found that the health care costs associated with domestic violence totaled \$326.6 million in Pennsylvania between 1990 and 1991.<sup>36</sup> In addition, the United States Surgeon General has reported that more women are injured each year by battering than all other causes combined.<sup>37</sup>

Law enforcement efforts also have a price. In 1989, New York City spent approximately \$41 million in police, court, and incarceration costs resulting from domestic violence arrests.<sup>38</sup> The average cost for each domestic violence-related arrest totaled \$3241.<sup>39</sup> Domestic violence represents the largest category of emergency calls to police each year.<sup>40</sup>

Battering also imposes a direct cost in the employment setting. Businesses suffer losses from employee absenteeism and reduced worker productivity due to the impact of domestic violence on the workplace.<sup>41</sup> The estimated value

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31. Zorza, *supra* note 14, at 383.

32. *See generally* Snyder, *supra* note 1.

33. Zorza, *supra* note 14, at 385.

34. *Id.* at 383.

35. Additionally, 20% to 35% of women seeking medical care in emergency rooms are there due to domestic violence. *Id.*

36. R. Robert Tyson & Robert E. McAfee, *Family Violence and the Insurance Industry: Education, Not Discrimination*, 274 JAMA 1428 (1995).

37. Hallock, *supra* note 10, at 586 (citing S. REP. NO. 197, 102d Cong., 1st Sess. 36 n.10 (1991)).

38. This figure does not include the cost of defense attorneys for the indigent. Zorza, *supra* note 14, at 385; *see also* Roberta Cooper Ramo, *ABA President-Elect Announces Domestic Violence Initiative*, 29 FAM. L.Q., Summer 1995, at ix.

39. Zorza, *supra* note 14, at 385.

40. RICHARD J. GELLES & CLAIRE PEDRICK CORNELL, *INTIMATE VIOLENCE IN FAMILIES* 131 (1990).

41. Ramo, *supra* note 38, at ix.

employers lose as a result of battering amounts to \$13 billion annually.<sup>42</sup> Furthermore, the victim suffers both a direct loss of earnings and an impaired earning capacity, and may well lose her job if domestic violence actually occurs in the workplace.

In addition, society bears the cost of maintaining domestic violence and other temporary shelters for abused women. In New York City alone, these costs total approximately \$30 to \$40 million annually, which is probably a conservative estimate.<sup>43</sup> Government coffers also fund foster care programs for the children of battered mothers. The City of New York reportedly spends \$71.5 million annually on foster care benefits,<sup>44</sup> and forty percent of the children receiving these benefits would not require foster care were their mothers not the victims of abuse.<sup>45</sup> It is difficult to imagine how much money the nation as a whole spends for this type of foster care.

## 2. Uncalculated Costs

A number of identifiable expenditures are missing from the cost tabulation of domestic violence. First, many battered women's injuries, which can be traced to abuse, are never connected to their true cause and thus remain unmeasured.<sup>46</sup> Second, each unreported incident of domestic violence includes some or all of the identified costs listed in the preceding Part, but are not tallied. Third, the price of remedial services such as counseling, which help women and children who are either emotionally traumatized by the abuse or physically injured, remains uncalculated.<sup>47</sup> The psychological wounds caused by domestic violence are frequently more severe than the physical injuries<sup>48</sup> and usually last longer. Finally, women who are battered during pregnancy often produce children with birth defects: domestic violence has been identified as the "leading cause of birth defects, more than all other medical causes combined."<sup>49</sup> The cost borne by society of raising children with birth defects caused by physical abuse has not been measured. Yet these injured children are perhaps the most tragic victims of domestic violence.

In summary, no one knows precisely how much domestic violence costs the nation each year. However, it is undisputed that the hidden, and not so hidden, costs of domestic violence fall upon all elements of society and particularly upon the state and federal governments. Recent developments in the insurance industry

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42. This figure includes the loss of productivity due to harassment, employee absenteeism and tardiness, leaving work early, and use of company time to call doctors, counselors, lawyers, shelters, family, and friends because the victims cannot do so at home. *Zorza*, *supra* note 14, at 385.

43. *Id.* at 384.

44. *Id.*

45. *Id.*

46. *Id.* at 383; Hyman, *supra* note 7, at 1781.

47. *Zorza*, *supra* note 14, at 383.

48. *Id.* at 383-84.

49. Eli H. Newberger, *Abuse of Pregnant Women and Adverse Birth Outcome: Current Knowledge and Implications for Practice*, 267 JAMA 2370 (1992).

have further shifted these costs onto society. When Pennsylvania's insurance companies documented the expenses generated by battering, the costs were so staggering that the companies began to reject applications of abuse victims as bad insurance risks.<sup>50</sup> Soon other insurers followed suit in denying battered women access to insurance coverage.<sup>51</sup> Currently, several major insurers identify a history of domestic violence as an underwriting criteria and, ultimately, as a basis for denying insurance to battered women. The denial of insurance is yet another barrier that prevents battered women from improving their situations, another hurdle that thwarts the eradication of domestic violence.

## II. INSURANCE DISCRIMINATION

Many well-known insurers regularly refuse battered women insurance. The American Council of Life Insurance and the Health Insurance Association of America defend the practice, while the Prudential Insurance Company, First Colony Life Insurance, Nationwide, and State Farm Mutual Insurance Company are just a few examples of insurance companies that have adopted underwriting procedures which discriminate against victims of domestic violence.<sup>52</sup> In the past year, those insurers that routinely refuse to insure women who have suffered injury at the hands of an abuser have received sharp criticism. While approximately half of the nation's largest insurance companies have admitted to utilizing domestic violence as an underwriting criterion, exactly how often insurers deny applications from or coverage to battered women is unknown. Advocates for domestic violence victims have proposed both state and federal legislation which would prohibit this type of discrimination against battered women. Insurers have opposed this legislation, claiming that it would impair the free market and abridge the insurers' right to contract on the basis of risk.<sup>53</sup> In addition, these insurers defend their underwriting practices on the grounds of fairness to consumers and necessity in providing affordable, yet profitable, products.<sup>54</sup>

### A. Frequency of Discrimination

The discovery of the insurance company practices of denying access or restricting coverage to battered women has been recent. In 1994, the United States House Judiciary Committee conducted an informal survey of sixteen of the nation's largest insurers representing about fifty percent of the insurance

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50. See, e.g., Insurance Discrimination, *supra* note 8.

51. See *supra* text accompanying note 8.

52. Deborah L. Shelton, *Adding Insult to Injury: Families Hurt by Domestic Violence Take a Second Hit When Insurers Deny Them Coverage. The Practice Is a Blow to the AMA's Campaign Against Family Violence*, AM. MED. NEWS, Dec. 4, 1995, at 11, 12; Fern Shen, *For the Battered Spouse, Insurers' Bias Worsens Pain*, WASH. POST, Mar. 9, 1995, at A1; Insurance Discrimination, *supra* note 8.

53. See *infra* part II.D.

54. See *infra* part II.D.2.



market.<sup>55</sup> Eight of the sixteen insurance companies admitted to using domestic violence as a factor when making decisions about issuing insurance policies and setting premiums.<sup>56</sup> Since the survey, at least two of the insurers say that they have changed their policies and no longer discriminate against abuse victims.<sup>57</sup>

A variety of factors make it difficult to estimate how widespread this insurance practice is or how many women have been denied coverage because of their abused status. First and foremost, domestic violence remains a hidden problem, which goes largely unreported because victims are often reluctant to come forward due to economic concerns or fear of retaliation by the abuser.<sup>58</sup> Second, insurers are not obligated to file with state insurance departments the criteria they utilize in making coverage decisions or otherwise disclose their underwriting standards. This results in an unregulated use of underwriting criteria.<sup>59</sup> Finally, insurance companies are not required to disclose reasons for rejecting applicants.<sup>60</sup> All of these factors contribute to uncertainty in determining the exact number of incidences of insurance discrimination against domestic violence victims. Nevertheless, since it is known that in 1994 approximately fifty percent of the largest insurers in the United States admitted to using domestic violence as an underwriting criterion, it is reasonable to assume that other smaller insurers apply similar standards for rejecting battered women's applications for insurance coverage.

### *B. Denial of Insurance*

Many insurance companies<sup>61</sup> have responded to the emerging expense assessments of domestic violence by denying victims access to all types of insurance—medical, life, disability, property, and casualty.<sup>62</sup> Insurers acquire this information from abuse victims by requiring applicants to sign a release permitting the insurer to obtain medical records, which often reveal the damaging information regarding prior abuse.<sup>63</sup> Because health care providers have become more effective in recognizing and documenting evidence of domestic violence, the insurer likely has a reliable source of information in medical records.<sup>64</sup>

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55. *New Law to Make Insurance Companies Cover Abused Women* (National Public Radio broadcast, Mar. 8, 1995) [hereinafter NPR Broadcast]; see also Insurance Discrimination, *supra* note 8.

56. Insurance Discrimination, *supra* note 8.

57. Both State Farm and Nationwide claim to have abandoned discriminatory insurance practices against abuse victims. Shen, *supra* note 52; NPR Broadcast, *supra* note 55.

58. Zorza, *supra* note 3, at 274-75.

59. Donald W. Light, *The Practice and Ethics of Risk-Rated Health Insurance*, 267 JAMA 2503, 2504 (1992); see also Leah Wortham, *Insurance Classification: Too Important to Be Left to the Actuaries*, 19 U. MICH. J.L. REF. 349, 420 (1986).

60. Insurance Discrimination, *supra* note 8.

61. For information regarding insurance companies which have discriminated against battered women in the past, see *supra* text accompanying note 52.

62. See sources cited *supra* note 8.

63. Insurance Discrimination, *supra* note 8.

64. See generally sources cited *supra* note 7 (discussing the medical profession's efforts to increasingly recognize, document, and treat cases of domestic abuse).

Additionally, insurance companies share confidential information concerning client risk factors through subscriber databases such as Equifax<sup>65</sup> and the Medical Information Bureau, an industry-funded organization that shares computerized information about applicants with some 600 insurance companies.<sup>66</sup> Finally, insurance companies can gain access to an individual's history of abuse by examining court documents and credit reports that often contain information regarding court-ordered protection orders.<sup>67</sup>

This discrimination against battered women constitutes one more obstruction preventing victims from leaving abusive situations.<sup>68</sup> Insurance discrimination may endanger abuse victims by reducing their access to important insurance benefits which are critical in financing medical care or maintaining the family in the case of death or disability.<sup>69</sup> Moreover, once victims realize that they may lose insurance benefits by seeking help from medical workers and the legal system, they may stop reporting violent episodes<sup>70</sup> and may not disclose the true cause of their injuries.<sup>71</sup> Eventually, doctors and health care workers may even stop documenting abuse injuries in order to protect victims' insurance coverage<sup>72</sup> and to assure their own payment. All of these consequences undermine the legal system's goal of prosecuting the abuser by reducing the reporting and documentation of abuse. As a result, many battered women are faced with two oppressive options—staying with the abuser or struggling in poverty.

### C. Principles of Insurance Law

Insurance companies utilize certain procedures when determining to insure, or not to insure, an applicant. Domestic violence is one basis upon which some insurers reject individuals seeking coverage. On one hand, advocates who oppose this practice suggest that government regulation of the insurance industry is necessary to prohibit discrimination against battered women. However, insurance companies that rely on a history of domestic violence as an underwriting criterion oppose state regulation and defend their practice of discriminating against domestic violence victims.

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65. Gina Kolata, *When Patients' Records Are Commodities for Sale*, N.Y. TIMES, Nov. 15, 1995, at A1; Insurance Discrimination, *supra* note 8.

66. Benjamin Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1801 (1987); Shen, *supra* note 52; see also Light, *supra* note 59, at 2505 ("Those excluded or denied cannot easily run to another insurer, because insurance companies share 'confidential' information through a common data bank.").

67. Insurance Discrimination, *supra* note 8.

68. See *supra* part I.

69. Insurance Discrimination, *supra* note 8.

70. "If [the abuse victim] is honest because she wants [the battering] documented for a protective order, she won't be covered. If she lies so she will be covered, it won't be documented." Stein, *supra* note 8, at 17 (first alteration added) (quoting Nancy Durborow of the Pennsylvania Coalition Against Domestic Violence).

71. Insurance Discrimination, *supra* note 8; see also Fountain, *supra* note 9; Seelye, *supra* note 9.

72. Insurance Discrimination, *supra* note 8.

### 1. The Underwriting Process

Insurance companies that operate in a private system of insurance develop methods which assess each applicant's risk of loss,<sup>73</sup> and consequently the insurer's risk of paying a claim. In the underwriting process, insurers decide whom they will insure and on what terms they will insure them,<sup>74</sup> thereby deciding which individuals receive insurance coverage.<sup>75</sup> Companies usually rely upon statistical analysis of risk in making underwriting decisions.<sup>76</sup> The insurers' alleged rationale for using a statistical system of risk rating involves fairness and efficiency.<sup>77</sup> In theory, risk rating is fair because an insured who participates in high-risk activities is likely to incur higher bills and accordingly is charged a higher price for coverage.<sup>78</sup> Insurers further claim that this underwriting model offers an incentive for efficient behavior because higher rates deter individuals from engaging in high-risk behavior.<sup>79</sup> For example, lower premiums for non-smokers encourage smokers to kick their high-risk habit.<sup>80</sup>

The insurance industry has vast discretion in making underwriting decisions and zealously guards that power.<sup>81</sup> The actual underwriting criteria used by companies are rarely, if ever, reviewed by insurance regulators.<sup>82</sup> This lack of oversight provides the less scrupulous insurer the opportunity to engage in discriminatory underwriting.<sup>83</sup>

A closer look at the actual practice reveals that underwriting decisions are rarely made using a statistically sound mathematical methodology,<sup>84</sup> and are often made with little regard to social impact.<sup>85</sup> For example, insurers do not, in a scientific and consistent fashion, consider all known risk factors when making underwriting decisions. First, some insurers admit that they make choices among numerous existing risk factors—electing not to use some of them—and that the

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73. Schatz, *supra* note 66, at 1803.

74. See generally ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 2.1(b) at 35-36 (1988); Nicholas A. Papa, Comment, *Testing the Health Insurance Industry's Response to the AIDS Epidemic*, 18 OHIO N.U. L. REV. 687, 691 (1992).

75. Schatz, *supra* note 66, at 1803 (arguing that underwriting decisions are socially-charged and of the public interest because they determine which individuals receive quality health care).

76. Mark Scherzer, *Private Insurance*, in *AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC* 404, 409 (Scott Burris et al. eds., 1993).

77. *Id.* at 410.

78. But see Light, *supra* note 59 (arguing that risk rating is, in reality, a morally unfair system because it deliberately capitalizes on social inequality and disadvantage by depriving those with the greatest need for medical care of access to medical attention).

79. KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 71-74 (1986).

80. See *id.*; see also Papa, *supra* note 74, at 691-92.

81. Robert Lowe, *Genetic Testing and Insurance: Apocalypse Now?*, 40 DRAKE L. REV. 507, 523-24 (1991); Wortham, *supra* note 59, at 354.

82. Light, *supra* note 59, at 2504; Wortham, *supra* note 59, at 371-73.

83. Wortham, *supra* note 59, at 354-55.

84. See *id.* at 376.

85. See Schatz, *supra* note 66, at 1803.

criteria used are not always based upon risk.<sup>86</sup> Second, insurers opt not to use some risk factors to promote economic efficiency: for some risk factors, the expenses associated with identifying and segregating the information necessary to use them as underwriting criteria surpass what the company must pay out in claims.<sup>87</sup> Third, insurers choose not to utilize other risk factors because of their potentially negative impact on marketing.<sup>88</sup> Fourth, studies demonstrate that different insurance companies vary considerably in how much weight they attribute to identical conditions, leading to inaccuracies and wide variations in risk rating.<sup>89</sup> Finally, some companies often rely on assumptions and stereotypes, rather than exclusively considering scientific, statistical analysis, when determining risk.<sup>90</sup>

This examination of the actual underwriting process reveals that it is neither a neutral process nor a statistically sound method. As a result, regulation which prohibits discrimination based on domestic violence would not dismantle the insurance industry or destroy the flawed methodology of the underwriting process.<sup>91</sup>

## 2. Industry Regulation

Regulations already force the insurance industry to consider or ignore certain criteria in the underwriting process that may be contrary to a purely statistical risk analysis. This government regulation of the insurance industry is considered desirable due to the pervasiveness of insurance in American society.<sup>92</sup>

The federal government has had the authority to regulate the insurance industry since 1944, but it has been reluctant to exercise that power.<sup>93</sup> However, certain types of insurance discrimination are prohibited by federal law because they are

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86. Insurance Discrimination, *supra* note 8; *see also* Light, *supra* note 59, at 2505; Wortham, *supra* note 59, at 375-76.

87. Insurance Discrimination, *supra* note 8.

88. *See* Light, *supra* note 59, at 2505 (stating that marketing departments of insurance companies adjust actuarial figures in order to maximize market share and profits); Wortham, *supra* note 59, at 375 (citing evidence of insurers' admissions that one motivating factor for using sex as a classifier in life insurance policies was the perception of a growing female market).

89. Light, *supra* note 59, at 2505.

90. Schatz, *supra* note 66, at 1787-88; Scherzer, *supra* note 76, at 417 (noting that insurance companies relied on social stereotypes, entirely at odds with a scientific assessment of risk, by using employment in stereotypically gay professions as an indicator of single male applicants' risk of contracting the AIDS virus); *see also* Insurance Discrimination, *supra* note 8.

91. Wortham, *supra* note 59, at 377.

92. Scherzer, *supra* note 76, at 412-13; Wortham, *supra* note 59, at 350-51.

93. Wortham, *supra* note 59, at 415, 386 n.206 (explaining the United States Supreme Court's holding in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), subjecting the insurance industry to federal antitrust laws, and the subsequent passage of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), which exempted the business of insurance from federal regulation if these regulations conflicted with state laws regulating insurance).

socially unacceptable.<sup>94</sup> Federal law currently forbids insurance companies from discriminating in underwriting on the basis of race, color, religion, sex, or national origin in employer-sponsored insurance plans, but not in private insurance decisions.<sup>95</sup> Other federal civil rights statutes support a ban on racial classifications in private insurance decisions.<sup>96</sup> However, insurers remain free to underwrite on the basis of gender in private lines of insurance,<sup>97</sup> making insurance discrimination against battered women permissible.

States engage in extensive regulation of the industry and restrict insurers from using certain classifications in underwriting.<sup>98</sup> State law restricts companies from underwriting on the basis of race, age, ethnic origin, residence, sex, and some physical disabilities.<sup>99</sup> However, most state laws do not enjoin insurers from using domestic violence as an underwriting criterion. Therefore, enacting a regulation to prohibit this practice would be an appropriate measure.<sup>100</sup>

Insurance companies are private businesses dealing in a commodity needed by most Americans, yet the private goal of maximizing profit is often in conflict with the important public value of ensuring broad insurance coverage.<sup>101</sup> "Within this [private insurance] system, the desire of the insurance industry to guarantee its fiscal solvency must be balanced against society's need to maintain its moral solvency. Insurance companies' unjustified fears about the former should not lead us to sacrifice the latter."<sup>102</sup> Regulation of the insurance industry to prohibit discrimination against abuse victims is a necessary step toward accomplishing the dual public mission of extinguishing domestic violence and ensuring the availability of insurance.<sup>103</sup>

#### *D. Justifications for Discrimination*

Insurance companies defend their decision to use domestic violence as an underwriting criterion on several grounds. These insurers contend that domestic violence victims choose to stay with their abusers and are more likely to accumulate abuse-related claims in the future, making them high-risk applicants who are normally denied coverage.<sup>104</sup> Some insurers even go so far as to argue that insuring abuse victims creates an incentive for batterers to kill in an effort to collect on life insurance policies. Finally, some insurance companies claim

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94. Schatz, *supra* note 66, at 1791-92 (arguing that socially-charged underwriting classifications are not necessarily moral solely because they are statistically based); Shen, *supra* note 52.

95. Wortham, *supra* note 59, at 364-65.

96. *Id.* at 362-63.

97. *Id.* at 363.

98. Wortham, *supra* note 59, at 364-69; Scherzer, *supra* note 76, at 412-15; Insurance Discrimination, *supra* note 8.

99. Insurance Discrimination, *supra* note 8.

100. *Id.*

101. Scherzer, *supra* note 76, at 412.

102. Schatz, *supra* note 66, at 1805.

103. Wortham, *supra* note 59, at 415; *see also* Insurance Discrimination, *supra* note 8.

104. *See* discussion *infra* part II.D.2.

that a history of domestic violence is a preexisting condition and, as a result, injuries stemming from that condition are uninsurable.

### 1. "Choosing" to Stay

Some insurers maintain that insurance discrimination against abuse victims is appropriate because battered women "choose" to stay in abusive environments. Some industry spokespersons maintain that insurance companies should have the discretion to deny insurance or reduce coverage to any person with a dangerous or risky lifestyle.<sup>105</sup> Thus, a common argument insurers use to support discrimination is that battered women choose to lead a risky lifestyle. One company spokesperson summarized the view that insurers cannot be responsible for a woman's unwise choices: "[A battered woman] has a choice to move on someplace else. We're a business, not a social welfare organization."<sup>106</sup>

Insurers have also justified their position by comparing coverage of domestic violence victims to insuring skydivers, race car drivers, and professional boxers.<sup>107</sup> Domestic violence is a crime, however, rather than a voluntary lifestyle or career choice.<sup>108</sup> It seems easy to distinguish between the two groups—victims on one hand and skydivers, race car drivers, and boxers on the other—in several ways. Abused women are victims of criminal activity;<sup>109</sup> skydivers, race car drivers, and boxers are not. Skydivers, race car drivers, and boxers choose their vocations, but abused women neither enjoy violence nor do they choose to be battered.<sup>110</sup> Finally, skydivers, race car drivers, and boxers can easily quit their activity to avoid the risk, while formidable obstacles involving economics and safety deter battered women from leaving their abusers.<sup>111</sup>

Advocates, lawmakers, and insurance regulators condemn insurance discrimination as revictimizing the battered woman—a classic case of penalizing the crime victim.<sup>112</sup> They argue that domestic violence is an important social and public health issue, thereby elevating its importance beyond a mere criterion for denying insurance.<sup>113</sup> There are social implications for refusing to insure battered women—discouraging victims from reporting crimes, seeking help, and leaving batterers—each of which should override the profit motive.<sup>114</sup> Denying insurance to abuse victims creates yet another obstacle hindering women from leaving abusive relationships. Finally, critics of this practice claim that insurance

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105. Fountain, *supra* note 9.

106. Shen, *supra* note 52 (quoting David McMahon, Vice President of First Colony Life Insurance Co.).

107. *Id.* (statement of John D. Harker, director of the life insurance service center at Nationwide) ("What we're looking for are situations where people basically have risks higher than the general population,' . . . [such as] 'professional boxers . . . race car drivers or . . . [a daredevil like] Evil Knievel.'") (first omission and alteration added).

108. Insurance Discrimination, *supra* note 8.

109. Stein, *supra* note 8, at 16-17.

110. Zorza, *supra* note 3, at 274.

111. *See supra* part I.A.

112. *See generally* Fountain, *supra* note 9.

113. *Id.*

114. *See generally* Shen, *supra* note 52.

discrimination creates a disincentive to securing police protection and even medical treatment, as battered women attempt to avoid documentation of their abuse.<sup>115</sup>

## 2. Categorizing Victims as "High-Risk"

Insurance companies also defend the use of domestic violence as an underwriting criterion on grounds of economic impact. Industry spokespersons insist that factoring a history of domestic violence into the underwriting decision is necessary to avoid insuring high-risk applicants who would ultimately force companies to raise insurance rates for all customers, including those who do not incur similar expenses.<sup>116</sup> One company spokesperson went so far as to claim that insurers could face bankruptcy if they fail to take into account risks such as battering, breast cancer, or skydiving.<sup>117</sup>

The insurers' fears of insolvency are refuted by simple reference to those insurance companies which do not currently use domestic violence as an underwriting criterion,<sup>118</sup> such as Aetna and Blue Cross/Blue Shield.<sup>119</sup> These companies are still profitable and able to offer consumers affordable products without discriminating against abuse victims. Even companies that attempt to screen domestic violence victims from their risk pool inevitably cover abuse victims when the abuse remains unidentified, as is often the case.<sup>120</sup> Furthermore, insurance companies unwittingly insure battered women through group insurance plans, even when they deny abuse victims insurance when issuing individual policies.<sup>121</sup> In contrast to individual underwriting techniques, insurers underwriting for group insurance plans consider only the relevant characteristics of the group as a whole, not the individual characteristics of each group member.<sup>122</sup> In group insurance plans, insurers rarely expend resources to evaluate the risk of each individual worker—including those with a history of domestic violence—because insurers assume that within such a group only a few individuals will have conditions so severe as to render them a substandard or noninsurable risk.<sup>123</sup>

Furthermore, insurance companies have yet to produce any statistical evidence that women with a history of domestic violence exposure are at a greater risk of

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115. See *supra* notes 70-71 and accompanying text.

116. Shen, *supra* note 52; see also Papa, *supra* note 74, at 691-92 (relating the insurance industry's belief that for a company to remain fiscally solvent, it must be able to either exclude or charge higher premiums for high-risk applicants).

117. Shen, *supra* note 52 (citing statement of David McMahon, Vice President of First Colony Life Insurance Co.).

118. For an explanation of underwriting techniques, see generally Karen A. Clifford & Russel P. Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806 (1987); Wortham, *supra* note 59; Papa, *supra* note 74, at 691-92.

119. Judi Hasson, *Firms That Don't Insure Battered Women Examined*, USA TODAY, June 2, 1994, at 6A.

120. See *id.*

121. See Shen, *supra* note 52.

122. Clifford & Iuculano, *supra* note 118, at 1809.

123. *Id.*

incurring future medical expenses than non-victims.<sup>124</sup> After reversing its company policy of discriminating against battered women, major insurer State Farm Life admitted that it had no statistical basis for refusing to underwrite abuse victims.<sup>125</sup> The company justified the previous underwriting practice, despite lacking statistical evidence, as “just sort of a logical conclusion.”<sup>126</sup>

### 3. Deterring Abusers from Murder

Some insurers offer an additional rationale for refusing to extend coverage to battered women. Insurance companies claim that denying coverage to domestic violence victims protects them from the risk of being murdered by their abusers. Similarly, avoiding this risk insulates insurers from potential lawsuits.<sup>127</sup> These insurers state that if the batterer is the beneficiary of the life insurance policy, extending coverage provides a financial incentive for the abuser to kill the abused woman to receive the proceeds from the policy.<sup>128</sup>

Insurers have not provided evidence that insuring battered women fosters domestic violence or that denying coverage deters domestic violence.<sup>129</sup> Many experts believe that abusers batter their victims for reasons of control and domination, rather than to capitalize on insurance policies.<sup>130</sup> Others relate that the likelihood of this scenario playing out in real life is remote, and that the argument rests on faulty reasoning because there is no factual evidence to support it.<sup>131</sup> Finally, insurers *are* protected from lawsuits: policy provisions usually prevent beneficiaries from recovering when the policyholder’s death or injury is the result of intentional misconduct, and state law typically prohibits an abuser from receiving benefits from the policy of an injured or murdered victim.<sup>132</sup>

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124. Shen, *supra* note 52 (“[Insurance companies] ‘have not come forward with any bona fide evidence that the victims of abuse are at a greater risk’ [than any other group] . . . .”) (quoting Deborah Senn, Washington State Insurance Commissioner).

125. Fountain, *supra* note 9; Leslie Scism, *State Farm Eases Policy on Victims of Family Violence*, WALL ST. J., June 1, 1994, at A8.

126. Fountain, *supra* note 9 (quoting K.C. Eynatten, a State Farm spokesperson).

127. Shen, *supra* note 52.

128. Seelye, *supra* note 9.

129. Insurance Discrimination, *supra* note 8.

130. “[B]attering is not something people do for money’ . . . . ‘The immediate cause of battering may be that she burned the toast, and the general issue is dominance. But it doesn’t happen because the batterer went and checked the insurance policy.’” Shen, *supra* note 52 (quoting Susan Kraham, staff lawyer with the Legal Defense and Education Fund of the National Organization for Women).

131. “‘This is the kind of logic that leads to this pernicious practice [of insurance discrimination against domestic violence victims]’ . . . . ‘Blame the victim, and then come up with a flimsy excuse why victims of crime shouldn’t be able to get life and health insurance.’” Fountain, *supra* note 9 (quoting Josh Isay, spokesman for U.S. Representative Charles Schumer).

132. Insurance Discrimination, *supra* note 8.



#### 4. Classifying Abuse as a Preexisting Condition

Some insurance companies refuse to cover claims resulting from domestic violence on the theory that the injuries are a result of a preexisting condition.<sup>133</sup> Claims which stem from a preexisting condition are those resulting from an injury or sickness sustained by the insured prior to the effective date of the policy's coverage.<sup>134</sup> A preexisting condition limitation excludes or limits the benefits the insurer must pay for claims that arise from the preexisting condition.<sup>135</sup> The practice of classifying domestic violence-related injuries as "preexisting conditions" is patently unfair: insurers penalize battered women for having been crime victims in the past by refusing to cover future injuries that may result from domestic violence because they stem from a "previously existing condition."<sup>136</sup> Denying insurance to abuse victims today holds the victims responsible for any past or future criminal activity of the abuser.<sup>137</sup> "'The whole preexisting conditions [argument] is tremendously unfair'. . . 'If you have a violent neighbor (who batters you), it's not a preexisting condition, but if it's by your husband it is; that's unfair.'"<sup>138</sup>

Insurers' arguments that a history of domestic violence is a preexisting condition justifying denial of coverage appear unsupported by legal precedent.<sup>139</sup> Insureds can rely on long-standing legal precedent regarding conditions like tuberculosis, in which courts found mere infection, which was not causing illness or certain to cause future illness, to be an insufficient basis for a preexisting condition.<sup>140</sup> This logic is applicable to enjoining the use of domestic violence as a preexisting condition: a woman's history of battering does not indicate that she is more likely to be battered in the future. One lawyer observed that insurance companies seem to rely on the preexisting condition rationalization to justify denying coverage to domestic violence victims, because battered women denied coverage on this basis are unlikely to challenge the insurers in court.<sup>141</sup>

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133. *Abuse Not Pre-existing Condition, Bill Says the Legislation by Senator Paul Wellstone Would Outlaw Refusal of Health Insurance Coverage for Battered Women*, FORT WORTH STAR-TELEGRAM, Mar. 11, 1995, at 13A, available in 1995 WL 5628992 [hereinafter *Abuse*].

134. Scherzer, *supra* note 76, at 421; see also Papa, *supra* note 74, at 689.

135. Clifford & Iuculano, *supra* note 118, at 1819.

136. See *Abuse*, *supra* note 133; see also Shen, *supra* note 52.

137. See Stein, *supra* note 8, at 17; see also Shen, *supra* note 52.

138. Stein, *supra* note 8, at 17.

139. Diana G. Erwin, *Some Insurance Policies Add to Abuse of Women*, THE SACRAMENTO BEE, Mar. 2, 1995, at A2, available in 1995 WL 4102359.

140. Scherzer, *supra* note 76, at 421.

141. Erwin, *supra* note 139.

## III. LEGISLATIVE PROPOSALS

In response to insurance discrimination against domestic violence victims, both federal and state legislatures have made efforts to resolve the controversy. At the federal level, several members of Congress have introduced bills that prohibit insurance companies from utilizing a history of domestic violence when making underwriting decisions. Similarly, a number of state legislatures have recognized this type of discrimination by either enacting or considering proposals prohibiting insurers from denying or limiting insurance coverage for injuries on the basis of domestic violence. Finally, the National Association of Insurance Commissioners has proposed a model code that would forbid insurers from engaging in certain types of insurance discrimination against abuse victims.

*A. Federal Legislation*

In 1994, Congress passed landmark legislation making domestic violence a federal crime.<sup>142</sup> In the Violence Against Women Act of 1994,<sup>143</sup> Congress created federal crimes of domestic violence, recognizing both the severity and magnitude of the problem. Senator Joseph Biden, the author of the Act, stated that the legislation's purpose is to classify domestic violence as a serious criminal infraction. "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence."<sup>144</sup>

Building upon the impetus for treating domestic violence as a serious crime, Congress has started to address the harms of domestic violence in other legal contexts besides criminal justice. Within the past year, Congress has introduced several bills relating to insurance coverage and domestic violence. Some bills prohibit insurance discrimination against battered women exclusively in the realm of health insurance; however, the most recent proposal would ban the practice in all lines of insurance. A major point of contention between advocates on behalf of domestic violence victims and the insurance companies turns upon whether insurance companies will be able to examine an individual's medical records for a history of domestic violence.

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142. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.) (1994).

143. For a general discussion of proposed variations of the Violence Against Women Act of 1994 leading to its enacted form, see Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1 (1995); see also Hallock, *supra* note 10.

144. S. REP. NO. 138, 103d Cong., 1st Sess. 38 (1993).

### 1. Description of House Bill 2654

On November 16, 1995, United States Representative Bernie Sanders of Vermont introduced the latest bill which, if enacted, would prohibit insurance discrimination against victims of domestic violence. The legislation, entitled the Victims of Abuse Insurance Protection Act,<sup>145</sup> would prohibit insurers from denying abuse victims coverage in all forms of insurance. The proposed legislation reads:

(a) No insurer or health carrier may, directly or indirectly, engage in any of the following acts or practices on the basis that the applicant or insured, or any person employed by the applicant or insured or with whom the applicant or insured is known to have a relationship or association, is, has been, or may be the subject of abuse:

(1) Denying, refusing to issue, renew or reissue, or canceling or otherwise terminating an insurance policy or health benefit plan.

(2) Restricting, excluding, or limiting insurance or health benefit plan coverage for losses as a result of abuse or denying a claim incurred by an insured as a result of abuse, except as otherwise permitted or required by State laws relating to life insurance beneficiaries.

(3) Adding a premium differential to any insurance policy or health benefit plan.

(4) Terminating health coverage for a subject of abuse because coverage was originally issued in the name of the abuser and the abuser has divorced, separated from, or lost custody of the subject of abuse or the abuser's coverage has terminated voluntarily or involuntarily. . . . Nothing in this paragraph prohibits the insurer from requiring the subject of abuse to pay full premium for the subject's coverage under the health plan.<sup>146</sup>

The language of this legislation constrains insurers from discriminating against domestic violence victims in several ways. First, insurance companies cannot refuse to issue or terminate an insurance policy on the basis of abuse. Second, insurers cannot limit coverage or deny claims which arise from domestic violence incidents. Third, the Bill prohibits companies from charging a higher premium based on a prior history of abuse. Finally, insurers cannot terminate health coverage for a domestic violence victim when the original coverage was issued in the abuser's name and when the abuser's acts would otherwise cause the victim to lose coverage.

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145. H.R. 2654, 104th Cong., 1st Sess. (1995).

146. *Id.*

## 2. Privacy Protections

The legislation proposed by Representative Sanders also protects the privacy of abuse-related information by including a confidentiality provision that protects victims from having abuse-related information transferred among insurers and through commercial databases.<sup>147</sup> The relevant section states:

No insurer may use, disclose, or transfer information relating to an applicant's or insured's abuse status or abuse-related medical condition or the applicant's or insured's status as a family member, employer or associate, person in a relationship with a subject of abuse for any purpose unrelated to the direct provision of health care services unless such use, disclosure, or transfer is required by an order of an entity with authority to regulate insurance or an order of a court of competent jurisdiction or by abuse reporting laws. Nothing in this paragraph shall be construed as limiting or precluding a subject of abuse from obtaining the subject's own medical records from an insurer.<sup>148</sup>

This provision limits the ability of insurers to utilize information regarding abuse for any purpose except providing medical care. In addition, this part of the Bill prohibits insurers from sharing confidential data about a victim's history of abuse and her prior inability to obtain insurance coverage through commercial databases.<sup>149</sup> Without this protection, an insurer learning through an information pool that another company previously denied an applicant insurance would likely assume that the victim is a bad risk and deny her coverage as well.<sup>150</sup> In addition, both the victim and people in a relationship with the victim, such as family members or employers, get protection from the confidentiality clause. Another strength of this provision is that it explicitly allows abuse victims unlimited access to their own medical records which might be in the hands of an insurer. As a result, the victim is fully aware of exactly what information the insurance company has available to it and on what basis it makes coverage decisions. Finally, granting applicants the right to review their personal files also deters improper underwriting decisions by the insurer.

Insurers generally are not required by state law to disclose the reasons they reject insurance applicants.<sup>151</sup> This Bill imposes a requirement that the insurer give a mandatory written notice of, and state the reason for, any adverse action relating to the insurance policy to the abuse victim. The language of the Bill provides: "An insurer that takes any adverse action relating to any plan or policy of a subject of abuse, shall advise the subject of abuse applicant or insured of the specific reasons for the action in writing. Reference to general underwriting practices or guidelines does not constitute a specific reason."<sup>152</sup>

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147. *Id.*

148. *Id.*

149. *See supra* text accompanying notes 65-66.

150. *See supra* part II.B.

151. *See supra* note 59 and accompanying text.

152. H.R. 2654, *supra* note 145.

This provision is beneficial because it protects victims of abuse by requiring insurers to adhere to a simple and straightforward procedure when rejecting an applicant or refusing to cover an injury. This will deter insurers from obscuring discriminatory actions in general rejection letters. In addition, the notice requirement empowers abuse victims by informing them of the status of their insurance and providing them with evidence of discriminatory underwriting for enforcement purposes.

### *B. Enforcement Mechanisms*

House Bill 2654 provides victims who experience insurance discrimination with two avenues of redress.<sup>153</sup> First, the Act authorizes the Federal Trade Commission ("FTC") to investigate and determine whether any insurer has violated the terms of the statute. The operative language states:

The Federal Trade Commission shall have the power to examine and investigate any insurer to determine whether such insurer has been or is engaged in any act or practice prohibited by this Act. If the Federal Trade Commission determines an insurer has been or is engaged in any act or practice prohibited by this Act, the Commission may take action against such insurer by the issuance of a cease and desist order as if the insurer was in violation of section 5 of the Federal Trade Commission Act. Such cease and desist order may include any individual relief warranted under the circumstances, including temporary, preliminary, and permanent injunctive and compensatory relief.<sup>154</sup>

If the FTC discovers a violation, it may issue cease and desist orders which may include individual relief for the victim. Any violation of the FTC's order is subject to civil penalties of up to \$10,000 in fines for each infraction.

Second, the Act creates a private right of action for victims who experience insurance discrimination: "An applicant or insured claiming to be adversely affected by an act or practice of an insurer in violation of this Act may maintain an action against the insurer. . . . Upon proof of such conduct by a preponderance of the evidence, the court may award appropriate relief."<sup>155</sup> Thus, the Bill authorizes battered women to file a private action against the insurance company in federal court to secure injunctive relief, damages, and attorneys fees and costs.

The existence of a private right of action allows victims to sue insurance companies who engage in unlawful discrimination directly, rather than waiting for the overburdened FTC to pursue an administrative remedy. This section empowers battered women by encouraging them to protect their own pecuniary interests while also placing additional pressure on discriminatory insurers, who would then be amenable to suit from two parties—the FTC and the wronged applicant.

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153. *Id.*

154. *Id.*

155. *Id.*

### C. State Enactments

State legislatures have recently begun to consider adopting legislation which would ban insurance discrimination against domestic violence victims. Since 1994, six states have enacted laws making such discrimination illegal: California, Connecticut, Delaware, Florida, Iowa, and Massachusetts.<sup>156</sup> In addition, over fourteen other states have proposed legislative or regulatory approaches to this issue.<sup>157</sup>

On October 4, 1995, California enacted a statute which prohibits insurance discrimination against domestic violence victims. The language of the statute provides:

(a) No health care service plan shall deny, refuse to enroll, refuse to renew, cancel, restrict, or otherwise terminate, exclude, or limit coverage, or charge a different rate for the same coverage, on the basis that the applicant or covered person is, has been, or may be a victim of domestic violence.

(b) Nothing . . . shall prevent a health care service plan from underwriting coverage on the basis of the medical condition of an individual so long as the consideration of the condition (1) does not take into account whether such an individual's medical condition was caused by an act of domestic violence, (2) is the same with respect to an applicant or enrollee who is not the subject of domestic violence as with an applicant or enrollee who is the subject of domestic violence, and (3) does not violate any other act, regulation, or rule of law. The fact that an individual is, has been, or may be the subject of domestic violence shall not be considered a medical condition.<sup>158</sup>

The California law is an example of just one state statute banning discrimination against victims of domestic violence. Although the statutory language varies, most state legislation contains loopholes potentially allowing insurers to continue to discriminate against battered women. For instance, the California statute only prohibits discrimination in health insurance; thus, the law leaves insurers free to discriminate in other areas, such as life or property and casualty insurance. On the other hand, one strong point of the California provision relates to medical conditions.<sup>159</sup> Insurers are not allowed to deny battered women coverage simply because they discovered a history of domestic violence in the applicant's medical records.

Many of the state statutes or proposals have significant shortcomings. For instance, some prohibit discrimination against domestic violence victims only in the realm of health insurance, instead of in all lines of insurance.<sup>160</sup> Further, some

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156. *E.g.*, CAL. HEALTH & SAFETY CODE § 1374.75 (West Supp. 1996); Insurance Discrimination, *supra* note 8.

157. *NAIC Roundup*, THE INS. REGULATOR, Dec. 11, 1995, available in 1995 WL 7146438; see also Insurance Discrimination, *supra* note 8.

158. CAL. HEALTH & SAFETY CODE § 1374.75 (West Supp. 1996).

159. For a discussion of medical histories, see *infra* part III.D.2.

160. The previously mentioned California statute is one piece of legislation covering only health insurance. For an example of a more comprehensive proposal covering health, life, and disability policies, see Alaska S.B. 197, 19th Leg., 2d Sess. (1996).

state laws allow insurers to underwrite on the basis of preexisting medical conditions, potentially allowing insurers to deny coverage to applicants who have a history of domestic violence documented in medical records.<sup>161</sup>

In addition, most of the proposed or enacted state statutes are not nearly as comprehensive as the proposed federal legislation because they do not allow individuals access to their own insurance records.<sup>162</sup> Moreover, the state laws do not require insurers to provide the insured with a written explanation for adverse actions taken which affect insurance coverage.<sup>163</sup> Finally, the state legislation rarely provides the wronged individual with a private right of action.<sup>164</sup> All of these shortfalls lessen the protection afforded to domestic violence victims under state antidiscrimination measures and reinforce the need for a comprehensive federal remedy.

Making progress in state legislatures is also slow work—only a handful of states have actually passed antidiscrimination statutes—for several reasons. First, state reform measures are often frustrated by insurers' threats of withdrawal from conducting business in the state.<sup>165</sup> In addition, insurance companies constitute a powerful lobby and often apply political pressure that state regulators have trouble resisting.<sup>166</sup> Finally, insurance companies are usually national or international in nature and operate across state lines, making enforcement of individual state laws difficult.<sup>167</sup> For these reasons, comprehensive federal legislation appears to be the only uniform way to prohibit insurers from discriminating against abuse victims.

#### D. NAIC State Model Legislation

The National Association of Insurance Commissioners ("NAIC") is an association of all state insurance regulators<sup>168</sup> that coordinates state insurance regulation.<sup>169</sup> One goal of the NAIC is to serve the public interest by helping state insurance officials achieve laws which fairly and equitably treat insurance consumers.<sup>170</sup> The NAIC began to study the effects of insurance discrimination

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161. See DEL. CODE ANN. tit. 18, § 2304(24) (West Supp. 1995) (allowing insurers to underwrite based on the preexisting condition of abuse only if such conditions are routinely underwritten in the same manner for applicants who are not abuse victims).

162. See Louisiana S.B. 1369, Reg. Sess. (1995).

163. See CONN. GEN. STAT. ANN. § 38a-816(18) (West Supp. 1996); Maryland H.B. 39, Reg. Sess. (1996).

164. Compare Illinois H.B. 2502, 89th Gen. Ass. (1996) (allowing private right of action) with ME. REV. STAT. ANN. tit. 24-A, § 2159-B (West Supp. 1996) (disallowing victim to directly sue discriminating insurance company).

165. Wortham, *supra* note 59, at 416.

166. *Id.*

167. *Id.*

168. Insurance Discrimination, *supra* note 8.

169. Fountain, *supra* note 9.

170. Memorandum from Nancy Durborow, Health Projects Coordinator, Pennsylvania Coalition Against Domestic Violence, and Terry Fromson, Staff Attorney, Women's Law Project, to Domestic Violence Advocates (June 30, 1995) (unpublished memorandum on file with the *Indiana Law Journal*).

against victims of domestic violence in 1995, as soon as it discovered the presence of the practice. The association has stated publicly that it has a goal of developing a model law which would prohibit such discrimination.<sup>171</sup>

### 1. Proposed Model Law

The NAIC's Discriminatory Practices Working Group recently completed drafting model legislation which prohibits unfair discrimination against domestic violence victims.<sup>172</sup> The draft language reads as follows: "No insurer or health carrier may engage, directly or indirectly, in an unfairly discriminatory act or practice against a subject of abuse. . . . [T]he discriminatory acts and practices described and prohibited in this Act are egregious and are presumed to have been committed in conscious disregard of this Act."<sup>173</sup>

In addition to prohibiting unfair discrimination against abuse victims, the guidelines contained in the proposed model law define abuse<sup>174</sup> and also furnish the following examples of discriminatory practices:

- A. Denying; refusing to issue, renew or reissue; canceling or otherwise terminating a health benefit plan; or restricting or excluding health benefit plan coverage; or adding a premium differential to any health benefit plan on the basis of the applicant's or insured's abuse status;
- B. Excluding or limiting coverage for losses or denying a claim incurred by an insured as a result of abuse on the basis of the insured's abuse status;
- C. Terminating group coverage for a subject of abuse because coverage was originally issued in the name of the abuser and the abuser has divorced, separated from, or lost custody of the subject of abuse, or the abuser's coverage has terminated voluntarily or involuntarily. . . . ; or
- D. Disclosure or transfer of any information by person employed by or contracting with a health carrier relating to an applicant's or insured's abuse status . . . for any purpose unrelated to the direct provision of health care

171. *Id.*

172. Shelton, *supra* note 52, at 12.

173. UNFAIR DISCRIMINATION AGAINST SUBJECTS OF ABUSE IN HEALTH BENEFIT PLANS MODEL ACT § 2 (Proposed Official Draft, Dec. 4, 1995).

174. The NAIC model law defines abuse as the occurrence of one or more of the following acts:

- (1) Attempting to cause or intentionally, knowingly or recklessly causing another person, including a minor child, bodily injury, physical harm, severe emotional distress, psychological trauma, rape, sexual assault or involuntary sexual intercourse;
- (2) Knowingly engaging in a course of conduct . . . under circumstances that place the person or minor child in reasonable fear of bodily injury or physical harm;
- (3) Subjecting another person . . . to false imprisonment; or
- (4) Attempting to cause or intentionally, knowingly, or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another person

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*Id.* § 1A.



services, except where required by the commissioner, a court of competent jurisdiction, or abuse reporting laws.<sup>175</sup>

The model law establishes guidelines for insurers to follow when advising abuse victims of adverse insurance decisions. An insurer must provide the victims with a written explanation for the adverse action and must be able to demonstrate that the action was not discriminatory.<sup>176</sup> Perhaps the strongest facet of the NAIC proposal is that it establishes protocols to which insurers must adhere when working with abuse victims whose safety is at stake. The proposal mandates that “[h]ealth carriers and insurers shall develop, file with the insurance commissioner, and adhere to protocols specifying how company employees, contractors, agents and brokers will pursue an insurance action, including claims investigation and subrogation, that may impact the safety of a subject of abuse involved with that action.”<sup>177</sup>

Once the model law has been approved by the entire NAIC, it will be ready for implementation by the states.<sup>178</sup> However, even if the NAIC endorses a draft which prohibits discrimination against battered women, the NAIC cannot compel insurance regulators to adopt and implement the regulation in their home states.<sup>179</sup> Fortunately, insurers are likely to consider themselves bound by the regulation even if a particular state insurance commissioner fails to adopt it, as history shows that once a few states endorse a model law of the NAIC, most insurance companies comply.<sup>180</sup> As a consequence, the NAIC model legislation will likely have a significant impact on changing the discriminatory practices of insurers.

## 2. Potential Pitfalls

Controversy over the place of medical histories looms large between advocates for abuse victims and insurance lobbyists in debates surrounding any legislation. Insurers underwrite on the basis of preexisting medical conditions when they examine medical records.<sup>181</sup> Some insurers support model legislation as long as it preserves their right to gain access to the medical records of applicants and underwrite on the basis of information contained in the records.<sup>182</sup> Insurance companies insist that they cannot effectively assess the risk of certain applicants unless they can examine the applicant’s past medical history.

However, allowing unfettered underwriting on the basis of medical histories is no longer appropriate because it undermines the purpose of protecting abuse

175. *Id.* § 3.

176. *Id.* § 4.

177. *Id.* § 5.

178. Memorandum from Terry Fromson, Staff Attorney, Women’s Law Project, to the National Organization of Women Legal Defense and Education Fund Committee on Insurance Coverage and Domestic Violence (Nov. 21, 1995) (unpublished memorandum on file with the *Indiana Law Journal*).

179. Schatz, *supra* note 66, at 1789.

180. *Id.*

181. Light, *supra* note 59, at 2503-04.

182. Fountain, *supra* note 9.

victims from discrimination. This practice would allow insurers to discover which applicants are likely victims of abuse and indirectly discriminate against them. Health care providers may have documented in a chart an injury stemming from abuse, which will then become part of the medical record available to the insurer. Additionally, the insurer will be able to examine the records for injuries commonly associated with domestic violence—such as black eyes or bruises—and use this as a basis for rendering an applicant ineligible for insurance coverage.<sup>183</sup> Because there is little regulation of underwriting practices,<sup>184</sup> insurers may use these techniques to weed out domestic violence victims during the application process, allowing the discrimination to remain undetected.

Insurers will continue to have access to medical records for general underwriting purposes. As a result, it must be assumed that they will discover or discern which applicants are victims of domestic violence. Consequently, any legislation must clearly forbid insurers from denying insurance coverage to abuse victims, in all instances, to effectively end discriminatory practices.

#### *E. Endorsement of House Bill 2654*

Ultimately, Congress must adopt a uniform federal remedy to proscribe all insurance companies from discriminating against battered women. Passage of federal House Bill 2654<sup>185</sup> would provide uniform protection from insurance discrimination to abuse victims in all states, regardless of whether individual state legislatures have implemented this type of legislation.<sup>186</sup> A comprehensive federal remedy would ensure that fleeing domestic violence victims still have effective insurance coverage even if they go to other states.

House Bill 2654 presents a strong statutory response to discriminatory practices. First, it includes an extensive explanation of exactly which insurance practices constitute unlawful discrimination. This complete description serves a dual purpose: it puts insurers on notice of prohibited practices and also aids in prosecution by providing victims with a clear definition of wrongful acts. Second, the Bill protects the privacy of battered women by preventing insurers from sharing abuse-related medical information through commercial databases. The legislation also retains the insured's right to access of her own records which are in the insurer's hands. Third, House Bill 2654 requires insurance companies to provide applicants or insureds with written notice and an explanation of any adverse action they take relating to insurance coverage. Finally, the proposal authorizes two methods of enforcement, through a private right of action and an administrative remedy.<sup>187</sup>

House Bill 2654 empowers abuse victims by granting them a private right of action, while also providing victims with the tools necessary to take on insurers

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183. Insurance Discrimination, *supra* note 8.

184. *See supra* notes 81-83 and accompanying text.

185. H.R. 2654, *supra* note 145.

186. Although several states are considering similar legislation, only six had enacted legislation as of the writing of this Note. *See supra* notes 156-57 and accompanying text.

187. *See generally* discussion *supra* part III.A-B.

in judicial proceedings. These tools include a comprehensive definition of discriminatory practices, written notice for any adverse actions taken by the insurer, and protections against privacy invasion through the compilation of sensitive abuse-related medical information in commercial data banks. These provisions aid individual abuse victims by making court challenges against insurance companies feasible.<sup>188</sup>

#### IV. ENDING DISCRIMINATORY PRACTICES

The insurance industry performs an essential function in American society by providing financial security for individual policyholders who are faced with catastrophes. Due to the special nature of insurance, regulating insurers' underwriting practices which harm battered women is both a necessary and appropriate measure. Discrimination against battered women, who are crime victims, is just as unacceptable as other types of discrimination which our society condemns. Federal legislation prohibiting insurance companies from refusing to cover victims of domestic violence must be adopted to end discrimination against these victims of crime. This type of comprehensive legislation will encourage the insurance industry to take steps to prevent spousal abuse and to lobby for increased prosecution and tougher penalties for those who violate criminal law by engaging in spousal abuse. Further, insurers are in the best position to spread domestic violence costs due to the loss distribution function of insurance.

##### *A. Eliminating Discrimination Against Battered Women*

Society as a whole, through legislative enactments and court mandates, has determined that discrimination based on race, gender, national origin, and religion may not be used as a basis for denying individuals access to basic needs such as employment, shelter, and insurance.<sup>189</sup> Discrimination is impermissible even when nondiscriminatory behavior is more expensive for the private sector.<sup>190</sup> Battered women are often both crime victims and victims of insurance discrimination. The pending federal legislation, which classifies battered women as a protected group, ensures that these women will no longer be victimized the second time by discriminatory insurance practices. Although insurers may be required to absorb abuse-related claims, they already do this for other protected classes; this is no excuse for engaging in this type of discrimination.

Domestic violence permeates all boundaries of society, affecting men and women of every race and every socioeconomic level.<sup>191</sup> Because the practice is uniform across society and analogous to other types of unacceptable discrimination, Congress enacted the landmark Violence Against Women Act of 1994, which categorizes domestic violence as a federal crime.<sup>192</sup> In the past,

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188. See discussion *supra* part III.A-B.

189. Lowe, *supra* note 81, at 528-30; Schatz, *supra* note 66, at 1792.

190. Schatz, *supra* note 66, at 1791-92.

191. Hyman, *supra* note 7, at 1781.

192. See *supra* notes 142-44 and accompanying text.

Congress banned discrimination on the basis of race, religion, gender, ethnicity, and national origin through a number of legislative mandates.<sup>193</sup> The Violence Against Women Act treats crimes of domestic violence in the same manner as those motivated by religious, racial, or ethnic bias.<sup>194</sup> The Violence Against Women Act recognizes that violent crimes committed because of a person's gender similarly raise issues of equality as well as safety and accountability. Long ago, Congress recognized that an individual who is attacked because of race is deprived of rights to be free and equal; we should guarantee the same protection for victims who are attacked because of their gender.

Whether the violence is motivated by racial bias, ethnic bias, or gender bias, the protection of the law should be the same.<sup>195</sup> Since Congress has already regulated society from engaging in pervasive discrimination against victims of gender-based crimes, it should prohibit discriminatory insurance practices against victims of the crime of domestic violence.

Ending domestic violence, by virtue of public and private initiatives, has become a matter of public interest.<sup>196</sup> Through both legislative reform and private outcry, society has condemned the practice of domestic violence and has shown a commitment to helping victims survive and reach safety. Insurance practices that discriminate against domestic violence victims contradict public health and welfare goals aimed at eliminating domestic violence and threaten to unravel over twenty years of work to protect abuse victims. Insurance discrimination discourages battered women from seeking necessary medical treatment and legal intervention, deters them from filing insurance claims, and constructs one more economic barrier that prevents victims from leaving abusive environments. For these reasons, Congress should adopt comprehensive legislation prohibiting insurance discrimination.

Insurance companies are private businesses dealing in a particularly crucial commodity for society as a whole. Insurance has become a necessity in providing financial security for individuals,<sup>197</sup> and the personal lines of insurance<sup>198</sup> play a critical role in guarding against potential disaster. Public policy decisions by lawmakers leave private insurance as the primary safety net for individuals, with the exception of reliance on government-funded programs.<sup>199</sup> As a result, the government should be responsible for ensuring widespread insurance availability,<sup>200</sup> particularly for victims of abuse, because "such an important

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193. See generally U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (current version at Civil Rights Act of 1991, 42 U.S.C. § 2000e (1994)).

194. Catherine F. Klein, *Full Faith & Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 253 (1995).

195. MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 103D CONG., 1ST SESS., THE RESPONSES TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 14 (Comm. Print 1993).

196. See *supra* part I.B.

197. Schatz, *supra* note 66, at 1792; Wortham, *supra* note 59, at 350-51.

198. The personal lines of insurance traditionally include automobile, homeowners' or renters', health, life, and disability insurance. Wortham, *supra* note 59, at 351.

199. Scherzer, *supra* note 76, at 412; Wortham, *supra* note 59, at 350-51.

200. Wortham, *supra* note 59, at 350. See generally Schatz, *supra* note 66, at 1792.

component of the personal financial infrastructure should not be left to the vagaries of the free market."<sup>201</sup>

The objective of insurance companies in maximizing profits often conflicts with the public goal of supplying expansive insurance coverage.<sup>202</sup> Insurance companies resist regulation by asserting that they are private businesses who are responsible for conducting business with an eye towards profitability, not the public interest.<sup>203</sup> Yet because insurers undisputedly control public access to an essential commodity in society, they experience broad governmental intervention<sup>204</sup> to ensure that they exercise financial and ethical responsibility.<sup>205</sup> Additionally, courts have generally rejected insurers' assertions that economic considerations justify discriminatory behavior.<sup>206</sup> The goal of insurance regulation is to allow insurance companies to operate profitably while curbing those practices which, due to the profit motive, threaten important public values.<sup>207</sup> This regulation should be expanded to forbid insurers from unfairly discriminating against victims of domestic violence because the insurance industry continues to be profitable for insurers.<sup>208</sup>

The United States Supreme Court endorsed regulation of the insurance industry, an industry "affected with a public interest," over seventy-five years ago.<sup>209</sup> The Court justified regulation of the private insurance industry by noting insurance's critical function in spreading loss throughout society, thereby reducing the burden of unexpected misfortune on individuals.<sup>210</sup> The risk-spreading function of insurance prevents individuals from bearing the enormous cost of a catastrophe alone,<sup>211</sup> and this should include the abuse-related costs accrued by battered women. For this reason, legislation prohibiting insurers from discriminating against domestic violence victims must be implemented. This legislation helps to eliminate the social inequality created by discrimination against abuse victims and also protects the public interest by ensuring that battered women and children who leave abusive situations have access to adequate health care.

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201. Lowe, *supra* note 81, at 531.

202. Scherzer, *supra* note 76, at 412.

203. *Id.* See generally Schatz, *supra* note 66, at 1791.

204. Clifford & Iuculano, *supra* note 118, at 1809-11; see also *supra* part II.

205. Scherzer, *supra* note 76, at 413.

206. Schatz, *supra* note 66, at 1791 (citing cases in which courts prohibited landlords and employers from discriminating against African-Americans, Jews, and women even though the non-discriminatory policies were more costly due to the prejudice of neighbors, customers, or co-workers).

207. Scherzer, *supra* note 76, at 413.

208. The premiums insurers charge to policyholders include a specific portion of profit. Ideal premiums match the insurance loss and expenses attributable to the individual or group member, as well as a "reasonable" amount of profit for the insurer. Lowe, *supra* note 81, at 524.

209. *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 406-08 (1914) (upholding a state's right to regulate fire insurance rates).

210. *Id.* at 412-13.

211. Lowe, *supra* note 81, at 531.

Society should not tolerate discrimination against people solely because they have been victims of crime. Allowing insurers to deny abuse victims insurance coverage is discrimination at its worst—denying a battered woman access to a basic necessity simply because an abuser has victimized her in the past. Since we as a society have made a commitment to eradicate domestic violence, victims of abuse must be included in a protected category because discrimination against them represents yet another invidious form of prejudice.

*B. Requiring Insurers to Manage Abuse-Related Costs*

There are a variety of reasons why insurance companies, rather than the government, are in the best position to shoulder the costs of domestic violence. First, insurers have the capacity to distribute more evenly the expenses generated by domestic violence over a wide base of policyholders due to the loss spreading functions of insurance. Second, it is important to remember that insurers, unlike the government, are in the business because they reap significant profits.<sup>212</sup> Third, managing health costs is the insurance industry's self-proclaimed specialty;<sup>213</sup> thus, insurers are much better equipped than government for calculating and preventing the costs associated with battering. Fourth, insurers, as institutions, are capable of devising schemes of shifting the costs of domestic violence to abusers, while providing victims with the coverage they desperately need.<sup>214</sup>

Finally, insurers will dramatically increase efforts directed at fighting domestic violence when it is in the industry's economic self-interest to do so. Industry commentators have noted that the insurance industry is "sorely in need of corporate role models."<sup>215</sup> In the past, insurers have taken steps to protect public safety by educating consumers and lobbying legislatures for tougher seat belt laws,<sup>216</sup> drunk driving penalties,<sup>217</sup> and highway safety measures.<sup>218</sup> These types of lobbying efforts are in the insurance industry's economic interest—as public

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212. See *supra* note 208.

213. Schatz, *supra* note 66, at 1804.

214. At first glance, shifting domestic violence-related expenses to abusers by allowing insurers to sue them appears equitable. Forcing batterers to bear the expense of their activity hypothetically serves the twin purposes of punishing the wrongdoer and deterring future abuse. However, this solution is problematic: advocates who work with abuse victims report that enraged abusers more typically retaliate against victims. As a result, subrogation is not an effective deterrent against future episodes of battering and often places victims in imminent danger. See Memorandum from Terry Fromson, Staff Attorney, Women's Law Project, to the National Organization for Women Legal Defense and Education Fund Committee on Insurance Coverage and Domestic Violence (Dec. 12, 1995) (unpublished memorandum on file with the *Indiana Law Journal*).

215. *A Heartening Initiative*, NAT'L UNDERWRITER, May 29, 1995, at 16.

216. Warren Brown, *Crash Course: Insurance Industry Opens Own Research Center To Test Car Safety Claims*, WASH. POST, Jan. 25, 1993, at F1.

217. Warren Brown, *Consumer Activists Joining With the Insurance Industry: Group Is To Lobby for Highway Safety*, WASH. POST, Sept. 28, 1989, at E1.

218. *Insurers & Other Safety Advocates Defend Helmet Laws*, FED. & ST. INS. WK., Mar. 6, 1995, available in 1995 WL 8595975.

safety increases, insurance claims decrease, thus allowing insurers to operate more profitably. The insurance industry can easily take similar steps in defraying the claims attributable to abuse. When insurers must bear some of the costs of domestic violence, they will become more socially responsible by funding educational programs with the purpose of ending domestic violence,<sup>219</sup> lobbying elected officials to enact measures to reduce spousal abuse,<sup>220</sup> and pressuring law enforcement personnel to enforce existing laws against domestic violence.

Battered women who are subject to insurance discrimination currently must shoulder abuse-related costs alone, a predictably impossible burden. Uninsured victims who are in dire need of assistance often rely upon government programs such as Medicare, Medicaid, and public hospitals for relief.<sup>221</sup> As insurance companies evade responsibility for insuring domestic violence victims, the financial burden shifts to the government. The final outcome: society as a whole picks up the tab of domestic violence through taxes, which results in the specific social costs remaining both unidentified and unprevented.<sup>222</sup>

Although insurance companies are private businesses with a pecuniary mission, they are the best entities to bear the social cost of domestic violence. The insurance industry is prominent in American society: it has the power and the resources to begin the formidable task of reducing, preventing, and finally eliminating the shared public burden of domestic violence. Legislation banning insurance discrimination against victims of domestic violence forces insurance companies to stop discriminating against the unfortunate victims of the crime of domestic violence.

#### CONCLUSION

The nation's largest insurance companies routinely engage in discriminatory practices directed at battered women. A recent Congressional survey discovered that some insurers refuse to cover applicants who have a history of domestic abuse. In response, several members of Congress have proposed legislation that prohibits insurers from using domestic violence as a rationale for denying battered women insurance coverage.

Insurance discrimination against abuse victims is dangerous. The exclusion of a battered woman from the insurance pool often leaves her with few choices but to stay in the abusive situation to ensure appropriate access to medical care for herself and her children. Discrimination also contributes to the social stigma associated with abuse victims. This stigma silences battered women and prevents them from seeking necessary medical treatment and reporting abuse to

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219. One insurance company, State Farm Life, reversed its policy of discriminating against battered women after it received a barrage of negative publicity. Subsequently, State Farm initiated the Corporate Alliance To End Partner Violence, a coalition with the purpose of forming an alliance of Fortune 500 companies dedicated to preventing and educating about domestic violence. *A Heartening Initiative*, *supra* note 215, at 16.

220. *See* Schatz, *supra* note 66, at 1797.

221. *Id.* at 1804; Wortham, *supra* note 59, at 352; Zorza, *supra* note 14, at 383-85.

222. For a similar argument regarding the social costs of AIDS, see Schatz, *supra* note 66, at 1804.

authorities, allowing the abusers to remain unaccountable for the crimes they perpetrate. Such silence ultimately leads to higher costs associated with battering; when the crime is not reported, it is more difficult to effectively direct education and prevention measures.

Society should not tolerate discrimination against victims of domestic violence. When insurers refuse to cover battered women, they hold victims responsible for the criminal activity of abusers. Federal legislation prohibiting insurance discrimination supports the efforts of victims who leave abusive partners by ensuring adequate insurance coverage, which in turn alleviates some of the economic barriers to leaving. In addition, enacting the proposed legislation will encourage the insurance industry to develop strategies directed at the prevention of domestic violence.

Society has condemned domestic violence through both public and private initiatives. Congress has already passed the landmark Violence Against Women Act of 1994, making domestic violence a federally prosecutable crime. Passage of legislation prohibiting insurance discrimination represents one more step in the fight to extinguish the tragedy of domestic violence from the daily lives of over four million women.