Premium Justice: An Egalitarian Defense of Risk-Based Insurance Pricing

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Abstract

Should insurance companies be allowed to charge different prices based on a policyholder's likelihood of making claims? This Article challenges the common view that "risk-based pricing" in insurance presents a tradeoff between the twin goals of efficiency and fairness. Drawing on recent developments in economic theory, it argues that charging prices based on risk can actually promote fairness and equality by distributing the benefits of insurance more evenly among participants than charging everyone the same price. This insight helps explain and justify a puzzling feature of American law: despite broad antidiscrimination protections in employment, housing, and other areas, insurance companies face surprisingly few restrictions on their ability to estimate insureds' level of risk using suspect classifications like race or sex. While this argument cannot justify all forms of insurance discrimination, it suggests that debates about insurance pricing should be understood not as conflicts between efficiency and fairness, but as reasonable disagreements about different conceptions of egalitarian distributive justice.

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Introduction

In the field of insurance, there are few issues more contentious than the practice of risk-based pricing. Because individuals differ both in the likelihood that they will suffer a loss and in the size of their potential loss, insurers try to estimate the amount that each insured expects to lose in a given period, so they can charge a price that reflects that amount. Whether this is appropriate has long been a point of contention, and has broad policy implications. Most state insurance regulators, for example, have a mandate to ensure that insurance prices are not "unfairly discriminatory."[1] There has also been a steady stream of public controversies during the last half-century relating to the defensibility of risk-based underwriting—from the use of sex in determining employment-based annuity rates,[2] to the use of characteristics that indicate a high risk of contracting HIV when selling life or health insurance,[3] to the denial of health and life insurance coverage to battered

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[1] *See, e.g.*, TEX. INS. CODE ANN. § 560.002(b)(2)(C) (West 2009) (prohibiting insurance rates that are "unfairly discriminatory"); CONN. GEN. STAT. § 38a-686(a) (2019) (same); CAL. INS. CODE § 1861.05 (West 1988) (same); FLA. STAT. ANN. § 627.062(1) (West 2024) (same). *See also* Daniel Schwarcz, *Towards A Civil Rights Approach To Insurance Anti-Discrimination Law*, 69 DEPAUL L. REV. 657, 665–68 (2020) (discussing state insurance regulations containing prohibitions on "unfairly discriminatory" rates); Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403, 406 (1985) (same).

[2] A long-running academic and public policy debate followed the Supreme Court's decisions in *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), which each dealt with the question of whether federal employment discrimination law banned sex classifications for employer-sponsored benefits. *See* Spencer L. Kimball, *Reverse Sex Discrimination: Manhart*, 4 AM. BAR FOUND. RSCH. J. 83 (1979); Lea Brilmayer, Richard W. Hekeler, Douglas Laycock & Teresa A. Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits:* Manhart *Revisited*, 49 U. CHI. L. REV. 489 (1982); Lea Brilmayer, Douglas Laycock & Teresa A. Sullivan*, The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222 (1983); George J. Benston, *Discrimination and Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues and a Response to Professors Brilmayer, Laycock, and Sullivan*, 50 U. Chi. L. Rev. 250 (1983). For a more thorough review of this debate and the many other contributions to the dialogue, see Leah Wortham, *Insurance Classification: Too Important to Be Left to the Actuaries*, 19 U. Mich. J.L. Reform 349, 356–58 (1985).

[3] *See* Katy Chi-Wen Li, *The Private Insurance Industry's Tactics Against Suspected Homosexuals: Redlining Based on Occupation, Residence and Marital Status*, 22 AM. J.L. & MED. 477, 477 (1996); Norman Daniels, *Insurability and the HIV Epidemic: Ethical Issues in Underwriting*, 68 MILBANK Q. 497 (1990); Joyce Nixson Hoffman & Elizabeth Zieser Kincaid, *AIDS: The Challenge to Life and Health Insurers' Freedom of Contrac*t, 35 DRAKE L. REV. 709, 710–11 (1987).

women,[4] to the push to forbid health insurers from discriminating on the basis of preexisting conditions[5] and genetic information,[6] to the propriety of charging higher homeowners' insurance premiums to those exposed to wildfire or hurricane risk.[7] And, insofar as many elements of the social safety net are structured on the model of private insurance,[8] the question of whether social insurance ought to be financed through taxes that place a heavier burden on those most likely to receive benefits continues to be a source of controversy.[9]

On one side of this issue are those who believe risk-based insurance pricing is presumptively unjust, especially when it turns on characteristics

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[4] *See* Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355, 355–57 (1997).

[5] The Health Insurance Portability Accountability Act of 1996 (HIPAA) requires group insurers to meet specific exceptions to deny health coverage due to an insured's preexisting condition. *See* 29 U.S.C. § 1181 (2018). The Patient Protection and Affordable Care Act of 2010 (ACA) prohibits all health insurers from denying coverage on the basis of preexisting conditions. *See* 42 U.S.C. §§ 300gg-3 to -4. For a history of the debate over this issue, see Sallie Thieme Sanford, *The Struggle to Bury Pre-Existing Condition Consideration*, 7 ST. LOUIS U.J. HEALTH L. & POL'Y 405 (2013) (detailing the arguments for and against the ACA's mandate to prohibit insurer discrimination based on preexisting conditions); Jennifer M. Franco, *Undermining the Protection of Health Insurance: The Preexisting Condition Clause*, 30 NEW ENG. L. REV. 883 (1995).

[6] The Genetic Information Nondiscrimination Act of 2008 protects individuals from genetic discrimination in health insurance and employment. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended at scattered sections of 26, 29, & 42 U.S.C.). For a discussion of genetic discrimination in insurance, see Michael Hoy & Michael Ruse, *Regulating Genetic Information in Insurance Markets*, 8 RISK MGMT. & INS. REV. 211 (2005); Robert Lowe, *Genetic Testing and Insurance: Apocalypse Now*, 40 DRAKE L. REV. 507 (1991).

[7] *See* Kenneth S. Abraham, *About the California Fires*, HARV. L. REV. BLOG (Jan. 27, 2025), https://harvardlawreview.org/blog/2025/01/about-the-california-fires/; Congressional Budget Office, *Climate Change, Disaster Risk, and Homeowner's Insurance* (Aug. 2024), https://www.cbo.gov/publication/60674; Lloyd Dixon, *Allocating Costs for California Wildfires*, RAND (July 24, 2019), https://www.rand.org/pubs/commentary/2019/07/allocating-costs-for-california-wildfires.html.

[8] On the influence of private insurance on the conceptual underpinnings of the modern welfare state and its social insurance programs in particular, see Eveline M. Burns, *Social Insurance in Evolution*, 34 AM. ECON. REV. 199, 199–203 (1944); JERRY RAY CATES, INSURING INEQUALITY: ADMINISTRATIVE LEADERSHIP IN SOCIAL SECURITY 30–35 (1983).

[9] *See, e.g.*, Joseph Antos, Premium Support Proposals for Medicare Reform, AEI (April 27, 2012), https://www.aei.org/research-products/testimony/premium-support-proposals-for-medicare-reform (proposing that Medicare beneficiaries fund a higher proportion of the program, linking the benefit more directly to its cost); PETER DIAMOND & PETER ORSZAG, SAVING SOCIAL SECURITY (2004) (arguing that since higher-income workers generally live longer and therefore collect Social Security benefits for more years, they should pay a larger share of Social Security taxes);

over which insureds lack control. Proponents of this argument tend to advocate for "community rating"[10]—a regulatory prohibition against charging different premiums on the basis of characteristics like sex, credit rating, geography, or pre-existing health conditions.[11] On the other side are those who assert that risk-based pricing promotes economic efficiency.[12] They argue that preventing insurers from varying premiums based on an insured's level of risk will threaten the stability and availability of insurance, and will distort policyholders' incentives to avoid loss in a way that will lead to economic waste.[13] As Kenneth Abraham put it, "[A]ttitudes toward insurance always seem to be pulling in two directions—one that highlights the risk assessment, or efficiency-promoting features of insurance classification, and the other that stresses insurance's risk distributional function."[14] This standoff has, for the most part, persisted.[15] Occasionally, one side or the other wins ground in the legislative or regulatory arena, but at

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[10] On the origin of the term "community rating," see Mark V. Pauly, *The Welfare Economics of Community Rating*, 37 J. RISK & INS. 407, 407–08 (1970).

[11] *See, e.g.*, Eric Mills Holmes, *Solving the Insurance/Genetic Fair/Unfair Discrimination Dilemma in Light of the Human Genome Project*, 85 KY. L.J. 503, 563 (1996) ("Since one cannot choose one's genetic make-up, arguably there should be no duty to pay more for insurance because of a poor genetic make-up"); Hellman, *supra* note 4, at 410–11; Deborah Stone, *Beyond Moral Hazard: Insurance as a Moral Opportunity*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY (Tom Baker & Jonathan Simon eds., 2002); Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517 (1983).

[12] *See, e.g.*, Michael J. Miller, *Disparate Impact and Unfairly Discriminatory Insurance Rates*, CAS. ACTUARIAL SOC'Y E-FORUM, Winter 2009, at 276 (arguing that risk-based pricing is efficient); Colin S. Diver & Jane Maslow Cohen, *Genophobia: What Is Wrong with Genetic Discrimination?*, 149 U. PA. L. REV. 1439, 1445 (2001) ("[T]he effort to ban genetic discrimination within insurance and employment markets would, if successful, cause significant welfare losses due to the distortion of allocative efficiency."); Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 BOS. U.L. REV. 1, 21 (1994) ("[T]he anti-discrimination approach often leads to the adoption of general and neutral rules that are inefficient for the firm and society at large."); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1545 (1987) ("It is a well-established implication of this approach that the more narrowly risk pools can be defined, the more broadly insurance can be offered in the society."); Abraham, *supra* note 1, at 420–28 (reviewing efficiency-based arguments); Jan Mossin, *Aspects of Rational Insurance Purchasing*, 76 J. POL. ECON. 553, 556 (1968).

[13] *See* Abraham, *supra* note 1, at 420-28 (reviewing these arguments).

[14] *Id*. at 404.

[15] *See, e.g.*, Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Understanding Insurance Antidiscrimination Law*, 87 S. CAL. L. REV. 195, 201–202 (2013) (framing the issue as a "tradeoff[] between the 'efficiency' costs of regulation and the 'fairness' benefits"); Hoy & Ruse, *supra* note 6, at 212 (casting the problem as "a classic efficiency-equity trade-off").

an intellectual level, the conflicting sides mostly continue to talk past one another.[16]

This Article aims to reframe that debate and allow both camps to engage on the same intellectual terrain. It argues that the most powerful argument *for* risk-based pricing is grounded not in efficiency, but rather in egalitarian distributive justice. The availability of an "egalitarian" argument for risk-based insurance pricing is counterintuitive; charging everybody an equal price would seem to be the more egalitarian thing to do.[17] But, as will be explained in more detail below, there are special features of insurance markets that distinguish them in fundamental ways from markets for traditional goods and services. These features create an unusual connection between risk-based insurance prices and a conception of egalitarian distributive justice. Moreover, traditional efficiency-based arguments for risk-based pricing, mostly based on the concern of "adverse selection," cannot motivate a general opposition to community rating. This suggests that the better way to understand the debate over risk-based insurance pricing is not as a tradeoff between efficiency and fairness, but rather as a disagreement over different conceptions of egalitarian distributive justice.

An example can help to illustrate the basic intuition of the egalitarian argument for risk-based insurance pricing. Imagine a person, Charles, who suffers from a genetic disease that causes him to need special health care. He expects to incur healthcare expenses that would cost him $5,000 this year, on average, if he were paying out-of-pocket. (This is an estimate based on his past medical expenses. The costs could turn out to be significantly higher, or lower, in any given year.) Charles, because he does not like the unpredictability of such expenses, is willing to pay $6,250 for health insurance that would cover all of his healthcare costs.[18] Now imagine healthier person, David, who expects to incur only $3,500 of expenses this

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[16] *See* Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 204 (2003) (noting "[t]he historical disconnect" between the "fairness" and "efficiency" literatures).

[17] To my knowledge, there has been no sustained expression or exploration of what this Article calls "the egalitarian argument for risk-based insurance pricing." The closest to a similar proposal of which I am aware is contained in a passing comment in TOM BAKER, KYLE D. LOGUE & CHAIM SAIMAN, INSURANCE LAW AND POLICY: CASES AND MATERIALS 258 (5th ed. 2023) ("Note that the argument for the use of actuarially fair insurance premiums is very similar to the argument for the use of 'benefit taxation' among public finance scholars. Under a benefit tax, individual taxpayers are taxed according to the benefit they receive from the public expenditure being funded by the tax.").

[18] Note that this hypothetical health insurance policy, for the sake of simplicity, has no deductibles, copays, or co-insurance.

year, and who (for the same reason) is willing to pay $4,375 for coverage. An insurance company with zero operating costs could feasibly charge both Charles and David the same price, $4,250. At that price, the insurance company's premiums would be equal to what it expects to pay out in claims ($5,000 to Charles plus $3,500 to David equals $8,500 in combined premiums). Both Charles and David would voluntarily purchase coverage at this price; no mandate would be required to ensure their enrollment. But one of them would nonetheless appear to get a "better deal" than the other. Charles is willing to pay $6,250 for something that costs him $4,250 for a benefit of $2,000, whereas David, by the same logic, only receives a benefit of $125. If, instead, each insured were charged a price that corresponded to his individual expected loss, then there would be less of a difference in the distribution of the benefit of coverage: if Charles were charged $5,000 and David were charged $3,500, then they would receive $1,250 and $875, respectively.[19]

Many who read this example will be inclined to argue that charging both Charles and David the same price is the appropriate thing to do. As a matter of distributive justice, it would seem improper to allow an insurer to discriminate against Charles because of his unfortunate genetics. Charging a flat premium, therefore, is morally correct because it creates a cross-subsidy from David to Charles that counteracts an undeserved inequality of genetic endowments.

This Article explores an alternative perspective on the same example. From this view, charging both individuals the risk-based price is the more just policy. The insurance arrangement "grew the economic pie" by creating $2,125 of benefit, and that new pie ought to be recognized as the joint product of both Charles and David. Neither of them has a greater claim to it than the other because insurance only works if there are multiple participants, joining their risks together into a pool. If one dollar of this benefit is worth the same to Charles as it is to David,[20] then an *equal* division of the economic benefit between insureds would be the most just way to divide it, and risk-based pricing comes closer to achieving that goal than community rating. One who takes this view might still accept that redistribution is warranted to compensate Charles for his poor genetics, while maintaining that using insurance to do so will be far messier and more error-prone than other more direct methods, such as the tax-and-transfer system. Dealing with insurance

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[19] For reasons that will be explained in more detail below, under normal circumstances, such a shift to risk-based pricing will necessarily have this effect. *See infra* Section II.A.

[20] *See infra* Section II.B for further discussion of this assumption.

pricing questions by attempting to divide the benefit of insurance equally among participants will, by contrast, have a neat egalitarian effect, and need not undermine separate efforts to achieve equality more broadly. The logic of this view applies not just to health insurance, but to all other types of insurance as well.

This Article does not claim that every possible conception of egalitarianism entails a commitment to risk-based pricing in insurance. Instead, it argues that there is a reasonable and morally plausible conception of egalitarianism that is consistent with risk-based pricing. The force of the argument therefore turns on whether this conception of egalitarianism, and the assumptions it makes when describing insurance markets, can achieve what John Rawls called "reflective equilibrium"[21] with our prior beliefs and moral intuitions. If the egalitarian argument for risk-based pricing described herein can meet that standard, as this Article suggests it can, then the availability of such an argument can help to explain the persistence, and broad appeal, of the claim that risk-based insurance prices are not only efficient, but also fair. Such a claim is frequently used in public policy debates to argue that insurance should not be redistributive in any broad sense—that it should not, for example, be used simply to effect transfers from the rich to the poor, from the healthy to the chronically ill, or from those who are protected from climate risks to those who are exposed to them.[22] This Article provides an analytically clear articulation of what, I suggest, is the motivating intuition for many who oppose such efforts, in good faith. Shedding light on its logic and underlying assumptions will help us better to understand risk-based pricing from a moral perspective.[23] Even (and especially) those who

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[21] "The method of reflective equilibrium consists in working back and forth among our considered judgments . . . about particular instances or cases, the principles or rules that we believe govern them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary in order to achieve an acceptable coherence among them." Norman Daniels, *Reflective Equilibrium*, STAN. ENCYC. PHIL. (NOV. 27, 2023), https://plato.stanford.edu/entries/reflective-equilibrium. *See also*, JOHN RAWLS, A THEORY OF JUSTICE: ORIGINAL EDITION 20 (2005) (introducing the concept of reflective equilibrium).

[22] *See, e.g.*, John H. Cochrane, *Health-Status Insurance: How Markets Can Provide Health Security*, (2009), https://papers.ssrn.com/abstract=1462376 (arguing that health insurance should be structured around individual risk-based pricing rather than forced transfers); Greg Ip, *Why It Matters How We Define 'Insurance,'* WALL STREET J. (Mar. 24, 2017), http://blogs.wsj.com/economics/2017/03/24/why-it-matters-how-we-define-insurance/; Dixon, *supra* note 7; Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, 9 CONN. INS. L.J. 371, 383–84 (2003) (reviewing the history of fairness arguments against cross-subsidies)

[23] Like Tom Baker, in his seminal article on adverse selection, "[m]y goal . . . is . . . to

are inclined to reject risk-based pricing can benefit from such an exploration because it will allow them to oppose it more effectively.

The Article proceeds as follows. Part I provides a brief background on how insurance markets work, and the current state of insurance antidiscrimination law in the United States. It also provides a primer on recent innovations in the economic theory of insurance markets that make some of their distinctive features especially clear. Part II leverages this economic theory to articulate, in more precise terms, the egalitarian argument for risk-based insurance pricing, and to make explicit the assumptions upon which the argument depends. Part III reviews alternative arguments that have been made to support risk-based insurance pricing and argues that they fail to justify the practice, whereas the egalitarian argument succeeds. Part IV illustrates what it would look like to re-frame the debate about the propriety of risk-based insurance pricing not as a conflict between efficiency and fairness, but rather as a dispute between different conceptions of egalitarian distributive justice. Part V concludes.

Though this Article focuses on insurance law, its logic can be applied to many other markets where consumers differ not only in how much they are willing to pay for a product, but also in how costly they are to the seller.[24] Credit markets—*e.g.*, mortgages, auto loans, credit cards, etc.—exhibit this dynamic, as do others.[25] By reframing the controversy over risk-based

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focus attention on the morality that is implicit in arguments for and against risk classification." Baker, *supra* note 22, at 375. Baker came to the conclusion that there was no intelligible egalitarian argument in favor of risk classification. *See id*. at 277 (describing the idea of actuarial fairness as "a watered-down form of liberalism that privileges individual interests over the common good and that privileges, above all, the interests of insurance institutions organized on its terms."). This Article comes to a different conclusion. *See infra* Section III.E.

[24] *See* Liran Einav, Amy Finkelstein & Neale Mahoney, *The IO of Selection Markets*, *in* 5 HANDBOOK INDUST. ORG. 390, 390 (2021) (defining "selection markets"). *See also* Peter Siegelman, *Risky Business: A Review Essay on the Law & Economics of Selection in Insurance Markets*, 30 CONN. INS. L.J. 221, 231–36 (2024) (discussing the impact of the selection market approach).

[25] *See* Einav et al., *supra* note 24, at 390 ("[W]hile insurance and credit markets are the prime examples of selection markets, and perhaps those where selection concerns are most clearly first order, selection concerns are also relevant for many other, more traditional markets. For example, a car dealership may find local consumers more profitable because they may use the dealership (post purchase) to service their cars. Restaurants may prefer certain groups of consumers because they tip more generously or eat faster, lowering the opportunity cost of occupying the dinner table. Labor markets are another important market where selection concerns could be important. When setting benefits, such as family leave policies, firms may consider the type of potential employees who will find such benefits attractive. Education markets are another natural application, since school costs likely depend on which students the school enrolls.").

insurance prices as, essentially, a dispute between different conceptions of egalitarianism, this Article suggests that debates about the propriety of discriminatory pricing in other contexts might be similarly understood.

I. A Primer on the Practice and Theory of Insurance Pricing

This Part lays the groundwork for those that follow. It explains how insurance premium prices are typically set, as a matter of practice. It also reviews the surprising lack of lack of restrictions, at least in the U.S. legal system, on insurers' freedom to discriminate on the basis of suspect classifications in their underwriting practices. It then introduces an innovative framework for modeling insurance markets, published in 2011 by Liran Einav and Amy Finkelstein, and adopted by many other economists since then.[26] Parts II–IV rely on this framework.

A. The Puzzling Absence of Insurance Antidiscrimination Rules

In competitive insurance markets, insurers face pressure to lower premiums as much as possible while maintaining their solvency. The primary method for achieving this is to align each insured's premium with her "expected loss"[27]—the anticipated claims she will generate during the coverage period—while adding a margin for administrative costs.[28] Insurers employ two principal approaches to estimate expected losses.[29] The first, "feature rating," relies on observable characteristics that correlate with risk.[30] Examples include calculating fire insurance premiums based on a property's value or its fire suppression systems, or varying health and life insurance premiums based on preexisting conditions, sex, or smoking habits. The second approach, "experience rating," uses the insured's claims history to project future losses.[31] This method manifests in practices like increasing auto insurance premiums after accidents or adjusting workers' compensation rates based on prior years' claims experience.

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[26] *See* Liran Einav & Amy Finkelstein, *Empirical Analysis of Selection and Welfare in Insurance Markets: A Self-Indulgent Survey,* 48 GENEVA RISK INS. REV. 167 (2023) (reviewing literature that relies upon the Einav-Finkelstein Framework).

[27] *See* Abraham, *supra* note 1, at 408 (defining expected loss as "the predicted probability that an insured will suffer a loss multiplied by the predicted severity of the loss").

[28] *See id.* at 421 ("Other things equal, insurers strive to charge insureds in accord with expected costs, which equal their expected losses plus a portion of the other costs of providing coverage.").

[29] *See id.* at 413–14.

[30] *See id*.

[31] *See id.* at 414.

Competition drives insurers to identify increasingly granular differences in insureds' expected losses—a practice called, "risk classification."[32] An insurer that develops more precise classifications can profitably "skim" lower-risk customers away from competitors by offering reduced premiums that better reflect those customers' true risk profiles while still covering the insurer's expected payouts.[33] If a competitor fails to adopt comparable

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[32] For a definition of the term "risk classification," see *id.* at 403. In this Article, I use the term "risk classification" to describe the practice of classifying insureds based on differences in their levels of expected loss. Risk classification is necessary for the practices of "risk-based pricing," and "risk-based underwriting," *i.e.,* setting prices that vary depending on risk classifications. *See also* Baker, *supra* note 22, at 376 ("Insurance risk classification is the process of sorting insurance applicants into categories believed to correspond to differences in expected risk. Common examples include sorting life insurance applicants by age, health insurance applicants by health status, workers compensation insurance applicants by type of industry, and property insurance applicants by the nature of the construction of the property to be insured (e.g. wood versus brick).").

[33] For a canonical statement of this competitive dynamic in insurance, see Mark V. Pauly, *Is Cream-Skimming a Problem for the Competitive Medical Market?*, 3 J. HEALTH ECON. 87 (1984). *See also* Logue & Avraham, *supra* note 16, at 211 ("Insurers have an economic incentive to classify or segregate individuals into relatively narrow risk pools. Put differently, it is in the nature of a competitive insurance market that insurance companies will be induced to charge each individual insured a premium that approximates that insured's expected costs. Economists sometimes (and insurance companies frequently) refer to such premiums as 'actuarially fair' premiums. If an insurer fails to price its policies actuarially fairly, other insurers will compete away the first insurer's business."); Baker, *supra* note 22, at 377 ("An insurer that discovers a new way to identify and exclude high risks improves its competitive position in two ways: it lowers its average risk and, assuming the people it rejects go elsewhere, it increases the average risk of its competitors. This competitive power of risk classification produces a classification 'arms race,' in which insurers either maintain their classification edge or face the loss of low risks to the competition and the migration of the high risks to their insurance rolls."); Abraham, *supra* note 1, at 408 ("The more refined (and accurate) an insurer's risk classifications, the more capable it is of "skimming" good risks away from insurers whose classifications are less refined. If other insurers do not respond, either by refining their own classifications or by raising prices and catering mainly to high risks, their "book" of risks will contain a higher mixture of poor risks who are still being charged premiums calculated for average risks."); Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OH. STATE L.J. 835, 860 (1986) ("In the insurance market . . . competition pressed prices to the actuarially fair premium, that is, expected loss.").

Note that empirical evidence shows that consumer inertia—when policyholders stick to their old insurance choice even when they could switch to a better alternative—can hinder such cream-skimming efforts. *See* Benjamin R. Handel, *Adverse Selection and Inertia in Health Insurance Markets: When Nudging Hurts*, 103 AM. ECON. REV. 2643 (2013) (finding that that policyholders tend not to switch to better insurance alternatives); Alma Cohen & Peter Siegelman, *Testing for Adverse Selection in Insurance Markets*, 77 J. RISK AND INS. 39, 65–66 (2010) (discussing reasons why policyholders might fail to adjust their purchasing decisions based on their risk profiles).

classification schemes, its risk pool will deteriorate as lower-risk insureds depart for a better deal elsewhere, forcing it to raise premiums on the insureds that remain in the pool. In extreme cases, this process can trigger a "death spiral" whereby insurers unable to keep pace with evolving underwriting techniques face mounting losses and eventually experience financial collapse.[34] Competition among insurers therefore pushes insurers to charge each insured a premium that approximates her true expected loss.[35] A theoretically perfect risk-based pricing regime—one that charges each insured an amount that *exactly* reflects her expected loss—is sometimes called "actuarially fair" pricing.[36] Of course, risk classification has its own

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[34] *See* Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1254–63 (2004) (reviewing the literature on insurance and evidence for insurance death spirals). Note, there is a subtle distinction between different types of insurance "death spirals." One is the phenomenon, caused by adverse selection, whereby all insurers in a given market will enter a death spiral, as low risks choose to self-insure. *See* Liran Einav & Amy Finkelstein, *Selection in Insurance Markets: Theory and Empirics in Pictures*, 25 J. ECON. PERSPS. 115, 120 (2011). Another is the phenomenon whereby an individual insurer fails to keep up with risk-based underwriting standards and experiences a death spiral as its policyholders leave to other, more competitive, insurers. *See* Baker, *supra* note 22, at 378 (describing this dynamic as "insurer-side adverse selection"); Casper H. de Jong, *Risk Classification and the Balance of Information in Insurance; an Alternative Interpretation of the Evidence*, 24 RISK MGMT. & INS. REV. 445, 457 (2021).

[35] *See* Keith J. Crocker & Arthur Snow, *The Theory Of Risk-Classification*, *in* HANDBOOK OF INSURANCE 281, 281 (Georges Dionne ed., 2nd ed. 2013); J. DAVID CUMMINS ET AL., RISK CLASSIFICATION IN LIFE INSURANCE 30–35 (1983); DeJong, *supra* note 34, at 449 (reviewing the economics literature on this point, and proposing that "[i]n a competitive environment and regulation permitting there will be a tendency towards ever more refined risk classification."); Bertrand Villeneuve, *Competition between Insurers with Superior Information*, 49 EUR. ECON. REV. 321, 323 (2005) ("[T]he common view is that competition should result in full revelation of available information (the consumer's type) and first-best efficiency (full insurance at an actuarially fair rate)."). *See also* David A. Cather, *Cream Skimming: Innovations in Insurance Risk Classification and Adverse Selection*, 21 RISK MGMT. & INS. REV. 335, 335 (2018) (noting instances in the auto insurance context where cream skimming occurred); AM. ACAD. OF ACTUARIES, *On Risk Classification* (Nov. 2011), *available at* https://www.actuary.org/sites/default/files/files/publications/RCWG_RiskMonograph_Nov2011.pdf (noting that the introduction of smoking as a risk factor in US life insurance forced all companies to offer different rates on that basis).

[36] Scholars focusing on this problem have tended to conclude that the term "actuarial fairness" has a question-begging, conclusory quality. *In what sense* are perfectly risk-based prices "fair"? *Why* should we care whether something appears fair from an "actuarial" standpoint? Etc. The general consensus has been that "actuarial fairness" in insurance premium pricing has *no* intrinsic connection to more common notions of fairness, but rather is merely another way of claiming that risk-based prices are efficient. *See, e.g.*, Avraham et al., *supra* note 15, at 203 ("[S]upporters of risk classification have co-opted the term

costs: developing the data and methods of distinguishing different levels of risk can be expensive. Eventually the competitive benefits to an insurer of further improving its classification methods will not exceed these costs.[37] This explains why insurance prices, even in a market with essentially no regulation of underwriting practices, never fully achieve perfect actuarial fairness.[38]

Competition between insurance companies thus explains why they have a tendency continuously to refine their risk classifications. But it does not *justify* the practice. When insurers charge higher premiums to insureds with greater expected losses, they discriminate against those insureds. Discrimination, as a general matter, is not considered just, especially when it turns on characteristics for which individuals are not responsible such as their race, sex, age, or genetics. This suggests that the morally appropriate way to regulate insurance markets is to force a truce between competing insurers by forbidding them from making classifications that we deem morally suspect even if those classifications are actuarially sound. Insurance, on this view, ought to be subject to antidiscrimination rules that require insurers to ignore characteristics like race, sex, age, genetics, and potentially many others.[39]

'actuarially fair' insurance, which has long been used by economists to describe insurance that is priced at expected cost. Despite these complications, [we] summarize the extant normative literature on risk classification and insurance discrimination through the 'efficiency vs. fairness' lens."); Baker, *supra* note 22, at 396 ("The particular moral vision is that of 'actuarial fairness'—-a watered down form of liberalism that privileges individual interests over the common good and that privileges, above all, the interests of insurance institutions organized on its terms."). This Article aims to explain the sense in which actuarially fair prices truly are "fair" according to a reasonable conception of distributive justice.

For an early use of the term, "actuarial fairness," see Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531, 532 (1968).

[37] *See* Abraham, *supra* note 1, at 422.

[38] *See id.* at 423. Note that another reason why insurers cannot feasibly charge perfectly-actuarially-fair rates is because, in reality, they have operating costs which must be recovered out of premiums (or, possibly, from income gained investing they premiums they hold while awaiting claims). Such costs tend to require insurers to charge an amount the actuarially fair rate. *See id.* at 426 (discussing the practice of premium "loading" to allow insurers to cover operating expenses).

[39] *See* Hellman, *supra* note 4, at 402 (1997); Holmes, *supra* note 11, at 563; Stone, *supra* note 11, at 287; Daniels, *supra* note 3, at 497 (1990). In 2011, the Court of Justice of the European Union adopted this perspective when it determined that insurers violated European Union antidiscrimination law when they used gender as a factor to calculate premiums and benefits. Case C-236/09, *Association Beige des Consommateurs Test-Achats v. Conseil des Ministres*, 2 C.M.L.R. 38 (2011). *See* Geert De Baere & Eveline *Goessens*, *Gender Differentiation in Insurance Contracts after the Judgment in Case C-236/09, Association Belge Des Consommaeurs Test-Achats ASBL v. Conseil Des Ministres Case Law*, 18 COLUM. J. EUR. L. 339 (2011) (discussing the *Test-Achats* decision).

Such rules would produce "community rating," the industry term for an insurance market that charges different insureds the same price, despite measurable differences between their levels of expected loss.[40]

Puzzlingly, actual insurance regulation in the United States does not even come close to implementing such rules. Federal law provides only limited protections against insurance discrimination, primarily in the health insurance context,[41] and no federal law prevents insurers from discriminating based on characteristics like race, religion, sex, or national origin.[42] For historical reasons, most of the responsibility of regulating insurers has been delegated to the state governments. One might expect, therefore, to find state insurance laws that have filled this regulatory void.[43] But when three of the nation's leading insurance law scholars conducted a comprehensive survey of state insurance regulations in 2014, they were surprised to find that "affirmative bans of insurer discrimination on the basis of potentially suspect policyholder traits are quite rare."[44] Insurance thus stands in stark contrast

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[40] *See* Pauly, *supra* note 10, at 407–08 (1970) (defining community rating).

[41] The Affordable Care Act and HIPAA prohibit consideration of preexisting conditions and gender. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201, 124 Stat. 119, 154-55 (2010) (codified at 42 U.S.C. § 300gg-3) (prohibiting the exclusion of preexisting conditions); *id*. § 1201 (codified at 42 U.S.C. §300gg-4) (prohibiting discrimination based on health status); *id*. § 2701(a)(1)A) (codified at 42 U.S.C. § 300gg) (omitting gender as a permissible for health insurers to consider). The Genetic Information Nondiscrimination Act bars genetic discrimination in health insurance. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881. In housing, Department of Housing and Urban Development (HUD) regulations and the Fair Housing Act prohibit homeowners insurance practices with disparate racial impacts. 24 C.F.R. § 100.70(d)(4) (implementing Fair Housing Act). For a review of the federal laws prohibiting insurance discrimination, see Avraham et al., *supra* note 15, at 198–99.

[42] *See* Avraham et al., *supra* note 16, at 199 ("Besides [the ACA, HIPAA, GINA, and HUD regulations], there are no federal laws expressly forbidding insurers from engaging in any form of discrimination in the underwriting process.")

[43] Under the McCarran-Ferguson Act, passed in 1945, federal laws that affect insurance are "reverse preempted" by any conflicting state law, unless the federal law expressly provides that it is meant to apply to insurance. *See* 15 U.S.C. § 1012(b) (2012). *See generally* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13 (1993) (providing a history of the McCarran-Ferguson Act).

[44] Avraham et al., *supra* note 16, at 201. *See also id*. at 201 ("[M]ore than half the jurisdictions do not ban the use of race in life, health, and disability insurance, twenty-three states do not ban its use in auto insurance, and seventeen do not ban its use for property/casualty insurance, which includes homeowners insurance. Similar statements can be made about national origin and religion. We also found similar gaps in state laws for other policyholder characteristics: only fifteen states ban the use of sexual orientation in health insurance and only nine states ban the use of gender in auto insurance. As all this suggests,

with other important social activities—such as employment, banking, education, housing, and public accommodation—that are subject to broadly-applicable antidiscrimination rules.[45] The bottom line is that, for the most part, insurers are not legally barred from using even the most suspect characteristics or traits in setting premiums. This is morally troubling because even if relatively few insurers explicitly take those characteristics into account in their underwriting practices, it opens the door to discrimination on bases that are straightforward proxies for suspect characteristics, like zip codes, credit scores, education levels, and marital status.[46]

American insurance markets thus appear to be characterized by a surprising deference to insurers' determinations of which classifications are appropriate.[47] Insurers have, for example, long fought against rules that would forbid them from charging different life and auto insurance rates to men and women—and, in general, they have won.[48] There have been several discrete efforts over the last half-century to push back against particularly controversial underwriting practices—such as when health insurers were discovered to be systematically discriminating against battered women,[49] individuals who might be exposed to HIV,[50] or individuals with pre-existing

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affirmative bans of insurer discrimination on the basis of potentially suspect policyholder traits are quite rare. Thus, only nine states ban the use of age in auto insurance; only six states ban the use of genetic testing in disability insurance; and only two states (Mississippi and Massachusetts, an unlikely pair) ban the use of location or zip code in property/casualty insurance.").

[45] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17; Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634; Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–03; Equal Pay Act of 1963, 29 U.S.C. § 206(d); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k). *See also* U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection for all persons).

[46] *See, e.g.*, Robert K. Yass, *Homeowner's Insurance and Credit Score: A Critical Race Theory Perspective*, 27 CONN. INS. L.J. 286 (2020); Gregory D. Squires & Charis E. Kubrin, *Racial Profiling, Insurance Style*, 24 J. INS. REGUL. 33 (2006) (discussing the use of variables as a proxy for rate in insurance underwriting); Li, *supra* note 3, at 477 (1996) (discussing insurer discrimination during the HIV epidemic against male hairdressers).

[47] Indeed, state laws prohibiting "unfair discrimination" in insurance markets have generally been interpreted to require only that there is an actuarial justification for a discriminatory practice. *See* Schwarcz, supra note 1, at 659.

[48] *See* Avraham et al., *supra* note 16, at 267 (reflecting, at the conclusion of a comprehensive survey of U.S. insurance discrimination rules, on "the stunted development of state insurance law and regulation on the topic").

[49] *See* Hellman, *supra* note 4, at 354–57 (reviewing the outcry against insurers discriminating against battered women).

[50] *See* Daniels, *supra* note 3.

health conditions.[51] Or when homeowners insurance companies faced scrutiny under disparate impact regulations promulgated by the Department of Housing and Urban Development (HUD), which sought to hold them accountable for discriminatory effects in their underwriting practices.[52] But these moments of resistance have been the exception, rather than the norm. This raises a question: Is there any justification for our general unwillingness, as a country, to subject insurance to comprehensive antidiscrimination rules?[53] The argument articulated in Part II, and explored in Parts III & IV, provides such a justification.

B. The Einav-Finkelstein Framework

This Section introduces the reader to a graphical model of insurance markets,[54] upon which Parts II–IV of this Article rely. The model reveals a profound structural difference between insurance markets and markets for traditional goods. That difference is what makes it possible to argue that risk-based insurance prices have an egalitarian distributive effect which can, in turn, justify the general absence of insurance antidiscrimination rules described above. The Einav-Finkelstein Framework (sometimes called the "EF Framework"[55]) caused a "sea change" in the economic study of insurance markets when it was introduced in 2010.[56] So far, however, it has had little impact on the legal academy's discourse on insurance, nor has it been used to analyze the distributive consequences of insurance antidiscrimination rules.[57]

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[51] *See* Sallie Thieme Sanford, *The Struggle to Bury Pre-Existing Condition Consideration*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 405 (2013) (detailing the arguments for and against the ACA's mandate to prohibit insurer discrimination based on preexisting conditions).

[52] *See* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, DISCRIMINATORY EFFECTS FINAL RULE FACT SHEET (2023), https://www.hud.gov/sites/dfiles/FHEO/documents/DE_Final_Rule_Fact_Sheet.pdf.

[53] *Cf.* Baker, *supra* note 22, at 382 (noting the need for an explanation for the "social decision to leave decisions about insurance risk classification in the hands of insurance companies").

[54] *See* Liran Einav & Amy Finkelstein, *Selection in Insurance Markets: Theory and Empirics in Pictures*, 25 J. ECON. PERSPS. 115 (2011) (introducing the EF Framework).

[55] *See* Einav & Finkelstein, supra note 26, 29–30 (acknowledging others who have referred to their framework as the "Einav-Finkelstein Framework" and abbreviating it to the "EF Framework").

[56] Siegelman, *supra* note 24, at 232. *See also* Einav & Finkelstein, *supra* note 26 (reviewing subsequent studies that utilize their framework).

[57] *But see* Michael Geruso, Timothy Layton & Adam Leive, *The Incident of Adverse Selection: Theory and Evidence from Health Insurance Choices* (Nat'l Bureau of Econ.

The EF Framework begins by making several simplifying assumptions about both the supply-side (*i.e.*, insurers) and demand-side (*i.e.*, insureds and prospective insureds) of insurance markets. Though the assumptions are entirely standard in the economic theorizing of insurance markets, because this Article is aimed at lawyers rather than economists, this Section makes those assumptions explicit.

Supply-side assumptions. The EF Framework assumes a marketplace of multiple insurers, indistinguishable from the perspective of prospective insureds, each offering a single, identical, insurance policy form. This means that the only choice prospective policyholders make is whether to purchase coverage;[58] they do not have any reason to choose one insurer over another or one policy over another. The model also assumes that the insurers' only cost of doing business is paying claims, and thus that there are no transaction costs, or operational costs, such as costs for advertising, office space, employee salaries, or processing claims.[59]. Moreover, the model assumes there is perfect competition within the insurance industry, which requires that the market is not dominated by a single monopolist insurer with the power to set prices, and that the insurers earn essentially no profit. The EF Framework leaves open, however, the possibility that government regulators might prohibit insurers from engaging in risk-based pricing. It also allows for the possibility that insurers lack the information needed to distinguish insureds based on their expected losses and so must charge all insureds a flat rate. The EF Framework therefore can be used to analyze the different market dynamics that arise when competition among well-informed insurers drives them to charge risk-based prices, as compared to the scenario in which

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Rsch., Working Paper No. 31435, 2023) (discussing a setting in which "adverse selection combines with income differences in demand for more generous insurance to create an equity-efficiency trade-off: reducing the efficiency losses from adverse selection involves a subsidy that disproportionately benefits higher-income consumers. Such a disparity in the incidence of subsidies used to correct selection was, to our knowledge, previously overlooked.").

[58] As Einav and Finkelstein note, however, "[o]ne can think of the binary choice [represented in this chart] as one between non insurance and a given insurance product, or between lower-coverage and a higher-coverage insurance product." Einav & Finkelstein, *supra* note 26, at 169.

[59] *See id*. at 169–70 ("We also assume that the firm costs are simply the insurance claims that they must pay out; in other words, we abstract from other firm costs, such as marketing their products or processing submitted claims."); Siegelman, *supra* note 24, at 252 n.93 (describing this as "an entirely standard assumption in the economics of insurance."). The EF Framework also assumes insurers are unable to earn revenue by investing the premiums they hold in anticipation of future losses. *See* Einav & Finkelstein, *supra* note 26, at 169. *See also* Priest, *supra* note 12, at 1528 (1987) ("Insurance company profits are the net of premium plus investment returns less losses (payouts and expenses).")

regulation or lack of information requires them to charge a single undifferentiated price.

Demand-side assumptions. As to insureds, the EF Framework assumes that prospective and actual policyholders are indistinguishable except for differences in their level of expected loss. In more technical terms, it assumes that the expected cost of paying an insured's claims is the only source of "heterogeneity" among them, and that the insureds are otherwise "homogeneous" or identical.[60] The model also allows for the assumption that insureds can accurately estimate their individual expected loss, and that they are "risk averse."[61] When individuals are risk averse, they will always be willing to pay more than the amount they expect to lose from a given hazard in order to transfer the risk of that loss to an insurer.[62] Thus, for example, if a homeowner has a 1% chance of suffering a $50,000 loss from fire this year, then she will have $500 of expected losses. Because she is risk-averse, she will be willing to pay at least $500 for insurance coverage that completely protects her from that risk. Her neighbor, who is identical to her in every respect except that he runs a 2% chance of suffering a $50,000 loss and thus has $1,000 in expected losses this year, will be willing to pay at least $1,000 for the same coverage. Again, other individual differences that might be relevant to the amount that someone is willing to pay for insurance in the real world—such as their overall wealth, their ability to understand the terms of their insurance policy, or their trust of insurance companies, their religious beliefs, etc.—are simply assumed away.[63] Again, such simplifications are usual in the field of economics.[64]

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[60] This is a standard assumption not just in insurance economics but in mainstream intermediate microeconomics. *See, e.g.*, HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 215–33 (2006).

[61] Risk aversion means that each dollar that an individual loses from an unlucky loss is worth more to her than previous dollar she lost. Intuitively, this makes sense: for each dollar that one loses, one moves further away from a merely inconvenient loss and closer to a loss that is a catastrophic disruption to one's livelihood. *See id.* at 224–25 (defining risk aversion).

[62] *See* Liran Einav, Amy Finkelstein & Mark R. Cullen, *Estimating Welfare in Insurance Markets Using Variation in Prices*, 125 Q. J. ECON 877, 884 n.5 (2010).

[63] *See* Einav & Finkelstein, *supra* note 26, at 169–70.

[64] It is possible, though beyond the scope of this Article, to evaluate the soundness of the egalitarian argument for risk-based insurance pricing, *see infra* Part II, if one relaxes these assumptions. In particular, one might relax the assumption that all insureds are equally risk-averse, and also the assumption all have equal amounts of wealth. How, and whether, heterogeneity along these dimensions would interfere with the egalitarian argument would depend, among other things, on whether the added heterogeneity is correlated or non-correlated with insureds' levels of expected loss, and if it is correlated, in which direction.

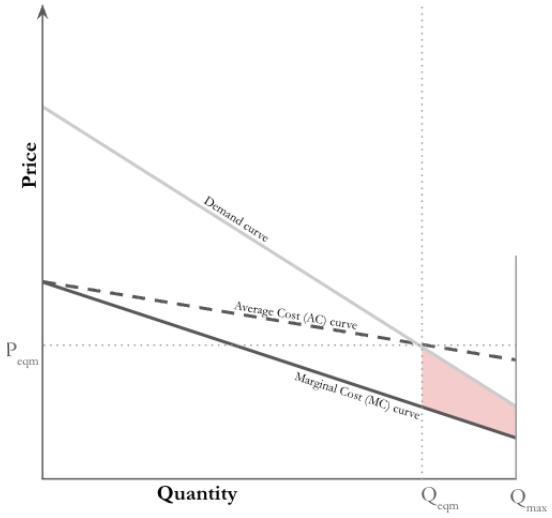


Fig. 1a. The Einav-Finkelstein Framework for Describing Insurance Markets

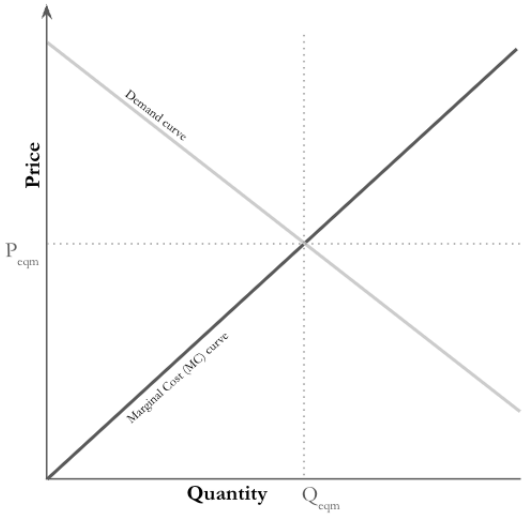


Fig. 1b. "Conventional production" market

Figure 1a presents the EF Framework, a graphical representation of an insurance market characterized by the above set of assumptions. The horizontal axis depicts the "quantity" of insurance that is purchased. Crucially, prospective purchasers of insurance are *sorted* along the horizontal axis according to their amount of expected loss, such that those with the highest expected loss sit on the left side of the horizontal axis. These high-loss consumers are the ones with the highest willingness to pay for insurance, which means that they will be willing to buy even when the price is very high. As the price falls, consumers with successively lower willingness to pay find it appealing to buy.[65] Q_{max} thus represents a market with complete uptake, one where all individuals purchase insurance. Any point to the left of this depicts less than 100% uptake.

The vertical axis depicts the expected cost of providing coverage (to the insurer), as well as the cost of purchasing coverage (to the insured). The Marginal Cost curve represents the expected cost of coverage for each individual insured, or put differently, the amount of losses that would be expected to be covered for each purchaser of insurance. The Marginal Cost slopes downwards because individuals are sorted according to their riskiness (*i.e.*, expected loss) left-to-right; insureds with the higher expected losses are always to the left of insureds with lower expected losses.

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[65] This departs from the traditional exposition of the EF Framework, which sorts insureds along the horizontal axis according to demand, not according to expected loss. The result is the same, however, and may be more intuitive to the non-technical reader.

Each point along the Demand curve represents an individual's maximum willingness to pay for insurance.[66] Because the model assumes that all individuals are risk-averse, the Demand Curve lies above the Marginal Cost curve and slopes downwards.[67] This positive correlation between willingness-to-pay and expected loss is called "adverse selection."[68] It means that those with the highest willingness-to-pay for insurance are also the costliest to insure.

The "Average Cost" curve denotes the average cost of insuring any quantity, Q, of insureds (*i.e.*, all insureds to the left of any given point, Q, on the horizontal axis). Thus, the average cost of insuring only the individual insured on the leftmost side of the horizontal axis (the riskiest person in the pool) is identical to that individual insured's expected loss—which explains why the Marginal Cost and Average Cost curves intersect on the left vertical axis. Similarly, the average cost of insuring all the insureds, Q_{max}, is simply the average of all their expected losses, identified by the point at which the Average Cost curve intersects the right vertical axis.

In a competitive market where all insureds are charged the same premium—perhaps because there is an antidiscrimination rule requiring community rating, or because insurers lack the information they would need to distinguish insureds based on their expected losses—the "equilibrium" price will be point at which the Demand curve intersects the Average Price curve. In Figure 1a, this is denoted by P_{eqm}. This price satisfies the condition that insurers make no profit, *i.e.*, that they charge an amount sufficient to cover the total cost of paying claims, and no more.[69] At price P_{eqm}, all

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[66] *See* Einav & Finkelstein, *supra* note 26, at 169–70 ("The resulting demand curve is standard, and reflects (one minus) the cumulative distribution function of individuals' willingness to pay for the insurance contract.").

[67] More formally, one might say that, for any insured *i* and *j*, if D(i) > D(j) if and only if MC(i) > MC(j). *See id.* at 170–71 ("[i]n many settings, it seems natural to assume that individuals' willingness to pay for insurance is" an increasing function of their expected costs.); Einav & Finkelstein, *supra* note 54, at 124. Intuitively, this means that the person with the lowest expected loss (located on the rightmost side of the horizontal axis) is willing to pay more for coverage than what she expects to lose in a given year, but that the *overall* amount she is willing to pay for coverage is less than the overall amount that the person with a greater expected loss (located to her left on the horizontal axis) is willing to pay. The same is true for any other two insureds located between those two points.

[68] *See* Einav & Finkelstein, *supra* note 26, at 170 (describing "the well-known adverse selection property of insurance markets: the individuals who have the highest willingness to pay for insurance are those with the highest expected costs"); Ronen Avraham, *The Economics of Insurance Law: A Primer*, 19 CONN. INS. L.J. 29, 44 (2012).

[69] Note that the assumed competitiveness of the market, coupled with the other supply-side assumptions, reinforces this price from both above and below: any insurer that attempts

individuals to the left of Q_{eqm} will purchase coverage (because the price of insurance will be less than what they are willing to pay), while individuals to the right of Q_{eqm} will not. This is true even though the latter group would purchase insurance *if they could buy it at a price that reflected their lower level of expected loss*. But so long as the insurer cannot charge them a different amount, it will have no way to serve them while breaking even. This illustrates how adverse selection, coupled with undifferentiated prices, can create economic waste, or "deadweight loss," denoted by the shaded region to the right of Q_{eqm}.[70]

The EF Framework reveals a key structural distinction between insurance markets and traditional product[71] markets as depicted by the canonical supply-demand curves illustrated in Figure 1b.[72] In traditional markets the marginal cost curve slopes *upwards* because it is driven by things like the returns to investments in production technology.[73] When it comes to markets for goods like toaster ovens, cars, or houses, producers will be willing to produce more goods as the per-unit price that consumers are willing to pay for those goods increases. When this price rises, more producers will find it profitable to enter the market or ramp up production, increasing the quantity of goods that are supplied. Crucially, in such markets, the price consumers are willing to pay for goods is determined by factors that are structurally distinct from the determinants of the *costs* of production. The quantity of a good that consumers will buy at a particular price depends, instead, on things like their (perhaps fickle) tastes for that good or their overall level of wealth. Under standard economic models, the Demand and Marginal Cost curves are determined by independent variables, precisely because the consumers and producers are different parties.

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to charge more than P_{eqm} will be undercut by competitors and driven out of the market; any insurer that attempts to charge less than P_{eqm} will have fewer premium dollars coming in than claims dollars going out, and will become insolvent.

[70] *See* Siegelman, *supra* note 24, at 253; Einav & Finkelstein, *supra* note 54, at 117. Moreover, if all insurers are subjected to the same community rating requirement, then the entire market can potentially enter a "death spiral." *See* Siegelman, *supra* note 34, at 1254–58 (reviewing arguments about the possibility of such death spirals); Einav & Finkelstein, *supra* note 54, at 120.

[71] See Einav & Finkelstein, *supra* note 54, at 117 ("The link between the demand and cost curve is arguably the most important distinction of insurance markets (or selection markets more generally) from traditional product markets."). For a lucid and nontechnical discussion of the insightfulness of the EF Framework, see Siegelman, *supra* note 24, at 223–36.

[72] *See, e.g.*, N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 77 (8th ed. 2017) (utilizing the traditional supply/demand graph).

[73] *See id.* at 256–59.

In insurance markets,[74] by contrast, both the Demand curve and the Marginal Cost slope downward because of the structural link between the two curves. As Peter Siegelman has put it, "[In insurance markets,] customers are simultaneously purchasers *and* costs to the seller."[75] The slope of the Marginal Cost curve is driven not by characteristics of the sellers, but by characteristics of the buyers.[76] The amount of a good that the "producer" of insurance (*i.e.*, the insurance company) can sell at a given price is driven by the Average Cost of insuring the individuals who pay that price. In insurance markets characterized by adverse selection, the marginal cost of production *decreases* as more units are produced (*i.e.*, as more policies are sold) because each incremental unit decreases, rather than increases, the overall cost of production.

II. The Egalitarian Argument for Risk-Based Insurance Pricing

This Part proceeds, first, by using the EF Framework to articulate the egalitarian argument for risk-based pricing in more technical terms. It then clarifies the conception of egalitarian distributive justice upon which that argument depends.

A. A Technical Statement of the Argument

Let us return to the EF Framework illustrated in Figure 1a, but change the assumptions slightly. For the moment, we will assume that all individuals are *very* risk-averse, such that the Demand curve shifts upwards enough that it lies everywhere above the Marginal Cost curve. This is illustrated in Figure 2a.[77] Under these conditions, if insurance is community-rated, then the equilibrium price P_{eqm} will be equivalent to the average cost of insuring the entire population of insureds. This is denoted by the point where the Average

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[74] Or "selection" markets more generally. *See supra* note 24.

[75] Siegelman, *supra* note 24, at 253.

[76] *See* Einav & Finkelstein, *supra* note 26 at 171 ("Marginal cost is driven by demand and thus varies with the selection of customers."); Einav & Finkelstein, *supra* note 54, at 117–18 ("The link between the demand and cost curve is arguably the most important distinction of insurance markets . . . from traditional production markets. The shape of the cost curve is driven by the demand-side customer selection. In most other contexts, the demand curve and cost curve are independent objects; demand is determined by preferences and costs by production technology. The distinguishing feature of selection markets is that they demand and cost curves are tightly linked, because the individual's risk type now only affects demand but also directly determines cost."). *See also* Avraham, *supra* note 68, at 33 (making a similar point).

[77] *Cf.* Einav & Finkelstein, *supra* note 54, at 119 (using a similar chart to illustrate the situation where "individuals' risk aversion is high (that is, the demand curve lies well above the MC curve)").

Cost curve intersects the vertical axis on the right. Under these conditions, all individuals will choose to purchase coverage at the equilibrium price regardless of their risk profile, thereby eliminating the deadweight loss caused by adverse selection.

We can now measure the difference between what any given insured is willing to pay for coverage, and the price she is charged. In economics, this difference is called "consumer surplus."[78] It is a common way to measure the benefit a consumer gets—*i.e.*, the increase to her "well-being"—when she pays less for something than she was willing to spend.[79] Figure 2a illustrates the amount of such consumer surplus that two insureds will receive, respectively, under conditions of community rating. An individual insured, *i*, will be willing to pay *D(i)* for coverage, but will only be charged the equilibrium price, P_{eqm}, resulting in a surplus for her of *D(i)* - P_{eqm}. By contrast, a less-risky individual insured, *j*, located towards the rightward side of *i* on the horizontal axis because of his lower level of expected loss, will be willing to pay *D(j)* for coverage, and will be charged the uniform price P_{eqm}, resulting in a surplus for him of *D(j)* - P_{eqm}. The relative size of these two surpluses is illustrated by the solid vertical line segments. As is visible on the Figure 2a, *i*'s surplus exceeds *j*'s surplus in absolute dollar-value terms; the line segment on the left is larger than the line segment on the right.

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[78] For a definition and explanation of the concept of consumer surplus, see HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 247–58 (7th ed. 2006); MANKIW, *supra* note 72, at 134–39. *See also* ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 78, 241, 272 (1890) (for an early use of the term "surplus"). For further discussion of the ability of consumer surplus to serve as a proxy for well-being, see *infra* Section II.B.

[79] For example, if you are willing to pay ten dollars for a movie ticket because you really want to see the film, but the ticket costs only seven dollars, you walk away with three dollars' worth of extra value. This difference is what economists call consumer surplus.

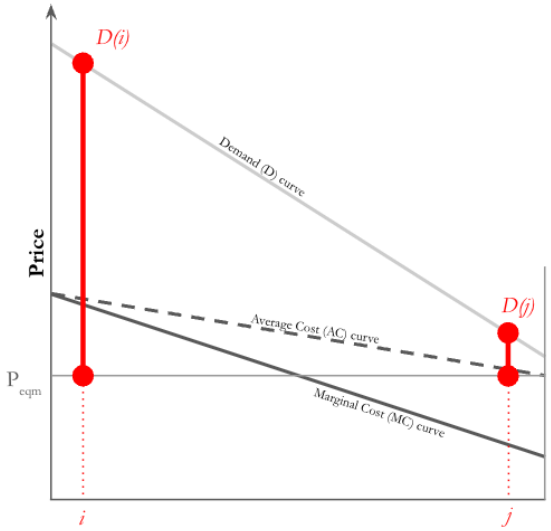


Fig. 2a. Distribution of Consumer Surplus with Community Rating

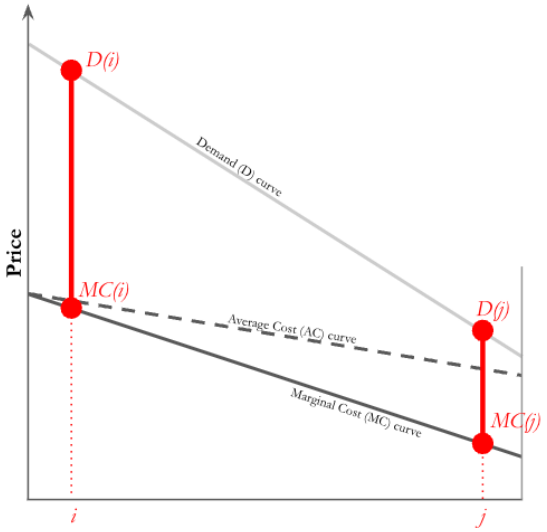


Fig. 2b. Distribution of Consumer Surplus with Perfect Risk Classification

Figure 2b illustrates the scenario in which, while keeping costs and demand the same, the requirement that all insurers charge the same price is eliminated. Under such circumstances, so long as insurers can accurately estimate each insured's level of expected loss, risk-based prices will be charged in equilibrium. And given our assumption of no transaction or loading costs, market competition will then force those risk-based prices to become actuarially fair prices, meaning that each insured will be charged a price *exactly* equivalent to her expected loss.[80] Under these conditions, insured *i* is charged a price equivalent to the cost of providing her coverage, *MC(i)*, which is equal to her expected loss, resulting in a surplus to her of *D(i) - MC(i)*. Insured *j*, by the same logic, receives a surplus of *D(j) - MC(j)*. As Figure 2b shows, although *i*'s surplus is still greater than *j*'s, the difference between them is smaller than it was under community rating. That is, the difference between the size of the two line segments in Figure 2b under individualized risk-based pricing is smaller than the difference between them in Figure 2a under community rating. This narrowing of the cross-individual differences in consumer surplus is a general result that does not depend on any other assumptions not specified above.

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[80] The competitive dynamics of such a market will support this price both from above and below. Any seller that tries to charge more than the market-clearing price will be undercut by competitors; any insurer that attempts to charge less than actuarially-fair prices will become insolvent.

The egalitarian argument for risk-based pricing thus can be formulated as follows: *under a standard set of assumptions, the distribution of consumer surplus between two insureds will always be more equal under risk-based pricing than under community rating.*[81] Characterizing this as an "egalitarian" argument for risk-based pricing requires a more clearly-specified egalitarian theory of distributive justice as applied to the division of consumer surplus in insurance markets. Section II.B provides such a theory.

Before proceeding, however, it is important to note that the above statement is not the same as the banal insight that the most-risky insureds are charged less, and the least-risky are charged more, when their costs are pooled and the members of the pool are charged a flat amount. This is instead a point about the relative distribution of consumer surplus produced through different methods of pricing insurance. Considering the distributive consequences of insurance from this perspective requires considering not just of the *burdens* of providing insurance coverage (*i.e.*, the distribution of the costs of providing coverage) but also the *benefits* of coverage (*i.e.*, the difference between the cost of coverage and the amount that an insured would be willing to pay for it, given all the other things on which she might spend her money). By considering the benefits and burdens together, it is possible to see why risk-based pricing should be justifiable not only to the low-risk insured (who selfishly want to pay less, regardless of the rationale), but also to the high-risk insured, on the ground that risk-based pricing treats her more equally than does community rating.

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[81] Stated more formally, for any two insureds *i* and *j*, where D(i) > D(j), the following inequality will be true: $(D(i) - P_{eqm}) - (D(j) - P_{eqm}) > (D(i) - MC(i)) - (D(j) - MC(j))$. The left side of this inequality measures the difference in consumer surplus enjoyed by the two different insureds under community rating, whereas the right side of the inequality measures the difference in consumer surplus enjoyed under risk-based pricing. The inequality reduces to MC(i) > MC(j), which is true by assumption if D(*i*) > D(*j*).

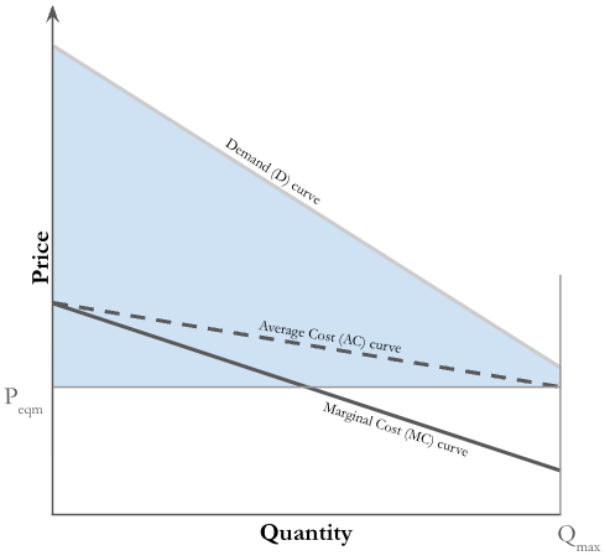


Fig. 3a. Distribution of Consumer Surplus with Community Rating



Fig. 3b. Distribution of Consumer Surplus with Perfect Risk Classification

It is also important to emphasize that this argument for risk-based pricing is not grounded in the pursuit of efficiency. The most common such argument, the one motivated by the adverse selection concern, recommends risk-based pricing over community rating on the belief that the latter will create deadweight loss.[82] But because we began this Part by assuming that all insureds are very risk averse, the move from community rating to risk-based pricing does not eliminate any deadweight loss. The shaded areas in Figures 3a and 3b, which denote the sum of all the consumer surplus enjoyed by the entire population of insureds, are equal in size.[83] They are, however, differently shaped, which shows that the different pricing regimes distribute the surplus "pie" differently. The argument outlined above says, in geometrical terms, that the shaded area in Figures 3b will always be "less wedge shaped" than the shaded area in Figures 3a, and thus a more equal distribution. That difference in shape is the core of the egalitarian argument for risk-based insurance pricing.[84]

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[82] *See supra* note 70 and accompanying text (discussing deadweight loss caused by adverse selection); *infra* Section III.A (discussing the adverse selection argument in favor of risk-based insurance pricing).

[83] The equivalence of the size of the two shaded areas can be demonstrated geometrically, straightforwardly.

[84] To be clear, if the assumption about extreme risk-aversion were relaxed, the same statement about equality of distribution would still be true but risk-based pricing would also

B. Defining a Conception of "Egalitarian" Distributive Justice

Characterizing this distribution of consumer surplus as "egalitarian" requires a more clearly-specified conception of egalitarianism. This Section articulates such a conception by specifying its core assumptions.

First, one must accept that it is possible not only to measure individual well-being,[85] but also to make *interpersonal comparisons* of *differences* in individual well-being.[86] This assumption is not unusual; it is commonplace in much policy work (especially cost-benefit-analysis) which attempts to analyze the well-being of individuals in society, and to recommend policies that both maximize well-being and distribute it fairly. It is also consonant with many of our most basic moral intuitions and common sense.[87] Engaging in a process of "reflective equilibrium"[88] would therefore seem to require accepting that interpersonal comparisons of differences in well-being are not only possible, but ethically necessary. Nonetheless, some have argued that interpersonal comparisons of welfare are impossible to measure or are conceptual nonsense.[89] The egalitarian argument for risk-based pricing fails

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eliminate deadweight loss. This would produce a separate argument in favor of risk-based pricing.

[85] For a discussion of different conceptions of well-being, *see* MATTHEW D. ADLER, MEASURING SOCIAL WELFARE 10–11 (2019) (defining "*individual* well-being" as "how well an individual's life goes" and discussing four ways of interpreting what this means).

[86] *See* Logue & Avraham, *supra* note 16, at 160–61 (reviewing economists and welfare scholars for whom "the ultimate target for a redistribution-minded policymaker [is] differences in overall well-being"). *See also* ADLER, *supra* note 85, at 10–15 (specifying four different types of well-being comparisons).

[87] *See* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 41–42 (2006) ("[A] little reflection will show that the orthodox view [that Pareto-noncomparable outcomes cannot be ranked with respect to overall welfare] is deeply counterintuitive. In one world, Felix feels fine but thousands die painful, premature deaths; in another world, the deaths and pain are averted but Felix has a headache. In one world, many workers lose their jobs, and suffer depression, family strife, or other ill effects of protracted unemployment; in another world, the unemployment doesn't occur but a small number of top executives can now only afford to buy BMWs rather than Lamborghinis. Although the two worlds in these scenarios are Pareto-noncomparable, the second world in each scenario is (intuitively) much better for overall welfare than the first."); *id*. at 42 ("The orthodox economic view that denies the possibility of interpersonal welfare comparisons thus leads to an 'error theory' of ordinary practice. It means seeing our pervasive practices, individual and governmental, of weighing the welfare gains to some persons against the welfare losses to others, as mistaken.").

[88] *See supra* note 21.

[89] *See* ADLER & POSNER, *supra* note 87, at 40 ("For at least seventy years . . . the orthodox view in welfare economics has been that overall welfare is a meaningless notion [when comparing two outcomes that are 'Pareto-noncomparable'"); LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE (1932) (making the same point).

if one takes this position, as it precludes any discussion of whether insurance markets distribute well-being equally or equitably. This same logic would undermine many arguments supporting broader egalitarian redistribution, too.[90]

Second, one must accept that interpersonal differences in consumer surplus are a plausible proxy for interpersonal differences in individual well-being.[91] So long as egalitarianism aims for something like an equal or fair distribution of individual well-being, it will be necessary to decide upon at least one such proxy, because well-being is not directly observable.[92] Microeconomics tends to focus on income as a proxy for well-being.[93] The egalitarian argument for risk-based pricing makes a similar move, by treating

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[90] A welfarist approach focused purely on Pareto efficiency can be understood as a form of egalitarianism. Under such a framework, a reallocation of resources is only considered an improvement if it makes at least one person better-off while making nobody worse-off. This does not require comparisons between different people's gains and losses in wellbeing. It is also extremely conservative because, for example, it changes that would produce large benefits to the disadvantaged at the cost of small individual losses to advantaged. *Cf.* DANIEL MARKOVITS & GABRIEL RAUTERBERG, CONTRACTS: LAW, THEORY, AND PRACTICE 21 n.6 (2018) ("Pareto efficiency has no conception of treating different people's flourishing as equally good, because it makes no interpersonal comparisons of flourishing at all.").

[91] This is a common assumption in the field of microeconomics, especially in the field of Industrial Organization. *See, e.g.*, MANKIW, *supra* note 72, at 138 ("Consumer surplus . . . measures the benefit that buyers receive from a good as the buyers themselves perceive it. Thus, consumer surplus is a good measure of economic well-being if policymakers want to satisfy the preferences of buyers."); Edward E. Schlee, *Expected Consumer's Surplus as an Approximate Welfare Measure*, 34 ECON. THEORY 127, 127 (2008) ("Expected consumer's surplus remains a popular measure of consumer welfare in applied microeconomic models with uncertainty."); R.D. Willig, *Consumer's Surplus Without Apology*. 66 AM. ECON. REV. 589, 589–597 (1976) (arguing that the change in consumer's surplus often approximates the willingness to pay for a price change). The assumption is not without critics, however. *See, e.g.*, Mark Glick & Gabriel Lozada, *The Erroneous Foundations of Law and Economics* 84 (Inst. for New Econ. Thinking, Working Paper No. 149, 2021), https://papers-ssrn-com.ezproxy.law.uconn.edu/abstract=3812839 (arguing that consumer surplus is "not a credible measure of welfare").

[92] *See* Logue & Avraham, *supra* note 16, at 204; Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1020–22 (2001); ADLER & POSNER, *supra* note 87, at 160.

[93] For discussions of this tendency to use income as a proxy for well-being, *see* Logue & Avraham, *supra* note 16, 160–61; Daniel N. Shaviro, *Inequality, Wealth, and Endowment Symposium on Wealth Taxes—Part II: Commentary*, 53 TAX L. REV. 397 (1999). *See also, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 28–29 n.25 (2009) (collapsing the distinction between welfare and income "for convenience").

consumer surplus dollars as income, and then assuming that each new dollar of income increases one person's well-being as much as it does another's.[94]

Third, the egalitarian argument for risk-based pricing assumes that a system that aims *narrowly* to equalize the distribution of well-being produced by a cooperative activity (*e.g.*, insurance) among the participants in that activity, and that ignores everything else, can be characterized as "egalitarian." Section IV addresses several objections that one might make to this assumption, most of which are grounded in an alternative conception of egalitarianism that is "wider" in scope in the sense that it requires considering the welfare of bystanders to cooperative interactions (*i.e.*, those who do not directly participate in the cooperative enterprise[95]), and "deeper" in the sense that it demands that all individuals accept redistributions that would benefit

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[94] For discussion of such a move, see Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULLETIN 455 (2018); Yoon-Ho Alex Lee, *The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus*, 57 ARIZ. L. REV. 85 (2015); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 983 (1991).

This assumption has some interesting and perhaps surprising implications if one also adopts the separate assumption that individuals experience diminishing marginal utility from income and wealth. *See* Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 915–19 (2010) (defining declining marginal utility); Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1395–98 (2004). Under such circumstances, the amounts of well-being that different individuals will gain from additional surplus dollars will be influenced by differences in their other sources of wealth. *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis Forty-Third Annual Administrative Law Symposium: A Happiness Approach to Cost-Benefit Analysis*, 62 DUKE L.J. 1603 (2012) ("Because of the diminishing marginal value of money, two individuals with differing levels of personal wealth can obtain vastly different amounts of welfare from the same gain (or loss) of income."); Robert H. Frank, *The Frame of Reference as a Public Good*, 107 ECON. J. 1832, 1834–35 (1997) (discussing variation in the significance of income's role in satisfaction across income levels). Under some circumstances, such as when the highest-risk insureds are also the most wealthy (*i.e.*, where expected loss correlates positively with wealth), the egalitarian argument for risk-based pricing is weakened. A full exploration of the implications of wealth heterogeneity is beyond the scope of this Article. For the moment, however, it is possible avoid complicating the mapping of surplus dollars onto well-being by recalling the assumption of the EF Framework that, aside from differences in expected loss, all individuals are otherwise identical, and thus that there is no wealth inequality among insureds. *See supra* note 63 and accompanying text.

[95] *But see* Joseph Heath, *On the Scope of Egalitarian Justice*, 1 LES ATELIERS DE L'ÉTHIQUE 21, 29–31 (2006) (arguing that Gauthier premises his conception of cooperation on a "Lockean proviso" that amounts to a "strict deontic prohibition against deployment of any 'negative' talents," which ignores the possibility that individuals who are not making an active contribution to a cooperative enterprise might are still contributing by "not making a negative contribution," which suggests that "society" as a whole ought to be treated as a system of cooperation and one that guarantees a basic minimum for all persons).

others but make them worse-off (*i.e.*, Pareto-inferior changes).[96] At the moment, however, it should be sufficient to point out that this "narrow" conception of egalitarianism is plausible as a matter of both political theory and political practice.

The "narrow" conception of egalitarianism that motivates the argument for risk-based pricing is grounded in the influential strain of contemporary "social contract" theory that includes the work of John Rawls[97] and David Gauthier.[98] Such theories take the central question of distributive justice to be how to divide up the benefits and burdens of cooperative interactions. In such interactions, there are multiple ways to divide up the surplus they create, including dramatically unequal distributions that would nonetheless make all participants better-off than they would have been on their own. The question thus becomes, "What constitutes a *fair* distribution of cooperative surplus?"[99] Social contract theorists argue that cooperative surplus ought to be distributed according to principles of justice that individuals would voluntarily choose before they enter the cooperative enterprise.[100] This perspective has some appealing features. Because it requires individuals to consent to any principled method of distributing surplus, it allows one to argue that such principles are just, even if they are not efficient. And because it focuses narrowly on dividing surplus produced by cooperative enterprises—*i.e.*, activities that produce gains which no single individual could achieve on her own—it can justify requiring an individual to split the fruits of cooperation with her fellow cooperators, rather than claim all of them for herself.[101] It

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[96] *See, e.g.* GERALD A. COHEN, RESCUING JUSTICE AND EQUALITY 7 (2008).

[97] *See* JOHN RAWLS, A THEORY OF JUSTICE: ORIGINAL EDITION 87 (2005). *See also* Heath, *supra* note 95, at 23–24 (discussing Rawls as holding the "narrow egalitarian" view).

[98] *See* DAVID GAUTHIER, MORALS BY AGREEMENT (1986); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 75–76 (2001); Heath, *supra* note 95, at 22–31 (lucidly making the distinction between "narrow" and "wide" scope egalitarianism).

[99] *Cf.* RAWLS, *supra* note 97, at 4 (2005) ("[A]lthough a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as by an identity of interests. There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts. There is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share.").

[100] *See* JOSEPH HEATH, MORALITY, COMPETITION, AND THE FIRM: THE MARKET FAILURES APPROACH TO BUSINESS ETHICS 145 (2014) (reviewing social contract theories). *See, e.g.*, GAUTHIER, *supra* note 98 at 141 (presenting such a social contract theory).

[101] *Cf.* HEATH, *supra* note 100, at 145 ("[T]he fact that each individual must be induced to agree is what accounts for the deontological flavor of these principles (*i.e.*, the fact that they do not always recommend maximizing aggregate welfare); while the fact that the interaction is cooperative explains why individuals might nevertheless be willing to accept something less than their maximal claim."); RAWLS, *supra* note 97, at 178–79.

suggests the possibility of principles of distributive justice that are broadly acceptable and thus broadly applicable, even in pluralist societies where individuals are motivated by self-interest rather than altruism.

This narrow conception of egalitarianism has practical benefits, too. By focusing solely on the distribution of surplus created between cooperating individuals, rather than on the distribution of resources in society as a whole, it satisfies a practical need to evaluate the fairness of specific types of activities, like insurance, without simultaneously evaluating the fairness of every other activity as well.[102] If, alternatively, it were only possible to evaluate the fairness of a specific cooperative enterprise—such as a commercial merger, a family dynamic, or a local zoning board vote—by first evaluating the fairness of society writ large, it would be difficult ever to gain confidence that one had a "complete enough picture" to evaluate the justice of any interaction.[103] To be clear, by applying its analysis to individual interactions rather than to society broadly, this conception of egalitarianism departs from Rawls, who applied his "political" conception of justice to the "basic structure" of society and not the associations and interactions that characterize "everyday life".[104] For this reason, Rawls's theory fails to produce helpful guidance on how to structure everyday interactions that we nonetheless tend to subject to a requirement of fairness. Departing from Rawls in this way has the benefit of producing principles of justice that apply to individual interactions, but also the cost of ignoring the possibility that such individual interactions might fail to produce a more just society as a whole.[105]

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[102] *See* HEATH, *supra* note 100, at 147 ("[I]ndividuals . . . expect their particular interactions and private associations to be fair, above and beyond whatever contribution the outcome may make to the fairness of the entire society (so that, for instance, even in the context of an unjust society, particular institutions or domains of interaction might nevertheless be just).").

[103] *See* Heath, *supra* note 95, at 35 ("Wide-scope egalitarianism runs contrary to the widely held intuition that it is possible for a particular group of individuals, dealing with a particular problem, to resolve it in a way that respects the principle of equality, independent of how every other domain of society is organized.").

[104] *See* RAWLS, *supra* note 97, 87–88 (2005) ("It is a mistake to focus attention on the varying relative positions of individuals and to require that every change, considered as a single transaction viewed in isolation, be in itself just. It is the arrangement of the basic structure which is to be judged, and judged from a general point of view."); John Rawls, *Idea of Public Reason Revisited, The*, 64 U. CHI. L. REV. 765, 788–90 (1997) (discussing the applicability of principles of justice to private associations like the family, arguing that some conception of justice applies to such associations, but not a "political" conception); John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159, 159 (1977).

[105] A thorough justification for applying this "narrow" conception of egalitarianism to

Fourth, one must accept that the proper way to distribute the well-being produced by cooperative enterprises is to spread it *equally*. That is, each participant in a cooperative venture ought to get the same boost to their well-being as every other, rather than a pro rata share based on some other metric like proportional contribution.[106] The moral plausibility of this assumption is supported by experimental psychology and economics that utilize the "ultimatum game."[107] In the game, two players divide a sum of money. One player, the proposer, offers a portion of the total to the other player, the responder. If the responder accepts the offer, both players receive their respective shares as proposed. If the responder rejects the offer, neither player receives anything. Traditional economic conceptions of individual rationality suggest the responder should always accept a non-zero offer.[108] Empirical studies show, however, that responders frequently reject offers perceived as unfair. In the United States, participants tend to opt for a 50/50 split of the money.[109] This suggests a shared preference for an even division of

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questions of distribution that arise at a level below that of the "basic structure" of society is beyond the scope of this Article. It is sufficient, for present purposes, to show that there is an intuitive need for *some* principled method of distributing social surplus created by insurance, and that the narrow conception of egalitarian distributive justice seems to be a political plausible—though perhaps not theoretically perfect—candidate. It is not difficult to imagine why a "contractualist" theory of distributive justice might be particularly applicable to insurance, even though it is obviously poorly suited to other associations and interactions like the family. *See*, Rawls, *supra* note 104, at 788–90 (discussing the inappropriateness of applying a "political" conception of justice to the family). The institution of insurance, especially private insurance, is the social interaction that perhaps most closely resembles the specifications of the original bargaining positions that animate contractualist theories like Rawls's. It would therefore seem that if there is any particular type of "micro-level" cooperative interaction that is a decent fit contractarian theories of distributive justice, it would be insurance.

[106] *Cf.* GAUTHIER, *supra* note 98, at 153 ("The co-operative surplus is in the fullest sense the joint product of the co-operators No one may reasonably or fairly expect more, and no one should reasonably expect or fairly accept less, than an equal share of the co-operative surplus, where equal shares may be determined."). Note that Gauthier's method of dividing surplus is not strictly equally, but rather according to his more complicated rule of "minimax relative concession." *See* GAUTHIER, *supra* note 98, at 113–56. *See also* Russell Hardin, *Bargaining for Justice*, 5 SOCL PHIL. & POL'Y 65 (1988) (discussing Gauthier's theory).

[107] *See* Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982) (the first ultimatum game experiment).

[108] *See* Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSPS. 195, 196 (1988).

[109] *See, e.g.*, Alvin E. Roth, Vesna Prasnikar, Masahiro Okuno-Fujiwara & Shmuel Zamir, *Bargaining and Market Behavior in Jerusalem, Ljubljana, Pittsburgh, and Tokyo: An Experimental Study*, 81 AM. ECON. REV. 1068, 1082 (1991) ("In the United States . . . the modal proposal is 500 [out of 1000.]").

cooperative surplus—which, as discussed above, is a plausible proxy for well-being. While alternative frameworks may provide more nuanced mechanisms for division of cooperative surplus,[110] the simplicity and intuitive appeal of equal division gives it broad moral plausibility.

In reviewing these four assumptions, it is important to recall the goal of this Article. It aims not to argue that egalitarians of kinds (and there are many[111]) must accept risk-based insurance pricing. Rather, it aims to articulate the logic of an argument that successfully reconciles a *plausible* and *reasonable* conception of egalitarianism with risk-based insurance pricing, and to make the strengths and weaknesses of that argument clear. The persuasive force of the argument necessarily turns on whether its assumptions are acceptable, given one's prior moral intuitions. This Article argues that the assumptions meet this standard, at least for many Americans, and therefore that there is a forceful egalitarian argument for risk-based pricing in insurance.

III. The Power of the Egalitarian Argument

This Part begins by focusing on the classic efficiency-based argument most-commonly made in favor of risk-based insurance prices—*i.e.*, that adverse selection will cause deadweight loss unless insurers are allowed to classify risks as they see fit.[112] It suggests that these efficiency concerns are not as serious as they seem, and thus that it may well be possible to subject insurance markets to more rigorous antidiscrimination regulation without sacrificing efficiency.

If this is the case, then what can justify our collective decision to allow insurers to classify risks with so little oversight?[113] Three answers have been offered in response to this question[114]: (i) that departures from risk-based pricing are both inefficient and morally objectionable when insureds have control over the relevant risk; (ii) that risk-based pricing is justified by the principle that everybody ought to "carry their own weight"; (iii) and that

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[110] David Gauthier's minimax relative concession theory is a prime example. *See* GAUTHIER, *supra* note 98, at 113–56.

[111] *See* Richard Arneson, *Egalitarianism*, STAN. ENCYC. PHIL. (Edward N. Zalta ed., Apr. 24, 2013), https://plato.stanford.edu/archives/sum2013/entries/egalitarianism/ (reviewing the different conceptions of egalitarianism).

[112] *See supra* note 70 and accompanying text.

[113] *See supra* Section I.A.

[114] *Cf.* Baker, *supra* note 26, at 383 ("The leading moral justifications for risk classification are the following: 1) without risk classification, low risks are unfairly forced to subsidize high risks; 2) risk classification promotes socially beneficial efforts to prevent loss; and 3) risk classification promotes individual responsibility.").

libertarian political theory justifies the practice. Sections III.B–D review each of those arguments and show that all have limitations that prevent them from justifying the degree of risk classification that is generally permitted in the United States. It then shows how the egalitarian argument for risk-based pricing succeeds where the others fail. The goal of this Part is therefore to show that the most powerful argument in favor of risk classification is the egalitarian argument. It is the only available justification for the conspicuous lack of antidiscrimination laws in America, today.

A. The Adverse-Selection Arguments Prove Too Little

As described above,[115] where adverse selection is present, it is often argued that limiting insurers' ability to classify risks will create deadweight loss and perhaps even lead to a total collapse of the insurance market.[116] Figure 1b (reproduced below as Figure 4a) illustrates this concern.

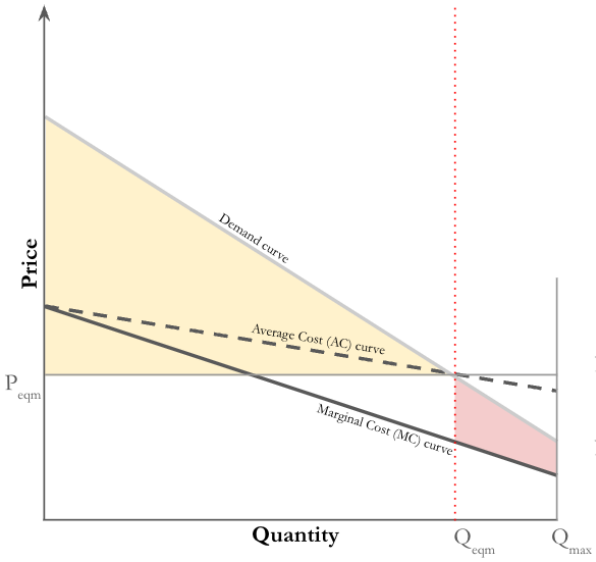


Fig. 4a. Insurance market with deadweight loss from adverse selection

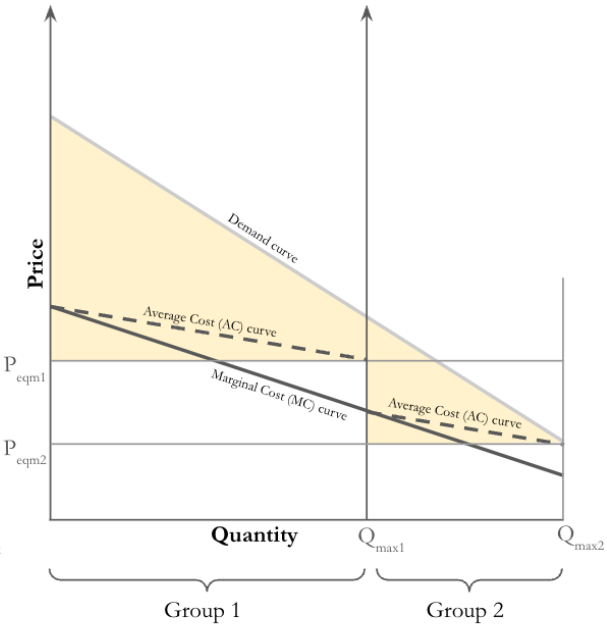


Fig. 4b. Insurance market with rough classifications but no deadweight loss

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[115] *See* supra note 70 and accompanying text.

[116] *See, e.g.*, Priest, *supra* note 12, at 1541 ("Adverse selection is a problem central to every insurance context, and it dominates the insurance function."). *See also* Cohen & Siegelman, *supra* note 33, 42 (reviewing arguments made by economists, regulators, courts, and legal scholars, expressing concern about adverse selection); Siegelman, *supra* note 34, at 1226–34 (same).

The EF Framework, however, elegantly demonstrates that inefficiencies caused by adverse selection can be eliminated with only *rough* risk classifications—*i.e.*, without achieving anything near actuarially-fair prices.[117] Figure 4b shows an insurance market where the insurer is able to separate insureds into two groups based on their levels of expected loss. Charging the relevant community rates within these two groups eliminates deadweight loss as well as the possibility of death spirals. It is, however, still a far cry from actuarially-fair pricing.

This means that the traditional efficiency concerns related to adverse selection can motivate an argument in favor of crude risk classifications, but not an argument in favor of actuarially fair pricing. There may, moreover, be a relatively large set of rough classification schemes available in any given insurance market that would meet this criterion.[118] Thus, for example, it might be the case that the efficiency concerns arising out of the possibility of adverse selection in the auto insurance market could be eliminated merely by making risk classifications based simply on the color of the insured's car, the gender of the driver, the driver's past record, or some other crude distinction. And although competition will drive all insurers towards a single classification scheme that is within this zone,[119] it is difficult to say more about where within that zone the market will land. The economic arguments for actuarial fairness therefore cannot provide normative guidance as to (a) how to select from among multiple classification schemes, all of which address the economic concerns but that separate individuals into different groups, or (b) why to continue pushing towards increasingly-accurate classification schemes, once the efficiency concerns have been addressed.

It appears, moreover, that most of the debate about the propriety and necessity of risk-based pricing takes place when the actual risk classification schemes at issue are within the set of schemes that do not create deadweight loss. This is evidenced by the fact that it is quite difficult it is to observe deadweight loss and death spirals in the real world.[120] Various kinds of

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[117] *Cf.* Baker, *supra* note 26, at 380–81 ("Faced with the choice between no insurance and expensive insurance, many or even most low risk applicants would not change their purchasing decision because of the higher price.").

[118] *See* Avraham et al., *supra* note 15, at 10–15; HEATH, *supra* note 100, at 370; Wortham, *supra* note 33, at 861. Note that this argument still assumes that individuals are reasonably risk averse, such that there is a relatively large "gap" between the Demand curve and the Marginal Cost curve. As risk-aversion decreases, and the gap between those two curves narrows, the classification schemes will need to approach perfectly-actuarially-fair classifications, in order to prevent efficiency losses.

[119] *See supra* note 33 and accompanying text.

[120] *See* Cohen & Siegelman, *supra* note 33, at 77-78 (finding mixed evidence of adverse selection, and finding very little documented evidence of insurance death spirals).

"frictions" also may have the effect of making adverse selection less likely to cause deadweight loss than traditional economic theory would suggest.[121]

If crude risk classifications, in conjunction with consumer inertia, are likely to be successful in preventing most of the economic downsides of adverse selection, then the theory of adverse selection fails to justify anything more than a minimal amount of risk classification. Put differently, it fails to provide an argument against more rigorous insurance antidiscrimination rules than are present in US insurance markets, today.

B. Arguments Based On The Insured's Control Beg the Question

Perhaps the next-most-commonly made argument for risk-based insurance pricing is based on the concern that community rating is improper when the underlying risk is within the insured's control. There is an efficiency-based and a fairness-based version of this argument.

The efficiency-based version focuses on the fact that classifications based on variables that are within an insured's control[122] can incentivize insureds to invest in efficient amounts of loss-prevention.[123] Thus, for example, where homeowners' insurance premiums vary based on exposure to climate risks like hurricanes or wildfires, there will be less demand for homes in areas

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[121] *See* Johannes Spinnewijn, *Heterogeneity, Demand for Insurance, and Adverse Selection*, 9 AM. ECON. J.: Econ. Pol'y 308, 308–09 (2017) (reviewing various frictions that provide an explanation for empirical studies that show an individual's risk type often plays only a limited role in explaining her demand for insurance, limited cognitive ability, biased risk perceptions, inertia, and information frictions); Benjamin R. Handel, *Adverse Selection and Inertia in Health Insurance Markets*: When Nudging Hurts, 103 AM. ECON. REV. 2643 (2013); Justin Sydnor, *(Over)Insuring Modest Risks*, 2 American Economic Journal: Applied Economics 177 (2010). *See also* Mark V. Pauly, *Is Cream-Skimming a Problem for the Competitive Medical Market?*, 3 J. HEALTH ECON. 87, 93 (1984) ("One of the things that theory [suggests] is that only a little bit of adverse selection may cause market equilibrium to unravel. But then only a little bit of consumer inertia is needed to reinstate it.").

[122] *See* Abraham, *supra* note 1, at 413 ("In this context, 'control' encompasses not only the ability to conduct activities more safely, but also the capacity to vary levels of activity or production to reduce or prevent losses.").

[123] *See* Baker, *supra* note 26, at 390 (listing "many instances in which risk classification is justified on the grounds of loss prevention"); *see also* Abraham, *supra* note 1, at 422 ("Because insurance is priced in accord with expected cost, insureds have the incentive to compare the cost of protecting against risk through insurance with the cost of reducing risk through loss prevention. Efficient classification discourages insureds from purchasing insurance when they can more cheaply protect against risk by investing in loss prevention. In contrast, inefficient classification may produce suboptimal loss prevention incentives. When coverage is priced below expected cost, for example, insureds may not take safety precautions that would otherwise be worthwhile. In this situation, they can obtain equivalent protection against risk by purchasing insurance at a lesser cost than the precautions.").

exposed to those risks.[124] Where insurance premiums are not permitted to vary on such bases, insureds will have less incentive to prevent and avoid loss. This is referred to as "moral hazard," and is understood to result in inefficiently low levels of loss-prevention.[125] By allowing insureds to "externalize" the cost of their risky behavior onto the pool, insurance that fails to classify risks appropriately causes a net increase in the aggregate amount of losses. This, it is often argued, is wasteful and inefficient.[126]

The fairness-based version of this argument focuses on the proposition that it is fair to allow insurers to charge different rates based on characteristics that are within an individuals' control.[127] The central insight of luck-egalitarianism, often credited to Ronald Dworkin[128] and Richard Arneson,[129] is that any theory of distributive justice with respect for individual autonomy must distinguish between inequality that results from individuals' voluntary choices and inequality that arises from mere chance.[130] On this view, it is fair and just to enact policies that equalize the latter, but not the former.[131] This suggests that, while it would be unjust to allow insurers to charge more based on characteristics like genetics, it is entirely proper to raise prices on insureds

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[124] *See* Kenneth S. Abraham, *About the California Fires*, HARV. L. REV. (Jan. 27, 2025), https://harvardlawreview.org/blog/2025/01/about-the-california-fires/; HOWARD C. KUNREUTHER & ERWANN MICHEL-KERJAN, AT WAR WITH THE WEATHER: MANAGING LARGE-SCALE RISKS IN A NEW ERA OF CATASTROPHES 266 (2009).

[125] *See* Avraham, *supra* note 68, at 66–68; Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 237–39 (1996).

[126] *See, e.g.*, Avraham et al., *supra* note 16, at 208 ("Legal restrictions on insurers' ability to classify risks can result in moral hazard, causing policyholders to take less than socially-optimal levels of care.").

[127] *See, e.g.*, *id*. at 215 ("Although the strongest version of the social solidarity norm would prohibit all forms of risk classification, many proponents of the social solidarity view will still permit classification when policyholders have control over the relevant characteristic."); Abraham, *supra* note 1, at 437 (discussing the "control-causality" objection to certain types of classifications).

[128] *See* Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB, AFFS 283, 293 (1981).

[129] *See* Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD.: INT'L J.L FOR PHIL. ANALYTIC TRADITION 77 (1989).

[130] Richard Arneson, in an early article, illustrated this difference as follows, "[I]magine two persons of identical tastes and abilities who are assigned equal resources by an agency charged to maintain distributive equality. The two then voluntarily engage in high-stakes gambling, from which one emerges rich . . . and the other poor. . . . In [another] example, one person may voluntarily cultivate an expensive preference . . . while another person does not. In [these] examples, it would be inappropriate to insist on equality of welfare when welfare inequality arises through the voluntary choice of the person who gets lesser welfare." *Id.* at 83–84.

[131] *See, e.g.*, Holmes, *supra* note 11, at 563.

whose voluntarily choices increase their level of expected loss.[132] Therefore, any insurance regulation that prohibits insurers from doing so violates basic principles of luck-egalitarian distributive justice.

The problem with both arguments is not that they are incorrect. Surely, there are certain things that are within an insured's control, on the basis of which it would be both efficient and fair for an insurer to raise premiums. Choosing high-risk hobbies like skydiving, or failing to replace the batteries on one's smoke detectors, come to mind. The problem, rather, is that *disagreements* about the propriety of risk classifications generally arise where the extent of insureds' control over the relevant trait is deeply contested.[133] As Ronen Avraham, Kyle Logue, and Dan Schwarcz have put it, in the context of health insurance,

> Of course it is theoretically possible to hold people responsible only for health features that involve choice, such as smoking, eating, and working out. But even in these domains, it is difficult to determine what choice means. Much behavior that seems voluntary may actually be the result of habit adopted in young age or addiction and, in any event, is highly correlated with numerous social factors, such as growing up in poverty or in a particular cultural setting.[134]

The same arguments can be made about differences in the life expectancy of men versus women,[135] or the responsibility that homeowners should bear for living in an area exposed to climate risks.[136] Thus, this type of argument for

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[132] *See* Logue & Avraham, *supra* note 16, at 212 (2003).

[133] *Cf.* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 28 (1986) ("controllability . . . [is a] is a normative conclusion[] about the risks for which individuals can properly be asked to bear insurance responsibility," and citing Michael Sandel for the argument that these normative conclusions "are derived from premises about the personal characteristics that are properly considered individual assets and those that are properly considered the collective property of society"); Abraham, *supra* note 1, at 438 ("The notion of 'control' is a normative conclusion about the characteristics for which individuals can properly be asked to bear insurance responsibility. This notion does not solve risk-distributional issues; rather, it directs one's attention to them.").

[134] Logue & Avraham, *supra* note 16, at 215.

[135] For instance, do women live longer because of genetics, or because they are more careful?

[136] *See* ABRAHAM, *supra* note 133, at 28 ("Territorial classification of residential fire and automobile insurance, for example, might have to be tempered to account for the semidetermined character of people's choices about where they live."). Moreover, because moral hazard may be a *goal* of insurance (*e.g.*, marine insurance encourages commercial

risk-based insurance pricing is only helpful where it isn't necessary—*i.e.*, where efficiency and fairness uncontroversially point in the same direction.

C. "Carry One's Own Weight" Arguments Prove Too Much

Another, separate, argument often made in favor of actuarial fairness is grounded in the proposition that each insured ought to "carry his own weight." Thus, for example, according to Spencer Kimball, "the goal of the ratemaking process is to discriminate fairly—to measure as accurately as is practicable the burden shifted to the insurance fund by the policyholder and to charge exactly for it, no more and no less."[137]

The problem with this argument is not just that it is conclusory. (*Why* is it "fair" for every insured to pay an amount equivalent to her expected cost of coverage? Which costs are "hers" in the relevant sense? Etc.) The more important problem is that, when the principle is framed this way, there is nothing about it that suggests it ought only to be applied to insurance transactions rather than to commercial transactions generally. But such a moral principle is conspicuously absent in market economies—*i.e.*, there is no general norm that each purchaser is entitled, as a matter of justice, to a

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risk-taking), there may be disagreements not over whether the insured actually exercises control, but rather over whether the increased risk is actually socially bad. *See* Logue & Avraham, *supra* note 16, at 210 (arguing that liability insurance for high-risk medical specialties like obstetrics is good *because* it creates moral hazard.) This requires agreement about whether an increased risk is net good or net bad for society as a whole. Thus, to determine whether the tradeoff between insurance and loss prevention is efficient, you need broad view of all of the externalities of loss prevention, which is difficult to get, much less establish consensus about.

[137] Kimball, *supra* note 2, at 105. Many others have justified risk-based insurance pricing with reference to the same principle. *See, e.g.*, Joseph Heath, *Reasonable Restrictions on Underwriting*, *in* 7 INSURANCE ETHICS FOR A MORE ETHICAL WORLD 127, 150 (Patrick Flanagan et al. eds., 7th ed. 2007) (discussing "the principle that . . . that the premium paid by an individual should be equal to that individual's expected loss," and describing it as "the natural thing"); *id.* at 150 (reframing the same principle in terms of cost-externalization); Richard A. Miller, *Discrimination by Gender in Automobile Insurance: A Note on Hartford Accident and Indemnity Co. v. Insurance Commissioner*, 23 DUQ. L. REV. 621, 624–25 (1984) (arguing that "costs [of production] should be reflected in the prices that consumers pay. . . identical prices to different customers, despite different costs of supplying those customers, also . . . involves discrimination" and interpreting the "unfairly discriminatory" regulatory language to mean "rates not adequately related to costs of providing insurance"); Wortham, *supra* note 2, at 361 n.41 (reviewing similar arguments); Benston, *supra* note 2, at 498 ("The task, then, is to calculate how much each [insured] should contribute, so that each pays a 'fair' share—an amount that reflects only the cost of the risk each person imposes on the group."); Herman T. Bailey, Theodore M. Hitchison & Gregg R. Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. 779, 781–82 (1975).

price that corresponds to the marginal cost of producing the unit of goods *she* purchased.[138] Though something like this may sometimes happen, such as when delivery services charge more based on the distance traveled, there are also many situations in which producers smooth differences in the cost of serving different customers and offer "flat-rate" pricing.[139] Indeed, markets do not supply a framework for assigning the "weight" of production costs to various consumers other than by creating market-clearing prices.[140] Instead, traditional welfare economics simply asks whether the transactions that produce market-clearing prices are beneficial for all parties involved, that is, whether the market equilibrium is Pareto efficient.[141] If so, then no participant has any legitimate claim to a price corresponding to a conception of his "own weight".[142] The "carry one's own weight" principle therefore fails because it proves too much.[143]

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[138] Quite the opposite, in fact. Everyone pays the same price, based on the cost of producing the last unit of output—the unit consumed by the marginal consumer—not "their" unit. *See* MANKIW, *supra* note 72 at 139–140.

[139] Such a simplified pricing schedule may well be efficient, given the transaction costs involved in charging each consumer a different price.

[140] If the "carry one's own weight" requirement were applied to market transactions generally and seriously, it would create a very thorny "what is the cost of what" problem. *Cf.* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 198 (1970) (describing the "what-is-the-cost-of-what" problem).

[141] *See* NICHOLAS BARR, THE ECONOMICS OF THE WELFARE STATE 78 (1998) (discussing the first fundamental theorem of welfare economics).

[142] Or any other conception of a "fair" or "just" price, for that matter. As Alasdair Macintyre put it, "What is necessarily absent in . . . markets is any justice of desert. Concepts of a just wage and just price necessarily have no application to transactions within those markets." ALASDAIR MACINTYRE, MARXISM & CHRISTIANITY at x (1995). *See also* HEATH, *supra* note 100, at 190; Friedrich A. Hayek, *Competition as a Discovery Procedure*, 5 Q. J. AUSTRIAN ECON. 9, 9–23 (Marcellus S. Snow trans.) (2002) (arguing that the central advantage of market economies over planned economies is that the latter, being subject to "conscious direction," "would always have to aim for prices that are considered fair," and yet "an economic system in which everyone received what others felt he deserved could not help but be a highly inefficient one").

[143] The EF framework elegantly illustrates the limitations of the "carry one's own weight" principle in a different way. It shows that, so long as insurance is purchased voluntarily so that individuals are not forced to purchase it at a price which makes them worse-off than they were without it, the difficult distributional question that arises from insurance markets reduces to how to divide the social surplus created through the cooperative enterprise of risk pooling. Because this surplus arises only when many risk-averse individuals join together to take advantage of the law of large numbers, no portion of it can be conceptualized as any one participant's "own weight." What is needed, instead, is a principled way to divide up the social surplus among the participants in a risk-pooling arrangement—one that recognizes that each is, in some sense, an author of the whole surplus.

D. Libertarian Arguments Are Morally Unappealing

It is also sometimes argued[144] that the most coherent non-economic argument in favor of risk-based insurance pricing is grounded in a type of libertarian political theory often associated with the work of Robert Nozick.[145] Nozick proposes a theory of property rights grounded in a principle of self-ownership, which provides that even if someone's "natural talents and abilities" are morally arbitrary in the sense that she did nothing to deserve them, she nonetheless has a right to the benefits of those attributes.[146] Nozick then couples that with a separate principle that individuals have a right to voluntarily transact with others, and that the terms of those transactions are necessarily just. The result is that the talented, the healthy, the good-looking, etc., are able to benefit more than the rest from their participation in the marketplace, and that this is acceptable as a matter of distributive justice.[147] As several have argued, adopting this view makes it possible to argue that individuals with low levels of risk have a liberty interest in being able freely to associate with others of similarly low risk, so they can benefit from insurance coverage at low rates.[148] According to Tom Baker, this conception of "[a]ctuarial fairness saddles people with all the consequences of their high risk status, whether deserved or not. Conversely, it entitles other people to all the benefits of their low risk status, also whether deserved or not."[149]

Such a theory is straightforwardly anti-egalitarian.[150] Other political theorists like John Rawls, Ronald Dworkin, and G.A. Cohen have, often in explicit opposition to Nozick, grounded their theories of justice in the foundational proposition that the outcome of the "natural lottery" is not something that individuals deserve, and therefore that people have no moral claim to *all* the fruits of their natural endowments.[151] For readers who share

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[144] *See*, *e.g.*, Baker, *supra* note 26, at 393; Hellman, *supra* note 4 at 402.

[145] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[146] *See id.* at 213.

[147] *See id.* at 160–64 (discussing the example of Wilt Chaimberlain).

[148] *See, e.g.*, Daniels, *supra* note 2, at 504–05 (arguing that the argument for actuarially fair premiums rests upon a "controversial premise . . . that individuals should be free to pursue the economic advantage that derives from any of their individual traits, including their proneness to disease and disability"); Hellman, *supra* note 4, at 398–402.

[149] Baker, *supra* note 26, at 394.

[150] This is not a controversial characterization of the Nozickian theory of distributive justice. *See, e.g.*, JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE (1996) (describing Nozick's *Anarchy, State, and Utopia* as "probably the most important antiegalitarian contribution to contemporary political philosophy").

[151] *See, e.g.*, RAWLS, *supra* note 97, at 75; RONALD DWORKIN, SOVEREIGN VIRTUE: THE

this intuition—and I suspect most do—the libertarian argument for actuarial fairness will be unappealing. It suggests not just that insurance coverage ought to be priced according to individual risk levels, but also that society generally ought to be structured in a way that explicitly underwrites any manner of inequality that arises out of voluntary transactions. Such a proposition, it feels safe to say, is not in line with contemporary American political morality that generally supports at least some degree of progressive redistribution through taxes.[152]

E. The Egalitarian Argument Succeeds Where The Other Arguments Fail

The egalitarian argument for risk-based pricing succeeds where the arguments outlined above fail.

Whereas the argument based on adverse selection cannot motivate a call for anything more than rough risk-based pricing, thus rendering it useless in the context of many of the debates about risk classifications where deadweight loss is not practically a concern, the egalitarian argument can make the case for perfect actuarial fairness in insurance prices.

Whereas the arguments based on moral hazard and luck egalitarianism can only motivate a call for risk-based pricing in the context of relatively uncontroversial classifications, the egalitarian argument can make the case for risk-based pricing even when such classifications are based on characteristics over which the insured has no control, or where the extent of an insured's control and responsibility for a given characteristic is a matter of debate.

Whereas arguments grounded in the principle that everybody "ought to carry his own weight" cannot explain why that principle should apply only to insurance rather than to all commercial transactions, the egalitarian argument justifies risk-based insurance prices by relying on an essential distinction between insurance markets and other markets. This distinction reveals the fact that competitive market prices, in *insurance* markets, are also plausibly "fair" as a matter of distributive justice. The egalitarian argument for actuarial fairness thus makes it possible to argue for "fair" prices in insurance, without entailing a theory of just prices that applies to all transactions.

Finally, whereas the libertarian argument can only motivate a call for risk-based pricing by relying on controversial and implausible propositions about the deservedness of unearned differences between individuals, the egalitarian

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THEORY AND PRACTICE OF EQUALITY 75 (2002); G.A. Cohen, *On The Currency of Egalitarian Justice*, 99 ETHICS 906, 931 (1989) ("a large part of the fundamental egalitarian aim is to extinguish the influence of brute luck on distribution").

[152] *See supra* note 163 and accompanying text.

argument for actuarial fairness does not rely on such notions. It focuses instead on the deservedness of the *surplus* that is created through insurance. Because that surplus is the product of the cooperative enterprise that is made possible by all participants in an insurance arrangement, it is not deserved by one participant any more than by another. It argues that the proper way to divide that surplus is equally between those who helped to produce it. One can thus find the egalitarian argument for risk-based pricing convincing, while remaining committed to the proposition that broader redistribution is warranted to address undeserved inequality.

For these reasons, the egalitarian argument distinguishes itself as the most powerful motivation for risk-based pricing, even beyond the amount that is necessary to maximize efficiency gains.

Tom Baker has pointed out that, even if there are moral arguments that "would obligate [insurers] to do more than classify applicants accurately within the context of their ordinary business arrangements," the main proponents of risk-based pricing tend not to go so far.[153] This is because the main proponents of risk-based pricing are not individual low-risk insureds claiming a moral right to a lower rate, but insurance companies seeking to skim low-risk insureds away from their competitors.[154] Such insurers do not argue for permission to engage in more-accurate risk classifications than is profitable to them, but rather merely to apply the risk-classifications that suit their business interests.[155] Nor do we vest low-risk insureds with a legal right to a price that accurately reflects their risk.[156] This suggests, Baker argues, that "[i]f there is a fundamental moral principle at work here, it is . . . utility," and therefore that there is no good faith moral argument in favor of risk-classification at work.[157]

This, I believe, is mistaken. The fact that insurance companies serve as the most visible defenders of risk-based insurance pricing does not mean that their reasons (*i.e.*, profit) are the *sole* reasons to support the practice. And the

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[153] Baker, *supra* note 26, at 394. *See also*, Abraham, *supra* note 1, ("The argument against inaccuracy in general seems therefore also to include the idea that there should be a right to purchase accurately priced coverage, even when purchasing is not required.").

[154] *Id*. at 394 ("[T]he fairness argument has been mobilized in public policy debates, not to protect the rights of low risk individuals, but rather to promote the freedom of insurance organizations to classify insureds through any means they wish.").

[155] *Id*. at 394

[156] *See id*. at 394.

[157] *Id*. at 395. *Cf*. Abraham, *supra* note 1, at 430 ("Critics of inaccura[te classifications] must be making [the argument that] when the amount of inaccuracy in the system is already economically optimal, . . . everyone should be charged more for coverage simple to assure greater accuracy in general. No one would favor such a system, however, because no one would benefit from it.").

fact that insurance companies do not classify insureds more accurately than is profitable, or the fact that we don't vest insureds with a legal right to actuarially-fair prices, does not undermine the moral force of the argument in favor of doing so. Instead, it simply shows that, when the assumptions of the EF Framework are relaxed and transaction costs are considered, risk-classification might not be efficient beyond a certain level of accuracy.[158] The alignment between competitive insurance prices and fairness that the egalitarian argument achieves breaks down, at a certain point, under such non-ideal conditions. How one weighs the efficiency costs of continuing to pursue more-accurate risk classifications beyond this point, against the egalitarian argument for doing so, is a difficult policy question involving tradeoffs between efficiency and ("actuarial") fairness. That we tend, in practice, to defer to insurers when determining how close we should try to get to perfectly accurate risk-based insurance prices shows that we prioritize efficiency over fairness when the two come into conflict. It does not show that there are no arguments for doing otherwise.

IV. Re-Framing the Debate

This Part illustrates what it would look like to re-frame the debate about the propriety of risk-based insurance pricing not as a conflict between efficiency and fairness, but rather as a dispute between competing conceptions of egalitarian distributive justice. It does so by focusing on a specific critique that comes naturally to many readers—*viz*., that any redistributive framework that focuses narrowly on spreading economic gains among participants in cooperative enterprises cannot be egalitarian in any satisfying sense. Such a critique finds support in a well-established strand of political theory known as "luck egalitarianism."[159] On this view, differences in individuals' entitlements are justifiable only if they are the result of individuals' freely-made choices, and not if they are the result of individuals' good or bad luck.[160] The ideal, from this perspective, is that resources should be distributed in a way that is entirely independent of luck, and entirely determined by desert. Justice therefore requires transferring resources from those who have more than they deserve to those who have less than they

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[158] For a statement of the assumptions underlying the EF Framework, *see supra* note 59 and accompanying text.

[159] *See* Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 289 (1999) (coining the term "luck egalitarianism" to describe the conception of egalitarianism "which takes the fundamental injustice to be the natural inequality in the distribution of luck"); Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003) (discussing luck egalitarianism).

[160] *See* Anderson, *supra* note 159, at 292.

deserve—even if it makes some people worse-off than they would be, absent such a transfer.[161] Luck egalitarians like Ronald Dworkin, G. A. Cohen, and Richard Arneson argue for various versions of this position, while contractarians like John Rawls and David Gauthier reject it.[162]

Luck egalitarianism aligns with several intuitive objections to the argument for risk-based pricing laid out in Part II, including: (1) that it improperly takes the subject of egalitarian redistribution to be individual interactions, rather than "society" taken as a whole, and thus ignores the well-being of those who do not participate; (2) that by focusing only on the distribution of surplus, the argument improperly ignores and perpetuates independent sources of "background inequality" that separately warrant redress, even among participants; and (3) that it cannot motivate an objection to insurance classifications based on characteristics that are morally arbitrary—such as race, sex, age, genetics, or any other "unchosen" trait.

Though such objections have intuitive appeal, it is not clear that luck egalitarianism—or any other theory of distributive justice, for that matter—can motivate them without at the same time coming into conflict with other widely-held intuitions. As Samuel Scheffler points out,

> in rejecting all inequalities of advantage resting on differing circumstances, luck egalitarianism goes far beyond the prevailing political morality, which . . . is prepared to tolerate significant distributive inequalities deriving from differences in talent and ability. . . . [T]he prevailing political morality [also] does not go so far as to say that any extra income deriving from people's choice should, in principle, be exempt from redistributive taxation.[163]

The degree to which this disjuncture between luck egalitarianism and "the prevailing political morality" render luck egalitarianism unacceptable as a theory of distributive justice is a longstanding topic of debate.[164] That the debate continues suggests objections to the "narrowness" of the conception

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[161] *See* Scheffler, *supra* note 159, at 25 (discussing the "principle of redress"); Heath, *supra* note 95, at 32.

[162] *See* Scheffler, *supra* note 159; Heath, *supra* note 95, at 22–25; Anderson, supra note 159.

[163] Scheffler, *supra* note 159, at 6.

[164] *See, e.g.*, Richard Arneson, *Dworkin and Luck Egalitarianism: A Comparison*, *in* The Oxford Handbook of Distributive Justice (Serena Olsaretti ed., 2018); SHLOMI SEGALL, WHY INEQUALITY MATTERS: LUCK EGALITARIANISM, ITS MEANING AND VALUE (2016); KASPER LIPPERT-RASMUSSEN, LUCK EGALITARIANISM (2015).

of egalitarianism articulated in Part II.B will not easily defeat the argument for risk-based insurance pricing, at least as a theoretical matter.

It is possible, nonetheless, to assess the "narrowness" critique from a more practical perspective. What would it look like to regulate insurance in a way that aims to redress background injustice? Would such a policy be exposed to concerns separate from those that animate the debate about the proper scope of egalitarian distributive justice? If so, would those concerns render insurance a less appealing tool of redistribution than other tools that we have available? The remainder of this Section aims to address those questions.

It might seem, at first, that an effort to use insurance to redress background injustice would require forbidding insurance classifications that depend on *any* morally arbitrary trait. This would make it illegal to discriminate based on unchosen characteristics like race or sex, and on the basis of loss experience for which the insured has no responsibility. Allowing insurers to charge some insureds more because of such traits would, in many cases, exacerbate pre-existing injustices affecting disadvantaged groups. But there are two reasons why such a prohibition would be a relatively ineffective way to address background injustice.[165]

The first reason often provided as to why insurance is unlikely to be an effective tool of general redistribution is that, so long as insurance is not universal, the egalitarian redistribution effected through insurance nondiscrimination rules will omit some individuals who ought, from a justice perspective, to be included in the redistributive program.[166] This will happen whenever some parties cannot obtain coverage (perhaps because they cannot afford it), or when parties choose to "self-insure" and thereby secede from the risk pool altogether. The redistributive effect of insurance price regulation will, under these circumstances, omit some members of the "haves" from whom resources ought to be taken (leaving the remainder of the haves to bear a heavier burden), and some members of the "have-nots" to whom resources ought to be given.[167] Moreover, if various risk pools contain different ratios

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[165] This ignores the argument, based on adverse selection concerns, that using insurance nondiscrimination rules will be inefficient. As Section III.A demonstrated, this argument has only limited force. *See supra* Section III.A and accompanying text.

[166] *See* Logue & Avraham, *supra* note 16, at 185–88 (2003) (discussing the "problem of underinclusiveness" in the context of legal rules generally).

[167] *See* Abraham, *supra* note 1, at 449 ("If the form of insurance involved is nearly universal-mandatory automobile coverage, for example-perhaps the risk-sharing population is already broad enough to warrant using the insurance system as a partial remedy for the inequality in question. Because so many persons participate in that kind of coverage, in effect society as a whole is bearing the costs of the redistribution. But if the insurance involved is

of haves and have-nots, then some haves will bear a heavier redistributive burden.[168] The egalitarian redistribution effected through insurance will therefore be *incomplete* and *unbalanced*. Though this concern does not entirely defeat an argument against risk-based insurance pricing, it dulls it by showing that alternative means of redistribution, such as a tax-and-transfer system that applies to all members of society, may be comparatively less arbitrary and more just.[169]

The second reason is that a strong commitment to preventing morally-arbitrary characteristics from influencing insurance premiums would have an *unpredictable* impact on conditions of background injustice.[170] This is because correlations that exist between morally-arbitrary disadvantages, on the one hand, and expected loss, on the other, may be positive or negative. Suppose, for example, that a poor neighborhood is comprised of small homes near a fire-prone forest, and a rich neighborhood is comprised of large homes that are buffered from forest fires. Suppose further that lack of opportunity caused the poor homeowners to live where they do, and that the rich inherited their homes from their parents. A rule preventing homeowners' insurance companies from classifying insureds on the basis of characteristics for which the insureds are not responsible will have cross-cutting effects in this setting. It will prevent insurers from charging the poor families higher premiums because of the fire risk. But it will also prevent insurers from charging these families lower premiums based on the lower value of their homes. The chaotic relationship between these different kinds of variables suggests that forbidding insurers from charging rates based on *any* undeserved difference might not predictably decrease the net amount of undeserved inequality.

It may seem that the unpredictability problem can be addressed by adopting an *ad hoc* approach to regulating different kinds of risk classifications. On this model, whenever a particular class deserves to be the

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specialized-professional liability or private disability coverage, for instance-then it is not at all clear that the cost of redistributing risk within the system should be borne only by those participating.")

[168] *See* Logue & Avraham, *supra* note 16, at 216–17 (2003); Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 Bos. U.L. REV. 1, 21 (1994).

[169] Moreover, any attempt to rectify these issues by making insurance more universal—covering more risks, and mandating more participation—will have the effect of making "insurance" look increasingly like a tax-and-transfer program.

[170] *Cf.* Logue & Avraham, *supra* note 16, at 182–85 (2003) (discussing "the problem of inaccuracy" that arises when legal rules are used to effect redistributive transfers, because the relevant categories of plaintiffs and defendants will not predictably correspond to the income classes that are the target of redistribution). *See also* Heath, *supra* note 137, at 148–49 ("[I]f one is to abandon the principle of actuarial fairness, one must do so across the board. And there are many cases in which doing so will not have progressive consequences.").

recipient of a redistributive transfer, then insurance classifications ought to be modified to produce cross-subsidies that benefit that class. Thus, for example, one might argue that gender should be permitted as a classification when, but only when, it will benefit women by lowering their premiums, because women are generally less wealthy than men for undeserved reasons.[171] Such a strategy will be vulnerable to the objection that, because some women are not undeservedly worse-off than some men, a rule that simply redistributes from men to women will create some cross-subsidies that run contrary to distributive goals.[172] It will, in some cases, effect injustice by taking from a man who deserves his resources and giving to a woman who does not deserve more. Moreover, if the relevant type of insurance is not universal, then the redistribution will be incomplete and unbalanced.[173] The only way to address these concerns completely would be to mandate participation in a universal insurance scheme, and to treat each insured as a single-member class—both of which present obvious difficulties.

These arguments against insurance nondiscrimination regulation are well-worn. Though not dispositive, they show that an imperative to redress background inequality can motivate only an inelegant argument against risk-based insurance pricing.[174] There are many obstacles—imperfect distribution of haves and have-nots across risk pools, cross-cutting types of undeserved inequality, and imperfect correspondence between classifications and actual moral desert—that interfere with insurance price regulation's precision as a tool of wide-scope egalitarian redistribution. The egalitarian argument for risk-based insurance pricing, outlined above, does not suffer from these deficiencies, because its conception of egalitarianism does not require it directly to rectify background inequality. This helps to explain its moral appeal when juxtaposed with attempts to use insurance price regulation to remedy such inequality.

There are, nonetheless, two arguments grounded in the concern for background inequality that can, straightforwardly, overcome the egalitarian argument for risk-based pricing.

First, if alternative means of achieving broader egalitarian redistributive goals are not practically available, then insurance antidiscrimination

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[171] Logue and Avraham reject this position as inconsistent with their view that different kinds of inequality should be addressed using the "redistributive policy instrument best tailored to redress that particular inequality." Logue & Avraham, *supra* note 16, at 224.

[172] This could happen, for example, when such an insurance nondiscrimination rule shifts wealth from poor men to rich women, if neither is "deserving" of their wealth. *Cf. id.* at 182–85.

[173] *See* Logue & Avraham, *supra* note 16, at 185.

[174] *See* ABRAHAM, *supra* note 133, at 25 (arguing that "insurance law and insurance are unwieldy devices for achieving wholesale shifts in wealth").

regulation may be an appealing "next best" means of doing so. Most redistributive programs require legislative action. But legislatures may be gridlocked—perhaps because of industry capture, antidemocratic filibuster rules, or for other reasons.[175] Such legislative "transaction costs" can be understood to prevent legislatures from enacting what is, in some sense, their true preference with regard to a particular type of redistribution.[176] Because regulators and judges are often in a position to enact insurance antidiscrimination rules directly, such action may be an "less-costly" way to achieve what the legislature cannot.[177]

Second, the egalitarian argument for risk-based insurance pricing can be overcome when insurance classifications are overridingly unacceptable for other reasons. This will happen when insurance classifications overlap with suspect classifications, like race. Under these circumstances, other principles like autonomy or non-domination can supply an extra-egalitarian argument against risk classification.[178] As Kyle Logue and Ronen Avraham put it, "[w]hatever the statistical insurance data reveal, it may well be that allowing insurers to discriminate on the basis of such characteristics perpetuates or reinforces invidious stereotypes and, on that basis alone, should be prohibited."[179] The conspicuous absence of rules prohibiting insurers from discriminating on the basis of suspect classifications suggests these concerns win-out less frequently than one might expect. The strength of the egalitarian argument for risk-based pricing can help to explain, and also justify, that fact.

V. Conclusion

Recent innovations in economics make it possible to articulate a previously untheorized normative argument *against* regulating insurance prices on antidiscrimination grounds—one that sounds not in efficiency, but in fairness and equality. The availability of this argument, even if it is not

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[175] *See* SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2004) (describing the causes and consequences of legislative gridlock in the United States).

[176] *See* Logue & Avraham, *supra* note 16, at 256 (raising a similar argument).

[177] Alternatively, one might argue that such "legislative transaction costs" are really indications that the proposed legislation merely lacks the necessary amount of democratic support—and thus that regulators or judges who pursue the same ends do so illegitimately. *See* Logue & Avraham, *supra* note 16, at 256.

[178] *See* Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L.J. 293 (2012) (outlining a theory of non-domination and distinguishing it from egalitarianism).

[179] *See* Logue & Avraham, *supra* note 16, 225 n.208. *See also* Abraham, *supra* note 1, at 441–45 (discussing suspect variables, and the conditions under which they ought to be inadmissible in insurance).

made with analytical clarity in everyday policy debates, helps to explain why previous analyses of the insurance classification controversy seem to miss something, namely, that advocates for risk-based pricing seem to be motivated not just by efficiency concerns but also by a good-faith intuition that risk-based pricing is actually more fair. By articulating this intuition, and identifying its assumptions, this Article aims to present the relevant controversy not as an irresolvable conflict between efficiency and fairness concerns, but rather as a reasonable disagreement over the meaning of egalitarianism. Doing so can help to sharpen serious debates about the propriety of insurance antidiscrimination rules, and to render disagreements in this field more tractable to policymakers charged with ensuring that insurance pricing is not unfairly discriminatory.

But, some might ask why bother rendering an argument *against* antidiscrimination rules with analytical clarity? My answer to this question is as follows.

On the one hand, I think doing so valuably sheds light on an important and under-appreciated perspective on insurance: that its defining feature as a social practice is that it allows for a mode of redistribution that is, in a sense, conservative (in the sense that it only recommends Pareto-improving interactions) and narrow (in the sense that it only aims to redistribute the gains from such interactions among those who participate in them), while still being recognizably egalitarian. There are virtues to such a minimal modality of redistribution. It is broadly palatable in diverse and pluralistic societies where more radical forms of egalitarian redistribution will be too controversial to enact through voluntary means. Such minimal redistribution is, one might say, "better than nothing" from an egalitarian perspective. It also generates a type of social solidarity that is scarce in diverse communities; it can bind strangers together, even in the absence of altruistic motives.[180] This explains why it is possible to preserve the essential qualities of insurance as a "thin" and "selfish" modality of cooperation, while still requiring that insurance prices be "fair" in the sense articulated above.[181]

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[180] This stands in contrast to an appealing, but utopian, solution to the "classification controversy" proposed by Regina Austin. *See* Austin, *supra* note 11, at 581 ("The ultimate solution to the controversy must . . . lie in the achievement of real voluntary groups or communities whose members are engaged in important economic and social tasks relevant to the control of risks and the provision of support and resources for the victims of accidents and losses. These activities must be undertaken pursuant to a genuine consensus of values. . . . This solution requires far-reaching changes in the structure of economics, politics, kinship, and community.").

[181] Though it is beyond the scope of this Article, a similar argument can likely be made about other selection markets, including credit markets.

On the other hand, a rigorous application of the arguments laid out in this Article would be difficult to stomach. Allowing insurance companies to charge higher prices based on race, sex, pre-existing health conditions, genetics, or any other "chance" characteristic would feel cruel. This is not just because insurance has become an essential good in contemporary society, and so raising its price can render a necessity unobtainable to those of modest means. It is also because such premium-price discrimination can look like an insult—indeed, in the case of highly-individualized insurance classifications, a personal one. Suggesting that unbridled insurance risk classification can be rendered morally acceptable by effecting more direct forms of egalitarian redistribution through tax-and-transfer schemes is not a satisfying response to either of these concerns. And in an era where legislatures seem chronically unable or unwilling to enact such policies, it is difficult to take such a response seriously. Moreover, the dignitary harms caused by, say, race-based insurance premiums are unlikely to be remedied by taxpayer-funded redistribution designed to benefit those disadvantaged by such discrimination.

In the end, I take this tension to be evidence of the inevitability of conflict between, on the one hand, a claim that insurance's limitedness ought to be preserved in order to protect its ability to provide distinctive social goods, including not just consumer surplus but also a special type of social solidarity; and on the other hand, a luck-egalitarian notion that treating individuals differently on the basis of underserved characteristics can infringe on their autonomy and dignity. The reconciliation of conflicting moral propositions like these is, inevitably, imperfect and messy. Individual conscience may lead reasonable people to weigh them differently. It is my belief, however, that understanding these conflicts *as conflicts* is preferable to attempting to fit them within a single unified moral and conceptual framework. The latter project will, I believe, inevitably fail. It will also be perceived, in the meantime, as an academic attempt to gaslight those who hold reasonable but different moral commitments into believing that they simply do not grasp an idealized overarching framework capable of answering all moral questions. So long as humans remain imperfectly rational creatures, it is important to recognize and embrace the possibility of different moral perspectives, and to support democratic processes that aim, however imperfectly, to produce agreement rather than truth.