

Stop Re-Victimizing the Victims: A Call for Stronger State Laws Prohibiting Insurance  
Discrimination Against Victims of Domestic Violence

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Introduction

In the mid-1990s, insurance discrimination against victims of domestic violence first attracted national media and political attention.<sup>1</sup> Despite this scrutiny, many states still permit insurers to consider domestic violence victimization in access, coverage, and insurance rating determinations.<sup>2</sup> This discrimination is often based on insurers' incorrect and offensive assertions that domestic violence victims voluntarily choose to engage in high-risk behavior.<sup>3</sup> Such victim-blaming ignores the fact that domestic violence is a crime and re-victimizes individuals seeking insurance protections for themselves and their children.<sup>4</sup> Insurance discrimination denies help to victims seeking to rebuild their lives and could mean the difference between a victim successfully escaping her abuser or continuing to suffer in silence.<sup>5</sup>

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<sup>1</sup> 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).

<sup>2</sup> See Nancy Durborow et al., *Compendium of State Statutes and Policies on Domestic Violence and Health Care*, Family Violence Prevention Fund 4 (2010), available at [http://www.acf.hhs.gov/sites/default/files/fysb/state\\_compendium.pdf](http://www.acf.hhs.gov/sites/default/files/fysb/state_compendium.pdf) (summarizing state statutes regarding insurance discrimination against victims of domestic violence in all lines of insurance).

<sup>3</sup> One insurance industry advocate stated that “insuring a victim of domestic violence would be akin to covering a smoker who doesn’t stop smoking.” *Hearing on the Healthcare Justice for Victims of Domestic Violence Reform Act Before the Comm. on Pub. Servs. & Consumer Affairs* 2 (D.C. 2010) (statement of Rebecca O’Connor, Policy Director, DC Coalition Against Domestic Violence) [hereinafter O’Connor Testimony] (internal quotations omitted).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Parts I and II of this paper will examine the prevalence and costs of domestic violence and explore how insurance discrimination against victims of domestic violence occurs. Part III will outline and respond to the insurance industry's arguments in favor of using domestic violence in insurance classification, including voluntariness, actuarial fairness, moral hazard, and adverse selection. After surveying the current state and federal on the issue in Part IV, Part V will conclude the paper by proposing four legislative reforms to state laws that will better and more comprehensively protect victims of domestic violence from insurance discrimination.

### I. Prevalence and Cost of Domestic Violence

Domestic violence<sup>6</sup> is a widespread problem that has substantial costs—both financial and emotional—on individuals and society at large. One in four women<sup>7</sup> will experience domestic violence at some point in her life,<sup>8</sup> and approximately 1.3 million women are physically assaulted by an intimate partner annually.<sup>9</sup> Nearly 5.3 million domestic violence victimizations

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<sup>6</sup> For the purpose of this paper, domestic violence is “the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by an intimate partner against another.” National Coalition Against Domestic Violence, *Domestic Violence Facts* 1 (July 2007), available at [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) (hereinafter NCADV, *Domestic Violence Facts*).

<sup>7</sup> For convenience and consistency, this paper will use female pronouns when referring to victims of domestic violence, as 85% of domestic violence victims are women. Bureau of Justice Statistics Crime Data Brief, *Intimate Partner Violence, 1993-2001* (Feb. 2003), available at [www.bjs.gov/content/pub/pdf/ipv01.pdf](http://www.bjs.gov/content/pub/pdf/ipv01.pdf). However, this paper recognizes that men can be victims of domestic violence and, when they are, should also be protected against insurance discrimination.

<sup>8</sup> NCADV, *Domestic Violence Facts*, supra note 6, at 2.

<sup>9</sup> Ctrs. for Disease Control & Prevention et al., *Costs of Intimate Partner Violence Against Women in the United States* 19 (2003), available at <http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf>. (hereinafter CDC, *Costs of IPV*).

occur each year, resulting in nearly 2 million injuries and 1,300 deaths.<sup>10</sup> Of those injuries, over 555,000 require medical attention, and more than 145,000 are serious enough to warrant hospitalization.<sup>11</sup> Domestic violence also produces over 18.5 million mental health care visits every year.<sup>12</sup>

The prevalence of domestic violence extracts financial costs. A report in the American Journal of Preventative Medicine found that women with a history of domestic violence had significantly higher health care utilization and costs, which continued long after the domestic violence ended.<sup>13</sup> Compared to women with no history of abuse, domestic violence victims were more likely to use mental health services, substance abuse services, hospital outpatient visits, emergency department visits, and admission to acute inpatient care during and after their domestic abuse.<sup>14</sup> After adjusting for age, education, and the presence of major unrelated illnesses, the study found that annual health care costs were 19% higher for women with a history of domestic violence than for women without a history of domestic violence.<sup>15</sup> This difference in costs amounts to \$439 per year per woman with a history of domestic violence.<sup>16</sup> It

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Frederick P. Rivara et al., *Healthcare Utilization and Costs for Women with a History of Intimate Partner Violence*, 32 AM. J. PREVENTATIVE MED. 89, 92-93 (2007), available at [http://www.ajpmonline.org/article/S0749-3797\(06\)00423-5/fulltext](http://www.ajpmonline.org/article/S0749-3797(06)00423-5/fulltext).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

should come as no surprise, therefore, that the annual health care costs for domestic violence—including medical and mental health services—are estimated to total almost \$4.1 billion.<sup>17</sup>

## II. How Insurance Discrimination Occurs

Insurance companies detect domestic violence in three primary ways. First, insurance companies require applicants to grant them access to their medical records, which often contain information about past abuse.<sup>18</sup> In fact, the increased awareness of and responsiveness to domestic violence injuries among medical professionals in recent years has made medical records richer and more reliable sources for insurance companies to obtain such information.<sup>19</sup> Second, insurance companies can share information about applicants' risk factors—both medical and non-medical—through databases such as Equifax and the Medical Information Bureau.<sup>20</sup> Insurance companies that subscribe to these databases are required to report client risk factors and are then entitled to access risk-related information on applicants or insureds.<sup>21</sup> Finally,

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<sup>17</sup> CDC, *Costs of IPV*, *supra* note 9, at 30. Of course, the societal costs of domestic violence extend far beyond health care utilization and include, for example, the costs related to law enforcement, temporary shelters, foster care, and lost productivity. *See, e.g.*, Ellen J. Morrison, Note, *Insurance Discrimination Against Battered Women: Proposed Legislative Protections*, 72 IND. L.J. 259, 262-66 (1996); Elizabeth A. Hoskins, *South Carolina Women Are Not Preexisting Conditions*, 63 S.C. L. REV. 949, 957-59 (2012).

<sup>18</sup> Sheri A. Mullikin, Note, *A Cost Analysis Approach to Determining the Reasonableness of Using Domestic Violence as an Insurance Classification*, 25 J. LEGIS. 195, 198-99 (1999).

<sup>19</sup> Morrison, *supra* note 17, at 267.

<sup>20</sup> Terry Fromson & Nancy Durborow, *Insurance Discrimination Against Victims of Domestic Violence*, Pa. Coalition Against Domestic Violence & Women's Law Project 1 (1998), available at [http://www.womenslawproject.org/brochures/Insurance\\_discrimDV.pdf](http://www.womenslawproject.org/brochures/Insurance_discrimDV.pdf). *See generally* Gina Kolata, *When Patients' Records Are Commodities for Sale*, NY TIMES, Nov. 15, 1995, available at <http://www.nytimes.com/1995/11/15/science/when-patients-records-are-commodities-for-sale.html?pagewanted=all&src=pm>. Property and casualty insurers also have databases on claims histories. Fromson & Durborow, *supra* note 20, at 1.

<sup>21</sup> Fromson & Durborow, *supra* note 20, at 1.

insurers can discover a history of domestic violence by accessing police reports, court documents, and credit reports that contain information about protective orders.<sup>22</sup>

Insurers can use this information in several ways, all of which penalize victims of domestic violence. In the underwriting process, insurers may consider a history of domestic violence when determining whether to offer insurance to an individual and, if so, at what price.<sup>23</sup> Insurers can cancel coverage for existing customers<sup>24</sup> and deny coverage for abuse-related conditions and claims.<sup>25</sup> Such actions by insurance companies may re-victimize victims of abuse;<sup>26</sup> prevent victims from obtaining healthcare for themselves and their families;<sup>27</sup> incentivize victims to remain in abusive relationships to maintain coverage;<sup>28</sup> and discourage

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<sup>22</sup> Mullikin, *supra* note 18, at 199.

<sup>23</sup> Fromson & Durborow, *supra* note 20, at 1. For examples of domestic violence victims being denied health, disability, life, property and casualty, and automobile insurance, see *id.* at 3-7.

<sup>24</sup> Mullikin, *supra* note 18, at 197. For examples of insurers cancelling domestic violence victims' policies, see Fromson & Durborow, *supra* note 20, at 4-6.

<sup>25</sup> Fromson & Durborow, *supra* note 20, at 2 (stating that some insurers deny "abuse-related claims on the basis of exclusions in the insurance policy for intentional acts"). See *infra* notes 142-46 and accompanying text.

<sup>26</sup> See Fern Shen, *Battered Women Say They're Victimized Again – By Insurers*, WASH. POST (March 13, 1995, 4:00 AM), <http://www.sfgate.com/news/article/Battered-Women-Say-They-re-Victimized-Again-by-3041987.php>.

<sup>27</sup> Fromson & Durborow, *supra* note 20, at 1.

<sup>28</sup> Morrison, *supra* note 17, at 268. As one lawyer noted, "If the batterer is the source of insurance for [the victim] and her child, and if she can't get insurance herself, she won't risk leaving." Shen, *supra* note 26, at 2 (quoting Lynne Gold-Bilkin, head of the ABA's Family Law Section).

victims from seeking necessary medical treatment, counseling, legal intervention, and other assistance.<sup>29</sup>

### III. Counterargument: Rationale for Insurance Classifications and Use of Domestic Violence

#### Specifically

Insurers use insurance classifications based in part on the principle of “actuarial fairness.”<sup>30</sup> Insurance premiums are actuarially fair if each insured pays a price for coverage that is equivalent to the risk he or she poses of suffering a loss and drawing from the insurance pool, given the information available.<sup>31</sup> To an insurer, therefore, evidence of domestic violence is simply information that—like an individual’s medical history, age, gender, occupation, lifestyle, etc.—helps the insurer to predict that individual’s risk and determine whether, and at what price, to provide insurance.<sup>32</sup> Insurance companies are private businesses who must remain solvent; to restrict an insurer’s ability to consider available and relevant information, the insurance industry would likely argue, decreases its ability to make more accurate predictions of risk, collect adequate premiums, and ensure solvency.<sup>33</sup>

The insurance industry’s unwillingness to provide coverage for domestic violence victims rests primarily on two justifications: the voluntariness of the behavior and the high-risk levels it

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<sup>29</sup> Fromson & Durborow, *supra* note 20, at 1.

<sup>30</sup> TOM BAKER & KYLE D. LOGUE, *INSURANCE LAW AND POLICY: CASES, MATERIALS, AND PROBLEMS* 636 (3d ed. 2013).

<sup>31</sup> *Id.*; KENNETH S. ABRAHAM, *DISTRIBUTING RISK* 84 (1986).

<sup>32</sup> Mary Crossley, *Discrimination Against the Unhealthy in Health Insurance*, 54 KAN. L. REV. 73, 102-03.

<sup>33</sup> Mullikin, *supra* note 18, at 221-22.

carries.<sup>34</sup> Some insurers maintain that insurance discrimination against victims of domestic violence is appropriate because battered women choose to stay in abusive environments.<sup>35</sup> For example, State Farm official repeatedly stated that insuring a battered woman is like insuring a diabetic who refuses to take insulin.<sup>36</sup> Others in the insurance industry have claimed that “women who choose to remain in these abusive relationships are similar to sky divers and travelers who enter war zones in that they choose to put themselves in dangerous situations.”<sup>37</sup>

Analogizing domestic violence to optional and dangerous activities like skydiving illustrates insurers’ second justification for using domestic violence as an insurance classification: that victims of domestic violence are greater risks. As one commentator noted, “it is extremely disingenuous to suggest that insurers are practicing unfair discrimination when they respond to the higher costs associated with domestic violence by raising rates or denying coverage. That is, after all, how insurers treat all high-risk insureds.”<sup>38</sup> Underlying the concern about high risk behavior is the fear of insolvency. One insurance executive reasoned that,

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<sup>34</sup> Morrison, *supra* note 17, at 272-74. Some insurers also argue that insuring victims incentivizes batterers to kill in order to collect on life insurance policies. By denying coverage to domestic violence victims, they contend, insurance companies are “protect[ing] [victims] from being murdered by their abusers.” *Id.* at 274.

<sup>35</sup> Mullikin, *supra* note 18, at 216.

<sup>36</sup> Hellman, *supra* note 1, at 361. As one insurance executive said, “[A battered woman] has a choice to move on . . . . We’re a business, not a social welfare organization.” Morrison, *supra* note 17, at 272.

<sup>37</sup> Mullikin, *supra* note 18, at n.160 (citing Shen, *supra* note 27). *See also* Fromson & Durborow, *supra* note 20, at 7 (“Some insurers say that a victim of domestic violence makes a voluntary lifestyle choice, similar to skydiving or riding a motorcycle, and liken battering to a career choice, such as washing skyscraper windows, for which an insurance company should not be responsible.”).

<sup>38</sup> Crossley, *supra* note 32, at n.150 (quoting Robert Detlefsen, *Abusing Discrimination*, Monthly Planet, Aug. 1, 1997, <http://www.cei.org/gencon005,01239.cfm>).

“Whether it’s battering or breast cancer or HIV or a sky diver or a person recovering from breast cancer, if we fail to take these things into account, it could lead us into bankruptcy.”<sup>39</sup>

In reality, neither of these theories—that victims choose to be battered and that victims present greater risks—support the use of domestic violence as an insurance classification. Domestic violence is a crime, not a lifestyle, career, or choice.<sup>40</sup> The idea that victims of domestic violence choose to remain in abusive relationships perpetuates dangerous stereotypes about domestic violence victims and ignores the multitude of significant obstacles that victims face when trying to leave their abusers.<sup>41</sup> Many victims lack the economic resources necessary to leave an abusive partner.<sup>42</sup> Often times, leaving an abuser means leaving a well-established life, including a job and a regular pay-check.<sup>43</sup> Even if a victim can leave her abuser, finding new housing can be challenging and prohibitively expensive.<sup>44</sup> Battered women’s shelters regularly turn away women and children due to limited space.<sup>45</sup> Victims also justifiably fear retaliatory attacks by their abusers if they leave.<sup>46</sup>

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<sup>39</sup> Shen, *supra* note 26, at 1 (quoting David McMahon, vice president of First Colony Life Insurance).

<sup>40</sup> Mullikin, *supra* note 18, at 217.

<sup>41</sup> See Morrison, *supra* note 17, at 262-63 (noting that “there are often insurmountable barriers which prevent abuse victims from escaping their violent surroundings”).

<sup>42</sup> Fromson & Durborow, *supra* note 20, at 7.

<sup>43</sup> Morrison, *supra* note 17, at 262.

<sup>44</sup> *Id.* at 262-63; Fromson & Durborow, *supra* note 20, at 7;

<sup>45</sup> Morrison, *supra* note 17, at 262. Even if a victim can secure a bed in a shelter, most shelters only offer temporary housing—usually up to thirty days—which is a very short timeframe to create a new life. Fromson & Durborow, *supra* note 20, at 7.

<sup>46</sup> Morrison, *supra* note 17, at 263.

In terms of actuarial fairness, there is no conclusive evidence that a history of domestic violence is a risk factor that changes the overall cost of insurance.<sup>47</sup> Certainly, the costs related to domestic violence<sup>48</sup> and the homicide rates of domestic violence victims<sup>49</sup> could justifiably lead an insurer to *assume* that domestic violence victims are greater insurance risks. After State Farm reversed its policy of discriminating against victims of domestic violence, a company spokesperson admitted that it had no evidentiary basis for refusing to insure victims of abuse; rather, “[w]e had no statistics at all to tell us that there was an increased risk... [i]t was just sort of a logical conclusion.”<sup>50</sup> Additionally, insurance companies’ fear of insolvency can be refuted through the examples of the insurance companies that do not use domestic violence as a classification; such companies, which have grown in number since the 1990s, are still profitable and able to offer affordable products without discriminating against victims of abuse.<sup>51</sup>

Insurers may also use domestic violence victimization as an insurance classification in order to prevent adverse selection and moral hazard. Adverse selection refers to “the (theoretical) tendency for high-risk people to be more interested in insurance than low-risk

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<sup>47</sup> Fromson & Durborow, *supra* note 20, at 7; Morrison, *supra* note 17, at 273; Mullikin, *supra* note 18, at 213-16.

<sup>48</sup> *See supra* notes 13-17 and accompanying text.

<sup>49</sup> *See infra* note 109 and accompanying text.

<sup>50</sup> Monica C. Fountain, *Insurance Companies Hit Battered Women Too*, CHI. TRIB., June 4, 1995, [http://articles.chicagotribune.com/1995-06-04/features/9506040136\\_1\\_domestic-violence-battered-domestic-abuse](http://articles.chicagotribune.com/1995-06-04/features/9506040136_1_domestic-violence-battered-domestic-abuse). The spokesperson added, “We altered our position quickly. We decided we just couldn’t be a part of that.” *Id.*

<sup>51</sup> Morrison, *supra* note 17, at 273.

people are.”<sup>52</sup> The theoretical result of adverse selection is that the average risk level of the individuals who purchase insurance will be higher than the average risk level of the general population.<sup>53</sup> In the context of domestic violence, adverse selection would lead domestic violence victims, assuming they are higher risks, to purchase insurance at a greater level than the average person. However, there is little research on adverse selection in the domestic violence context,<sup>54</sup> and the general nature of batterers (irrational and hard to predict) and the effects of the Battered Women’s Syndrome (creating a cycle of “learned helplessness” among victims) arguably cast some doubt on the strength of the argument.

Moral hazard is “the theoretical tendency for insurance to reduce incentives (1) to protect against loss or (2) to minimize the cost of a loss.”<sup>55</sup> In the context of domestic violence, moral hazard could entail a victim making herself more likely to be abused because she knows that she has insurance to cover the costs associated with her injuries, damage to property, etc. Of course, due to the nature of domestic violence, this is unlikely to occur; a victim is not going to incite her batterer to break her arm simply because she knows her health insurance will pay for the cast.<sup>56</sup> Related to moral hazard is the argument that providing life insurance to victims of domestic violence incentivizes batterers to murder in order to collect on the policy.<sup>57</sup> Advocates for

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<sup>52</sup> BAKER & LOGUE, *supra* note 30, at 12.

<sup>53</sup> *Id.*

<sup>54</sup> Of all the domestic violence-related sources consulted for this paper, only one source even used the term “adverse selection.” *See* Hellman, *supra* note 1, at 396.

<sup>55</sup> BAKER & LOGUE, *supra* note 30, at 6.

<sup>56</sup> Additionally, such an argument falsely—and somewhat offensively—presupposes that victims are responsible for their abuse and could have taken steps to minimize it.

<sup>57</sup> *See, e.g.,* Morrison, *supra* note 17, at 274.

victims of domestic violence would respond that this argument misunderstands the nature of domestic violence and why batterers abuse their victims. As one lawyer quipped, “Battering is not something people do for money... The immediate cause of battering may be that she burned the toast, and the general issue is dominance. But it doesn’t happen because the batterer went and checked the insurance policy.”<sup>58</sup> Nevertheless, if insurers remain concerned about this potential practice, states could follow the NAIC’s model law prohibiting discrimination in life insurance, which addresses this possible incentive.<sup>59</sup>

#### IV. Federal and State Laws Prohibiting Insurance Discrimination Against Domestic Violence

##### Victims

###### *a. Evolution of Federal and State Laws*

Prior to the early to mid-1990s, insurance companies regularly discriminated against victims of domestic violence in all lines of insurance.<sup>60</sup> In 1994, Congressman Charles Schumer called attention to this discriminatory practice when, as a member of the House Judiciary Committee, he surveyed sixteen of the nation’s largest insurance companies.<sup>61</sup> He determined that eight considered a history of domestic violence in making decisions regarding coverage and premiums.<sup>62</sup> Congressman Schumer’s discovery—and the fact that no law prohibited such

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<sup>58</sup> *Id.* at 274, n.130 (quoting Susan Kraham, lawyer with the Legal Defense and Education Fund of the National Organization for Women).

<sup>59</sup> *See infra* note 143 and accompanying text.

<sup>60</sup> Brief for Women’s Law Project et al. as Amici Curiae Supporting Appellant, *Lynn v. Nationwide Ins. Co.*, No. 1458 WDA 2012, at 8 [hereinafter *Brief*].

<sup>61</sup> *Hoskins*, *supra* note 17, at 950-51.

<sup>62</sup> *Id.*

discrimination<sup>63</sup>—generated national attention and outrage.<sup>64</sup> Domestic violence advocates, legislators, and state insurance regulators responded by drafting, and in some cases enacting, legislation prohibiting the use of domestic violence as an insurance classification.<sup>65</sup> Some insurers also voluntarily modified their practices.<sup>66</sup>

Forty-two states have passed laws prohibiting at least some kinds of insurance discrimination against domestic violence victims since 1994.<sup>67</sup> State legislatures and insurance departments were aided by the National Association of Insurance Commissioners (NAIC), which began studying the effects of insurance discrimination against domestic violence victims in 1995.<sup>68</sup> The NAIC created four model laws prohibiting discrimination against victims of domestic violence in life, health, disability, and property and casualty insurance.<sup>69</sup> Each of the model laws defines essential terms and specifies prohibited action; recommends developments of protocols for insurance company employees to follow to protect victims' safety and privacy; and

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<sup>63</sup> Durborow et al., *supra* note 2, at 4.

<sup>64</sup> *Brief*, *supra* note 60, at 10.

<sup>65</sup> Durborow et al., *supra* note 2, at 4.

<sup>66</sup> Hellman, *supra* note 1, at 356.

<sup>67</sup> O'Connor Testimony, *supra* note 3, at 3. Seven states—Idaho, Mississippi, North Carolina, South Carolina, South Dakota, Vermont, and Wyoming—and the District of Columbia do not prohibit this practice. Durborow et al., *supra* note 2, at 5.

<sup>68</sup> Morrison, *supra* note 17, at 281-82.

<sup>69</sup> See NAIC, *Unfair Discrimination Against Subjects of Abuse in Health Benefit Plans Model Act*, <http://www.naic.org/store/free/MDL-895.pdf>; NAIC, *Unfair Discrimination Against Subjects of Abuse in Life Insurance Model Act*, <http://www.naic.org/store/free/MDL-896.pdf>; NAIC, *Unfair Discrimination Against Subjects of Abuse in Disability Income Insurance Model Act*, <http://www.naic.org/store/free/MDL-897.pdf>; NAIC, *Unfair Discrimination Against Subjects of Abuse in Property and Casualty Insurance*, <http://www.naic.org/store/free/MDL-898.pdf>.

addresses enforcement.<sup>70</sup> Although the NAIC cannot compel states to adopt the model legislation, state legislatures and insurance companies often take note of NAIC's positions and may conform their policies, statutes, and behavior accordingly.<sup>71</sup>

After 1994, members of Congress also attempted to prohibit discrimination against domestic violence victims in some or all lines of insurance; however, none of the proposed legislation was enacted.<sup>72</sup> The Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>73</sup> prohibits the use of domestic violence as a preexisting condition in underwriting decisions and forbids companies from denying group health insurance to victims of domestic violence.<sup>74</sup> However, HIPAA's protections only extend to health insurance.<sup>75</sup> More recently, the Patient Protection and Affordable Care Act (PPACA)<sup>76</sup> implemented health insurance reforms that generally prohibit discrimination in access and underwriting.<sup>77</sup> Specifically, PPACA requires insurance companies to guarantee availability of coverage and prohibits exclusions based on preexisting conditions, which has the effect of preventing insurance discrimination

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<sup>70</sup> Durborow et al., *supra* note 2, at 4-5.

<sup>71</sup> Morrison, *supra* note 17, at 283.

<sup>72</sup> Mullikin, *supra* note 18, at 211.

<sup>73</sup> See Pub. L. No. 104-191, 110 Stat. 1936 (1997) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

<sup>74</sup> Mullikin, *supra* note 18, at 211-12.

<sup>75</sup> Durborow et al., *supra* note 2, at 5.

<sup>76</sup> Patient Protection and Affordable Care Act, § 2705, as added and amended Pub. L. 111-148, tit. I, § 1201(3), (4), Mar. 23, 2010, 124 Stat. 154, 156 (codified at 43 U.S.C. § 300gg-4).

<sup>77</sup> Durborow et al., *supra* note 2, at 5.

against domestic violence victims.<sup>78</sup> Again, however, these protections against discrimination only apply in health insurance.<sup>79</sup>

Although these federal statutes constitute important progress towards eliminating insurance discrimination against victims of domestic violence, they do not provide sufficient protection for two primary reasons.<sup>80</sup> First, of course, HIPAA and PPACA only apply to health insurance, whereas discrimination against victims of domestic violence occurs in all lines of insurance.<sup>81</sup> Second, although some advocates contend that victims would be better served by a federal law,<sup>82</sup> “[t]he insurance industry has long been recognized as a field traditionally regulated by the states rather than the federal government.”<sup>83</sup>

*b. Survey of State Laws*

Current state laws regarding insurance discrimination—where they exist at all—vary tremendously in their language, strength, and coverage of different lines of insurance.<sup>84</sup> The National Women’s Law Center’s report card categorizes states into four categories based on

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<sup>78</sup> O’Connor Testimony, *supra* note 3, at 3.

<sup>79</sup> *Id.* For a discussion of how PPACA should be addressed in the legislative reform this paper proposes, see *infra* Part IV(d).

<sup>80</sup> O’Connor Testimony, *supra* note 3, at 4 (“While the passage of federal legislation is a crucial step towards eradicating these discriminatory practices, it does not relieve states from a responsibility to enact the strongest and most comprehensive protections available for victims.”).

<sup>81</sup> Fromson & Durborow, *supra* note 20, at 2.

<sup>82</sup> Durborow et al., *supra* note 2, at 5 (arguing that a federal law covering all lines of insurance would provide uniformity of protection and better address the fact that victims of domestic violence often cross state lines when leaving their abusers).

<sup>83</sup> O’Connor Testimony, *supra* note 3, at 4.

<sup>84</sup> Crossley, *supra* note 32, at 103. For a detailed summary of every state’s insurance anti-discrimination law(s) (if applicable), see Durborow et al., *supra* note 3, at 9-68.

which lines of insurance their laws cover.<sup>85</sup> States that prohibit discrimination in all four lines of insurance (health, life, disability, and property/casualty) “meet policy”; states that do so in three lines of insurance are considered to have a “limited policy”; states that cover only one or two lines have a “weak policy”; and states with no protections have “no policy.”<sup>86</sup> According to the report, 24 states “meet policy,” 6 states have a “limited policy,” 14 states have a “weak policy,” and 7 states have “no policy.”<sup>87</sup>

Professor Deborah Hellman illustrates the tremendous diversity in the strength and language of state laws and legislative proposals by categorizing them into five types of bills, three of which are particularly illustrative in the context of this paper.<sup>88</sup> The weakest bills only prohibit irrational discrimination against victims of domestic violence; that is, the use of domestic violence victimization as a classification is only prohibited where it is not actuarially sound.<sup>89</sup> A New York statute, for example, states that insurers may not deny or limit coverage “solely because a person is or has been a victim of domestic violence.”<sup>90</sup> An insurer may, however, limit or deny coverage “because abuse victims are at higher risk than average insureds (i.e., both because the person is an abuse victim and because abuse victims have bad claim

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<sup>85</sup> National Women’s Law Center, *Domestic Violence in Insurance*, Health Care Report Card 1, available at <http://hrc.nwlc.org/policy-indicators/domestic-violence-insurance>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 3.

<sup>88</sup> Hellman, *supra* note 1, at 404-10.

<sup>89</sup> *Id.* at 404.

<sup>90</sup> N.Y. INS. LAW § 2612 (McKinney 1996) (emphasis added).

histories).”<sup>91</sup> Although these weak laws may have expressive significance, they do not provide any additional protection beyond state insurance laws, which already prohibit rates that are “[e]xcessive, inadequate, or *unfairly discriminatory*.”<sup>92</sup>

The most common type of law forbids the use of domestic violence victimization as a classification, but allows the adverse treatment of individuals an insurer believes are likely to become victims, so long as they are identified another way.<sup>93</sup> Because most domestic violence victims are identified through their records, which indicate repeated injuries and/or emergency room visits, an insurer could discriminate against victims using their medical records, rather than the prohibited domestic violence victim classification, and still comply with the law.<sup>94</sup> While this type of law may protect victims in name, it does little to prevent discrimination in practice.

Stronger laws prohibit insurers from charging more or denying coverage because of the likelihood that a victim will be attacked again by her abuser.<sup>95</sup> In many ways, this type of legislation closes the loophole left open by the previous category of laws: while the previous type of law forbids the use of domestic violence victimization as a classifier but allows insurers to use other means—like medical records—to identify insureds as victims, this stronger type of

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<sup>91</sup> Hellman, *supra* note 1, at 404.

<sup>92</sup> ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW (4th ed. 2007) (emphasis added).

<sup>93</sup> Hellman, *supra* note 1, at 405.

<sup>94</sup> *Id.* For example, a law in Indiana states that an insurer may not deny or limit coverage “because the individual has been, is, or has the potential to be a victim of abuse,” but does not prohibit an insurer from “adjusting premiums . . . on the basis that the individual has a physical or mental condition or claims history.” *Id.* (citing S.B. 306, 109<sup>th</sup> Leg., 2d Sess. (Ind. 1996)).

<sup>95</sup> *Id.* at 406.

legislation forbids insurers from trying to identify victims of domestic violence at all.<sup>96</sup> These types of laws—which Professor Hellman calls “target laws”—prevent insurers from using any classifications, including prior claims history, to predict future risk of claims resulting from domestic violence.<sup>97</sup>

## V. Insurance Classifications Based on Domestic Violence are Unfair and Socially Undesirable

### *a. Insurance Discrimination Further Endangers the Safety of Victims and Their Children*

Insurance discrimination can have devastating effects on domestic violence victims and their children.<sup>98</sup> First, the risk of losing insurance coverage may discourage victims from seeking the medical treatment or legal assistance that they need. This chilling effect may serve to keep victims, and by extension their children, at the hands of their batterers longer.<sup>99</sup> Victims that do not receive medical or legal assistance are less likely to have the support necessary to successfully leave their batterers.<sup>100</sup> Even if a victim otherwise has the strength and courage to

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 407. An example target-based legislation is a 1995 proposed federal bill that prohibited insurers from denying or cancelling an individual’s health insurance or varying or increasing premiums “on the basis that the individual or family member is, has been, or may be the subject of abuse, has had prior injuries that resulted from abuse, or seeks, has sought, or should have sought medical or psychological treatment for protection against abuse, or shelter from abuse...” *Id.* at 406-07 (citing H.R. 1201, 104th Cong. (1995)). Note that, in order to consciously *not* use domestic violence victimization as an insurance classification, insurers must actually make a determination that an insured *is* a victim of domestic violence. A critical corollary of these “target laws,” therefore, is a requirement that insurers keep this determination confidential.

<sup>98</sup> *Brief, supra* note 60, at 10.

<sup>99</sup> O’Connor Testimony, *supra* note 3, at 5.

<sup>100</sup> Mullikin, *supra* note 18, at 224-25. *See also* Jeannette Vorell, *Insurers Shouldn’t Hurt Victims Again*, PLAIN DEALER (Cleveland), May 23, 1997, at B10 (describing the experience of a

leave her batterer, a lack of insurance may pose severe economic hardships that ultimately persuade her to stay in the relationship. As one advocacy group noted, “For a battered victim seeking to leave the batterer, access to insurance and the life necessities associate with insurance may mean the difference between leaving or remaining trapped in the abusive situation.”<sup>101</sup>

When victims remain in abusive relationships because of these obstacles, their children often continue to witness the abuse or possibly be subjected to abuse themselves.<sup>102</sup> According to experts, children who witness or suffer from abuse are more likely to become abusers or victims as adults, meaning that these barriers to leaving can have long-term consequences on crime and public safety.<sup>103</sup>

Even if a victim can overcome these obstacles and successfully leave her abuser, not having insurance can negatively impact her ability to begin a fruitful and stable life on her own. “Not being able to obtain health, automobile or homeowners insurance because of domestic violence, means a mother can’t afford to take her kids to the doctor, can’t provide for her kids in

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victim who stated that the availability of insurance coverage, despite her history of domestic violence, allowed her to seek counseling, which was instrumental in her decision to leave and divorce her abusive husband).

<sup>101</sup> *Brief*, *supra* note 60, at 10.

<sup>102</sup> Mullikin, *supra* note 18, at 225.

<sup>103</sup> *Id.* (citing 141 CONG. REC. H10720-01, H10723 (daily ed. Oct. 24, 1995) (statement of Ms. Waters and Ms. Jackson-Lee) (stating that research shows that children who witness abuse at home are more likely to become abusers or victims when they become adults). Additionally, research shows that children who witness abuse are at a higher risk for substance abuse, depression, low self-esteem, poor impulse control, and sexual acting out. *Id.*

the event of a disability or death, own a care or even rent a home—all critical factors in establishing a life free of violence.”<sup>104</sup>

*b. Domestic Violence is a Crime, Not a Choice*

Insurance discrimination based on domestic violence victimization unfairly pegs victims as participants in risky lifestyle rather than victims of crimes. Not only are victims subjected to the uncontrollable, criminal acts of a third party,<sup>105</sup> but the nature of abusive relationships often make it extraordinarily hard for a victim to leave.<sup>106</sup> In addition to the economic factors that constrain victims, victims realistically fear that their batterers will pursue them and continue—or even escalate—the abuse.<sup>107</sup> Of reported incidents, domestic violence victims who separate or divorce their partners are more frequently and more severely battered than those who remain in their relationships.<sup>108</sup> Attempting to leave an abusive relationship can be lethal: three of every four women killed in the United States are murdered by current or former partners when the women attempt to leave or have already left.<sup>109</sup>

*c. Insurance Discrimination Is Contrary to Community Obligations and Desires*

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<sup>104</sup> *Insurance for Victims of Domestic Violence, Testimony in Support of Senate Bill 524*, Before the Labor & Human Resources Comm. of the U.S. Senate 6, 1995 WL 449183 (1995) [*hereinafter* Durborow Testimony].

<sup>105</sup> Mullikin, *supra* note 18, at 216.

<sup>106</sup> Durborow Testimony, *supra* note 109, at 6.

<sup>107</sup> *Id.*

<sup>108</sup> Morrison, *supra* note 17, at 263.

<sup>109</sup> *Id.* (citing Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 387 (1994)).

As previously established, domestic violence is a crime for which victims are not responsible. Not only are victims subject to violent crimes, but unlike victims of, say, assault and battery or mugging, economic, social, and physical security concerns make it extraordinarily difficult for victims to leave the abusive situation. Some advocates, most notably Professor Hellman, argue that “the state has a clear and uncontroversial obligation to provide crime protection and to do so on a fair basis.”<sup>110</sup> That individuals become victims of domestic violence, therefore, means that the state has failed to adequately provide the required crime protection.<sup>111</sup> As a result, “the community should share the cost the abuse victim faces by virtue of the fact that she is a poor insurance risk.”<sup>112</sup> Professor Hellman’s conclusion assumes that domestic violence victims are greater insurance risks and therefore cost more to insure, an assumption with which many academics and advocates disagree.<sup>113</sup> In addition, Professor Hellman refers strictly to health insurance coverage. Arguably, however, her overall conclusion could be generalized to apply to victims in all lines of insurance; that is, because (i) the community has failed to protect victims from domestic violence and (ii) insurance is critical starting a new safe and stable life, the community owes it to victims to prohibit insurance discrimination based on their victim status so that they can successfully rebuild their lives after escaping abuse.

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<sup>110</sup> Hellman, *supra* note 1, at 410.

<sup>111</sup> *Id.* This argument for community responsibility is bolstered by the fact that, for hundreds of years, society has tolerated domestic violence and failed to even recognize it as a crime. *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *See supra* notes 47-51 and accompanying text.

Even if one does not agree that the community is morally obligated to prohibit insurance discrimination against domestic violence victims because it failed to provide adequate crime protection, one can recognize that insurance classifications have expressive significance.<sup>114</sup> The kinds of insurance risk rating we permit versus the kinds of insurance risk rating we prohibit says something “about what kind of a community we want to be.”<sup>115</sup> As Professor Hellman concludes, “the debate about whether the actuarial fairness principle ought to govern health insurance pricing is a debate about whether ours is a community that is committed to the provision of aid to those who are sick and disabled.”<sup>116</sup> In the context of domestic violence, legislation that prohibits insurance discrimination “sends a message of community solidarity with battered women.”<sup>117</sup> Arguably, the strong public outcry against insurance discrimination based on domestic violence victimization suggests that the nation has indicated what kind of community it wants to be.

#### VI. Call For Stronger State Laws Addressing Discrimination in All Lines of Insurance

As previous sections have made clear, state laws fail to uniformly and comprehensively protect victims of domestic violence against discrimination by insurers. This section will outline

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<sup>114</sup> See Hellman, *supra* note 1, at 392-93.

<sup>115</sup> *Id.* at 403.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 392. See also BAKER & LOGUE, *supra* note 30, at 637 (“The principle of social solidarity... holds that insurance exists for the benefit of the group and therefore it should be structured to promote the broadest possible risk distribution, an idea that is consistent with placing limits on insurers’ ability to classify risks. In addition, the principle of distributional equality suggests that society should seek to eliminate or at least reduce certain arbitrary differences in opportunities or economic well-being that exist between individuals, especially where those differences are not the result of voluntary, informed choices but rather are the result of ‘brute luck.’”).

four important features that all state laws should include in order to better protect victims of domestic violence.

*a. State Laws Should Extend Protections to People “Perceived to Be” or “Who May Be” Victims of Domestic Violence.*

To adequately protect all victims, state laws should extend their protections to extend to individuals who are “perceived to be” victims of domestic violence. After all, “differential treatment based on perception is at the heart of discriminatory practices.”<sup>118</sup> Louisiana and Maine’s laws currently contain such language.<sup>119</sup> Maine’s statute prohibits discrimination “based on the fact *or perception* that a person is, or may become, a victim of domestic violence.”<sup>120</sup> Similarly, Louisiana defines “abuse status” as “the fact *or perception* that a person is, has been, or may be a subject of abuse, irrespective of whether the person has sustained abuse-related medical conditions.”<sup>121</sup>

Relatedly, all states should join the ten jurisdictions that extend protections to individuals who “may be” victims of domestic violence.<sup>122</sup> The inclusion of individuals who may be victims of domestic violence recognizes the reality that insurers are able to discriminate based on domestic violence even if an incident of abuse has not yet occurred.<sup>123</sup> One advocacy organization, the DC Coalition Against Domestic Violence (DCCADV), gives an example of

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<sup>118</sup> O’Connor Testimony, *supra* note 3, at 6.

<sup>119</sup> *Id.* at 7.

<sup>120</sup> Me. Rev. Stat. Ann. tit. 24-A § 2159-B (emphasis added).

<sup>121</sup> La. R.S. 22:1078(A)(2) (emphasis added).

<sup>122</sup> O’Connor Testimony, *supra* note 3, at 7, n.15.

<sup>123</sup> *Id.* at 7.

where this issue might arise: suppose a person seeking medical or mental health treatment might tell her doctor details suggesting that domestic violence is likely to occur.<sup>124</sup> If such individuals face discrimination based on such a disclosure—a disclosure which could necessary to treat and prevent future abuse—they are less likely to seek help or reveal that information.<sup>125</sup>

*b. State Laws Should Require Confidentiality from Insurers Who Possess Domestic Violence History.*

Fourteen states require that insurers who possess information about an insured or applicant’s status as victim of domestic violence keep that information confidential.<sup>126</sup> On a federal level, HIPAA restricts the ability of health plans to disclose individually identifying information.<sup>127</sup> Such laws “recognize the critical importance of confidentiality to victims of domestic violence, who lives and safety often depend on preventing information about treatment for their abuse from being sent to their batterers.”<sup>128</sup> According to the DCCADV, Wisconsin has one of the most comprehensive statutes regarding confidentiality protections and could be used as a model law for other states.<sup>129</sup> Specifically, state laws should set up protocols for insurers to keep victims’ abuse history, contact information, and location confidential.<sup>130</sup> Additionally,

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 8.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 8, n.17. See Wis. Stat. § 631.95(5). For DCCADV’s model provision requiring confidentiality, see O’Connor Testimony, *supra* note 3, at 8-9.

<sup>130</sup> Fromson & Durborow, *supra* note 20, at 12.

since status as a domestic violence victim should be a prohibited insurance classification, insurers should be prohibited from sharing an insured or applicant's domestic violence history from other insurers or databases.<sup>131</sup>

*c. State Laws Should Increase the Scope of Prohibited Insurer Conduct.*

Thirty four states currently prohibit insurers from using domestic violence victimization information in the process of making insurance rating determinations;<sup>132</sup> all other states should enact this basic protection against insurance discrimination. Additionally, states should prohibit insurers from denying claims arising out of domestic violence or from terminating coverage based on abuse-related claims.<sup>133</sup> Often, insurance companies will deny abuse-related claims on the basis of an exclusion in the insurance policy for intentional acts.<sup>134</sup> A common example of this scenario occurs when a batterer sets the family's home on fire to hurt his spouse. Even though it is the batterer's act that is intentional and caused the fire, an insurer might deny the claim made by the innocent victim by applying the intentional act exclusion to all people defined as an insured in the policy.<sup>135</sup> The insurer's denial of such a claim "leav[es] the victim without a home or the means to replace it ... [and] guarantee[s] the accomplishment of the batterer's goal of harming the victim."<sup>136</sup> Instead, these types of discriminatory practices undermine the purpose of the intentional act exclusion, which is to prohibit the wrongdoer from benefiting from his own

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 12, n.27.

<sup>133</sup> *Id.* at 12.

<sup>134</sup> *Id.* at 2.

<sup>135</sup> *Id.* For real examples of this situation, see *id.* at 5-7.

<sup>136</sup> *Id.* at 2.

wrongful acts.<sup>137</sup> For this reason, seventeen states currently prohibit insurers from denying claims arising out of abuse.<sup>138</sup>

*d. Insurance Discrimination Should Be Prohibited in All Lines of Insurance, With Special Attention Paid to PPACA and Life Insurance Concerns.*

Finally, and perhaps most importantly, victims of domestic violence should be protected from discrimination in all lines of insurance: health, life, disability, and property and casualty (i.e., homeowners, personal automobile, and commercial property and automobile).<sup>139</sup> Although PPACA's coverage guarantee and prohibition of preexisting condition exclusions should serve to protect victims of domestic violence from discrimination in health insurance,<sup>140</sup> compliance with and enforcement of PPACA's provisions remain to be seen. Therefore, state insurance departments and advocates for victims of domestic violence should monitor how forthcoming PPACA regulations address domestic violence victimization and be prepared to push for new state laws where PPACA's protections fall short.

Outside of the health insurance realm, states should prohibit insurance discrimination against victims of domestic violence in all other lines of insurance. States may encounter the argument that, for adverse selection and moral hazard reasons,<sup>141</sup> life insurance should be treated differently and not included in state laws prohibiting insurance discrimination based on domestic

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<sup>137</sup> O'Connor Testimony, *supra* note 3, at 11.

<sup>138</sup> *Id.* at 13, n.29. For example, Delaware's statute prohibits insurers from "deny[ing] a claim incurred by an insured as a result of abuse or the potential for abuse." *Id.* at 13 (citing 18 Del. C. § 2304(24)(c)).

<sup>139</sup> Fromson & Durborow, *supra* note 20, at 12.

<sup>140</sup> *See supra* notes 76-79 and accompanying text.

<sup>141</sup> *See supra* notes 52-59 and accompanying text.

violence victimization. This argument certainly has merits and makes intuitive sense. However, it can be challenged by the fact that thirty-three states currently prohibit discrimination in life insurance based on domestic violence.<sup>142</sup> In addition, the NAIC’s model legislation prohibits domestic violence classifications in life insurance.<sup>143</sup> That these states have outlawed life insurance discrimination against domestic violence victims without significant consequences for insurance companies supports the argument that other states can, too, and that any moral hazard and adverse selection concerns are minimal or nonexistent. However, state insurance departments should undertake additional research if necessary to ensure that such legislation can be passed without negative consequences for insurers. These two caveats aside, state laws should be amended to address and include any lines of insurance they currently omit.

## VII. Conclusion

Insurance discrimination against victims of domestic violence interestingly raises several issues that also apply to insurance regulation more broadly: ensuring the solvency of insurers, the expressive significance of insurance classifications, insurance regulation as an instrument of social policy, and the critical role of insurance in starting and maintaining a stable and secure

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<sup>142</sup> See Durborow et al., *supra* note 2, at 9-68 (outlining states’ insurance discrimination laws—or lack thereof—and the types of insurance they cover).

<sup>143</sup> NAIC, *Unfair Discrimination Against Subjects of Abuse in Life Insurance Model Act*, <http://www.naic.org/store/free/MDL-896.pdf> (prohibiting discrimination by insurers—in issuing or renewing policies—on the basis of abuse status). NAIC’s model law does take measures to address moral hazard concerns. Section 4(F) provides that “[This Act] does not prohibit a life insurer or insurance professional from declining to issue a life insurance policy if the applicant or prospective owner of the policy is or would be designated as a beneficiary of the policy, and if: (1) [t]he applicant or prospective owner of the policy lacks an insurable interest in the insured; (2) [t]he applicant or prospective owner of the policy is known, on the basis of medical, police or court records, to have committed an act of abuse against the proposed insured; or (3) [t]he insured or prospective insured is the subject of abuse, and that person... has objected to the issuance of the policy on the ground that the policy would be issued to or for the direct or indirect benefit of the abuser.” *Id.*

life. “Within this [private insurance] system,” one commentator observed, “the desire of the insurance industry to guarantee its fiscal solvency must be balanced against society’s need to maintain its moral solvency.”<sup>144</sup> As this paper has shown, some states and insurers have successfully prohibited insurance discrimination against domestic violence victims without causing insolvency issues. Furthermore, domestic violence is a crime, not a choice. Insurance discrimination re-victimizes battered women, penalizes them instead of their batterers, and denies them access to insurance at a time when they need it most. States should enact stronger and more comprehensive laws to prohibit the use of domestic violence victimization as an insurance classification.

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<sup>144</sup> Morrison, *supra* note 17, at 271 (quoting Benjamin Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1805 (1987)).