

Fall 2009

Ending Jim Crow Life Insurance Rates

Mary L. Heen

Recommended Citation

Mary L. Heen, *Ending Jim Crow Life Insurance Rates*, 4 Nw. J. L. & Soc. Pol'y. 360 (2009).
<http://scholarlycommons.law.northwestern.edu/njlspl/vol4/iss2/3>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Ending Jim Crow Life Insurance Rates

Mary L. Heen *

How people count and measure embodies certain assumptions about the thing they are counting; this was true in the nineteenth century, and it is equally true today.¹

[E]ver since the 1880's, Negroes have been subject to differential treatment by white insurance companies in that some of them, at that time, started to apply higher premium schedules for Negro than for white customers, whereas others decided not to take on any Negro business at all. The underlying reason, of course, is the fact that mortality rates are much higher for Negroes than for whites.²

[I]f the misery of our poor be caused not by the laws of nature, but by our institutions, great is our sin.³

I. INTRODUCTION

Earlier this decade some of America's best-known life insurance companies quietly settled multi-million dollar civil rights lawsuits involving race-based life insurance rates and benefits.⁴ As a result, those companies closed a chapter of American

*Visiting Professor, Spring 2009, Washington and Lee University School of Law, and Professor of Law at the University of Richmond. I am grateful for financial support for this project from the University of Richmond's Hunton & Williams Summer Research Endowment Fund. My thanks to reference librarians at the Library of Congress for guiding me through their insurance collection, and special thanks to law librarians John Barden, Suzanne Corriell, and Gail Zwirner at the University of Richmond and Caroline Osborne at Washington and Lee University for their assistance in locating additional research materials. I am also grateful for the excellent research assistance provided by current and former Richmond law students on various portions of this project, including Alex Brackett, Katie Faulkenham, Matt Howells, Laura Lesikar, Valerie L'Herrou, Mohsin Reza, Sara Dehne, Jenny Grondahl, Brian Boys, and Eric Foust. Thanks to colleagues Corinna Barrett Lain and Shari Motro for their very helpful comments on earlier stages of this project.

¹ PATRICIA CLINE COHEN, *A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA* 211 (1982) (emphasis omitted).

² GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 316 (1944).

³ CHARLES DARWIN, *THE VOYAGE OF THE BEAGLE* 526 (2d ed., P F Collier & Son 1909) (1839).

⁴ *E.g.*, *Thompson v. Metro. Life Ins. Co.*, 149 F. Supp. 2d 38 (S.D.N.Y. 2001) (denying defendant's motion for summary judgment); *MetLife Is Settling Bias Lawsuit*, N.Y. TIMES, Aug. 30, 2002, at C12 (describing settlement of a lawsuit under state and federal civil rights law challenging race-based underwriting practices of the company from 1901 to 1972 and reporting that \$250 million for associated litigation and regulatory costs had been set aside previously as a charge against earnings); *see \$1 Million Donated to Settle Bias Lawsuit*, HARTFORD COURANT, Dec. 21, 2002, at E2 (reporting that Prudential had donated \$500,000 apiece to the United Negro College Fund and the NAACP Legal Defense Fund in addition to payments to individual policyholders as part of a settlement of a lawsuit accusing it of using race-based insurance rates); Joseph B. Treaster, *Insurer Agrees It Overcharged Black Clients*, N.Y. TIMES, June 22,

economic history that began after the Civil War with door-to-door marketing of small individual life insurance policies to protect poor workers and their families from the indignity of a pauper's burial.⁵ The closing of this chapter in history also marked the end of a form of Jim Crow race discrimination largely invisible to the American public.

¶2 Although the settlements provided partial recompense to black Americans harmed by the continuing effects of policies sold during the Jim Crow era, the litigation itself did not accomplish a broader shift in commercial practice. Litigation brought under Civil War-era civil rights statutes⁶ primarily served as a “mop-up” operation following the industry's elimination of race-based practices for most new policies issued after the beginning of the modern civil rights era. Under pressure from civil rights advocates, for example, the Metropolitan Life Insurance Company eliminated explicit race-based rates for some new policies as early as 1948.⁷ By the early 1960s, industry professional organizations had developed and approved race-integrated mortality tables as an industry-wide standard.⁸ Thus, by the time the Civil Rights Movement had accomplished landmark legal and legislative changes in education, public accommodations, employment, housing, and voting rights, the biggest players in the life insurance industry had “voluntarily” discontinued their most visible race-based practices for newly issued policies.⁹

¶3 This Article traces the evolution of explicit race-based insurance practices over a century as the American life insurance industry responded to changes in the social, economic, and legal status of former slaves. It illustrates and illuminates the complex interaction between civil rights reform and private commercial practice. The story told here, drawn from insurance company and economic histories, NAACP Legal Defense Fund archives, and recently revealed details from state insurance department

2000, at A1 (reporting that American General had agreed to make restitution of \$206 million, mainly to black policyholders in five Southern states and their heirs, who as recently as earlier that year had paid up to a third more than white customers for small life insurance policies). Earlier this year, the John Hancock Life Insurance Company agreed to a \$24.4 million settlement in a class-action lawsuit which alleged that John Hancock racially discriminated in the sale of life insurance policies before 1959 by offering lower-grade policies to African Americans. Donna Goodison, *Hancock Settles Bias Suit*, BOSTON HERALD, April 8, 2009, at 27 (reporting on the settlement of *Norflot v. John Hancock Fin. Services, Inc. and John Hancock Life Ins. Co.*, No. 04-1099 (D. Conn. Jan. 29, 2007)).

⁵ That market declined in importance for many major life insurance companies as living standards improved and the employer-based group insurance market expanded throughout the twentieth century. E.g., JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 16–52 (2003).

⁶ Lawsuits challenging race discrimination in life insurance rates and benefits have included claims under the Civil Rights Act of 1866, which prohibits race discrimination in the making or enforcement of contracts. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981, 1982 (2006)). The Act's purpose was to “giv[e] real content to the freedom guaranteed by the Thirteenth Amendment.” *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 433 (1968) (recounting the legislative history leading to the passage of the Civil Rights Act of 1866 and 42 U.S.C. § 1982); see also *Runyan v. McCrary*, 427 U.S. 160, 170 (1976) (relying on same history with regard to purpose of 42 U.S.C. § 1981).

⁷ See discussion *infra* Part III.B.4, III.D.

⁸ See discussion *infra* Part III.B.4.

⁹ See NAT'L ASS'N OF INS. COMM'RS, SURVEY OF LIFE INSURERS RESULTS (Sept. 16, 1988) (reporting results of survey, in which 52 of the responding 2753 life insurance companies reported having ever used race-based premiums, with a majority of those companies reporting that they had discontinued issuing policies with race-based premiums prior to 1964 or 1965, and all but one of the rest reporting discontinuance by 1987; 22 reported that they were currently collecting race-based premiums for previously issued policies).

investigations and civil rights litigation, both affirms and challenges patterns of reform observed by legal historians outside of the private commercial context.

¶4 Studies of the development and interpretation of constitutional law have shown that civil rights reforms can provoke backlash that transforms former status hierarchies into more modern or private forms of discrimination.¹⁰ Recognition of the basic civil rights of free blacks at the end of the Civil War and during the short-lived Reconstruction era was soon followed, for example, by a reformulation of the legal status of former slaves.¹¹ After ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, the Supreme Court distinguished between political rights of citizenship and private associational affinities, ushering in the Jim Crow era of state-sanctioned social and economic segregation that persisted until the mid-twentieth century.¹² As observed by legal historian Reva Siegel in another context, “civil rights reform does not simply abolish a status regime” but “in important respects, it modernizes the rules and rhetoric” used to justify and enforce the former status hierarchy.¹³

¶5 When careful attention is paid to how race-based insurance pricing practices developed, an analogous privately imposed transformation can be discerned here: Private life insurance companies translated former race hierarchies into race-based mortality risk classifications. During a period of racial retrenchment, after free blacks had challenged formerly settled political, social, and legal understandings, private companies reformulated contested status regimes into actuarial risk categories that quantified differences between blacks and whites.¹⁴ Mortality rate differentials led to coverage restrictions and to a dual race-based pricing structure in low-income markets for life insurance.¹⁵

¶6 The century-long effort to outlaw race-based pricing practices in the insurance industry illuminates the challenges faced by those who sought reform of this “modernized” private commercial practice. During the Jim Crow era, life insurance companies doing business in newly emerging markets began categorizing blacks as “substandard” mortality risks.¹⁶ Adopted after the rise of scientific racism¹⁷ and

¹⁰ E.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–442 (2004); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1559–60 (2004); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

¹¹ See discussion *infra* Part III.A and notes 91–92.

¹² *Plessy v. Ferguson*, 163 U.S. 537, 544, 551 (1896); see also discussion *infra* Part III.A.

¹³ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2179 (1996) (providing a case study of domestic assault law as it evolved from a law of marital prerogative to a law of marital privacy).

¹⁴ See discussion *infra* Parts III.B.1, III.B.3 (discussing race-based policies adopted beginning in the 1880s by Prudential and by Metropolitan Life, and the rationalization of these policies in an influential study of “race traits” published by Prudential’s actuary at the end of the nineteenth century).

¹⁵ See discussion of race-based practices in industrial insurance markets *infra* in Part III.B.

¹⁶ See discussion *infra* Part III.B.

¹⁷ See, e.g., STEVEN JAY GOULD, THE MISMEASURE OF MAN 30–72 (1981) (discussing pre-evolutionary styles of scientific racism and the influence of Samuel’s Morton’s measurement by race of cranial capacity of skulls in the antebellum period and reporting contrary results when repeating Morton’s measuring experiments); see also BRUCE DAIN, A HIDEOUS MONSTER OF THE MIND: AMERICAN RACE THEORY IN THE EARLY REPUBLIC 227–63 (2002) (discussing the development of race theory from the American Revolution to the Civil War); AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW 231–54 (1993) (discussing nineteenth century scientific contributions to ideologies about race

rationalized during the ascendancy of the eugenics movement,¹⁸ these race-based practices became firmly entrenched in the life insurance industry.

¶17 Legal responses to race-based life insurance practices first appeared in the 1880s, when states began enacting civil rights laws to prohibit race discrimination in insurance. In 1884, for example, Massachusetts explicitly prohibited race-based rates or premiums for life insurance policies; several other northern states had adopted similar laws by the end of the nineteenth century.¹⁹ Major life insurance companies generally resisted legislative efforts to ban discrimination by withdrawing business from those states, by instructing their agents not to solicit black business, or by adopting other less visible race-based practices.²⁰ The resulting segregation and segmentation of life insurance markets lasted well into the modern civil rights era.²¹

¶18 Race-based pricing classifications and coverage restrictions proved difficult to dislodge not only because of the structure and legal regulation of private commercial insurance markets,²² but also because of the strength of the underlying ideologies of racial difference, race separation, and the rhetorical power of actuarial language. Legislation and litigation, despite some progress, proved ineffective in changing industry practice.²³

¶19 By the mid-twentieth century, the assumptions of scientific racism and the eugenics movement, which had been under attack by public intellectuals in America and Great Britain since the 1930s and 1940s,²⁴ were finally disavowed.²⁵ The shift in

differences as natural and inborn, and noting the influence of the *Types of Mankind*, a popular book on racial inequality published in 1854 that had ten editions before the end of the century); see generally THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* (1963); WILLIAM STANTON, *THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815–1859* (1960).

¹⁸ E.g., ELAZAR BARKAN, *THE RETREAT OF SCIENTIFIC RACISM: CHANGING CONCEPTS OF RACE IN BRITAIN AND THE UNITED STATES BETWEEN THE WORLD WARS 4* (1992). The Supreme Court upheld the Virginia legislature's eugenics-inspired 1924 compulsory sterilization act in *Buck v. Bell*, 274 U.S. 200 (1927), which permitted the involuntary sexual sterilization of Carrie Buck and her family, inmates of the Virginia Colony for Epileptics and Feeble Minded. See also *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's Racial Integrity Act of 1924, an anti-miscegenation law, which required registration of race at birth and criminalized marriage between white and non-white persons); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (overturning *Pace v. Alabama*, 106 U.S. 583 (1883), which upheld Alabama's anti-miscegenation law and criminal prosecution of a cohabiting unmarried black man and white woman).

¹⁹ See discussion of state anti-discrimination laws *infra* Part III.B.2.

²⁰ See discussion *infra* Parts III.B.2, III.D.

²¹ See discussion *infra* Parts II, III (including the development of black-owned and operated fraternal benefit societies and insurance companies).

²² The life insurance industry has long been regulated by the states and has historically objected to proposed federal intrusions into regulation of the business of insurance. HOWELL E. JACKSON & EDWARD L. SYMONS, JR., *REGULATION OF FINANCIAL INSTITUTIONS* 442 (1999). For a brief period in the mid-nineteenth century, leading figures in the insurance industry favored federal regulation when compliance with state regulations became more burdensome. According to a leading historian of the insurance business, the movement for federal regulation of insurance failed, however, for three main reasons: 1) it was opposed by an influential state regulator, New York's Commissioner of Insurance; 2) in the late 1860s, the Supreme Court ruled in *Paul v. Virginia*, 75 U.S. 168 (1868), that an insurance policy was not a transaction in commerce; and 3) the organization of state insurance commissioners into the National Convention of Insurance Commissioners in 1871 provided a mechanism for more uniform state regulation. See 1 R. CARLYLE BULEY, *THE AMERICAN LIFE CONVENTION 1906–1952*, at 83–84 (1953).

²³ See discussion *infra* Parts III.B.2, III.D.

²⁴ See discussion *infra* Part III.E (discussing the events leading to the rejection of scientific racism).

²⁵ BARKAN, *supra* note 18, at 279–340; see also, e.g., KLARMAN, *supra* note 10, at 113 (noting that among the intellectual elite, “the ideology of white supremacy had been thoroughly undermined by 1940,” and that “the groundwork had been laid for a fundamental rethinking of racial differences”).

commercial life insurance race-based practices began soon after the military defeat of the Nazi regime in World War II and the post-war exposure of the horrors of the regime's "Final Solution."²⁶

¶10 After World War II, the struggle for civil rights gained momentum. Unlike civil rights reform in education, employment, housing, and public accommodations, however, the adoption of racially-integrated mortality tables by the insurance industry and the prospective elimination of explicit race-based pricing by the major companies did not, for the most part, require court orders or the enactment of new federal civil rights legislation.²⁷

¶11 Instead, civil rights advocates and black customers pressured white insurance companies to change their race-based practices.²⁸ Commercial practice gradually changed after World War II, as noted above, beginning with the equalization of race-based rates and benefits by a leading company in 1948. Just over a decade later, the industry and its regulators developed and adopted race-merged mortality tables.²⁹ Although significant mortality differentials remained between racially classified groups in the late 1940s and throughout the 1950s, improvements in mortality for both black and white Americans gave companies the maneuvering room to equalize rates and benefits as part of overall rate reductions for all policyholders.³⁰

¶12 The thesis of this Article is that the industry professionals who reformed industry practice during the modern civil rights era acted in light of a fundamental shift in social and scientific understandings of race. With the repudiation of biological views of race following World War II, and with the growing political momentum of civil rights, the industry could no longer ignore the role played by racism in creating the social and environmental conditions that disadvantaged blacks. Evidence suggests that the discontinuation of explicit race-based pricing classifications by the major players in the private insurance industry resulted in large part from a combination of the transformative event of World War II, the growing influence of the Civil Rights Movement, and post-war marketplace changes. Civil rights legislation adopted during the second Reconstruction of the mid-twentieth century and the broadening social and political movement for civil rights undoubtedly reinforced the need to modify practices for existing and newly issued insurance policies. However, industry norms were already largely reformed by the time litigators sought relief for those still covered by the discriminatory policies of the Jim Crow era.

¶13 My inquiry in this Article centers on the development and evolution of race-based insurance classifications and not on whether these actuarial classifications represented an accurate generalization of statistical groupings.³¹ For purposes of this discussion, I'll assume that mortality differences exist to a greater or lesser extent among groups

²⁶ See discussion *infra* in Part III.E.

²⁷ See discussion *infra* Part III.

²⁸ See discussion *infra* Part III.B.4, III.D.

²⁹ See discussion *infra* Part III.B.

³⁰ See discussion *infra* Part III.B.

³¹ Although this Article does not focus on the development of actuarial statistics or the use of race distinctions in mortality studies more generally, mortality studies or standard tables utilized by the life insurance industry are referenced throughout the article in relationship to the history of the industry's pricing practices.

classified by race, sex, national origin, or even religion.³² These differences depend upon whether one looks at mortality statistics for the population as a whole or for those who apply for insurance coverage or some other category, such as urban or rural location, state of residence,³³ occupational group, or time in history.

¶14 Researchers have long debated the reasons for classification-based mortality differences, but by the second half of the twentieth century, most tended to agree that the magnitude of each factor changes over time and that these group-defined differences are largely explained by environmental, social, and behavioral factors.³⁴ Whether disparate rates or benefits for individuals based on actuarial differences between groups classified by race, sex, religion, or national origin ought to be permitted requires resolution of conflicting efficiency and fairness concerns.³⁵

¶15 Over a period of nearly a century, national civil rights policy eventually discredited explicit race-based pricing of life insurance despite continuing mortality differences when policyholders were grouped by race.³⁶ Gender-based pricing of insurance products, by contrast, is currently a common commercial practice outside of the employment setting.³⁷ The story of the rise and fall of race-based pricing thus also provides important insights and context for those interested in understanding the development of gender-based life insurance pricing practices.

¶16 This discussion proceeds as follows. The Article begins in Part II with a brief overview of the historical development of race-based pricing practices and an introduction to the working class life insurance markets in which they developed. Part III, the core of the Article, provides a more detailed examination of the post-emancipation use of explicit race classifications by life insurance companies, the development of segregated life insurance markets, and the discontinuance of race-based

³² For the argument that the anti-discrimination principle itself operates as a generalization not only to prohibit irrelevant discrimination but also, and more importantly, to prohibit generalizations that appear to rest on a sound statistical foundation, see FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 151 (2003).

³³ Many types of classifications, including state of residence, for example, have historically correlated with mortality differences. *E.g.*, Louis I. Dublin, *Foreword to FEDERAL SECURITY AGENCY, STATE AND REGIONAL LIFE TABLES, 1939–41*, at 6 (life tables for the white population of the United States, and certain groups of States, by sex, showing wide variation in longevity and mortality within the United States).

³⁴ See Lea Brilmayer, et al., *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 538–58 (1980) (describing research with regard to both race and sex and concluding that “all major investigators now believe that social, cultural, environmental, and behavioral factors are more important than genetic or biological factors” in explaining such mortality differences). Controversies over biological views of race revived toward the end of the twentieth century. See, e.g., Evelyn Hammonds, *Straw Men and Their Followers: The Return of Biological Race, IS RACE “REAL”?*, June 7, 2006, <http://raceandgenomics.ssrc.org/Hammonds/> (citing as examples the public debate provoked by RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1996), and a 2005 *New York Times* op-ed by the evolutionary developmental biologist Dr. Armand Marie Leroi).

³⁵ See, e.g., KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* (1986); Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403 (1985); Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 222–26 (2003).

³⁶ See discussion and accompanying notes *infra* Part III.B, III.D.

³⁷ In the 1970s and 1980s, such distinctions were invalidated for employment-related insurance benefits, leaving a discontinuity between insurance and annuity practices in the employment setting as compared to private insurance obtained outside of the employment setting. See, e.g., *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983); *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978).

pricing practices beginning after World War II. As reinforced by developments during the following several decades, the use of race distinct mortality tables for pricing purposes could no longer be sustained by the major players in life insurance industry.

II. A BRIEF OVERVIEW OF RACE CLASSIFICATIONS AND INSURANCE MARKETS

¶17 In the decades preceding the Civil War, Americans began to view numbers as a “tool of mastery over both nature and society,” as pointed out by Drew Gilpin Faust in her study of the Civil War.³⁸ Moreover, by the mid-nineteenth century Americans had “entered into what historian Patricia Cline Cohen has called ‘an infatuation with numbers.’”³⁹ Such quantification, in which “statistics emerged in close alliance with notions of an expanding state,” often focused on “censuses, on demography, and on mortality records.”⁴⁰

¶18 Constructing categories for classifying data involved judgment in the choice of variables by which the data are sorted. In antebellum America, race was a commonly used variable.⁴¹ For example, as noted by Cohen, the 1840 census distinguished lunatics and idiots by race but not by age, sex, or class “because it was assumed that race was the most salient division of the population.”⁴²

¶19 Because I focus primarily on the post-Civil War period, beginning with the end of Reconstruction and ending with the modern civil rights era, this Article does not examine in any detail the slavery-era history of American insurance and banking interests. The resurgence of interest in black reparations has prompted new disclosures about the slavery-era practices of major American institutions, including insurance companies.⁴³ Insurance companies provided slaveholders coverage for damage to or death of their slaves at rates substantially higher than for white lives and imposed certain coverage restrictions, including confining policy amounts to two-thirds of actual value, and covering only a limited term of years.⁴⁴ Although emancipation ended the slavery-era

³⁸ DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 251 (2008).

³⁹ *Id.* (quoting COHEN, *supra* note 1, at 205).

⁴⁰ *Id.*

⁴¹ COHEN, *supra* note 1, at 213.

⁴² *Id.* at 212–13. The preceding five censuses “had gradually departed from the Constitution’s bare requirement to count the total population, first by creating, then by progressively refining, categories based on age, sex, and color.” *Id.* at 176–77; *see also* MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* (1988). The historical roots of a quantification, Cohen argues, reveal how the “concerns of the moment led to a reformulation, along numerical lines,” of a subject about which people were formerly “content to be imprecise.” COHEN, *supra* note 1, at 207. What people chose to measure “reveals not only what was important to them but what they wanted to understand and, often, what they wanted to control.” *Id.* at 206.

⁴³ *E.g.*, CAL. INS. CODE §§ 13810–13813 (requiring disclosure of slavery era insurance policies, effective in 2001); ILL. INS. CODE § 155.39 (requiring disclosure of slavery era policies, effective in 2004). The slavery era disclosures, summarized in reports compiled by state insurance departments, comprise a “slavery era” insurance registry.

⁴⁴ *See generally* Sharon Ann Murphy, *Securing Human Property: Slavery, Life Insurance, and Industrialization in the Upper South*, 25 J. EARLY REPUBLIC 615, 618 (2005) (observing that “the proportion of insurance policies on the lives of urban slaves in the Upper South approximated that of white male northeasterners by the mid-1850s” and that “fire insurance companies likewise began underwriting slave lives”). A Baltimore life insurance company, which sold many slave policies through its Richmond office prior to the Civil War, charged double the rate they charged for white lives of the same age, confined policy amounts to two-thirds of actual value, and generally refused to insure for a term of more than seven years. *Id.* at 623–24. Although this company initially prohibited coverage of slaves engaged in certain

insurance business,⁴⁵ race-based practices resurfaced in other life insurance markets following Reconstruction.⁴⁶

¶20 The Civil War focused attention on “the transience of life in the most dramatic possible way.”⁴⁷ After the Civil War, many veterans, both black and white, and their survivors and dependents received benefits computed by reference to the veteran’s service entitlement, not by age or life expectancy, under an expanded federal Civil War pension system.⁴⁸ Those included in the system received old age and survivors benefits comparable to pension and social insurance programs later adopted in Europe;⁴⁹ however, many former slaves did not qualify for governmental benefits.⁵⁰

¶21 Private businesses also responded to the growing needs of American families for financial security in a period of rapid industrialization, social change, and increased

hazardous work, it later joined other companies in charging extra premiums for slaves engaged in hazardous occupations on steamboats, railroads, in coal pits or mines, or as engineers or firemen. *Id.* at 638–39, 645–46. *See also* MILDRED F. STONE, *SINCE 1845, A HISTORY OF THE MUTUAL BENEFIT LIFE INSURANCE COMPANY* 19–20 (1957).

⁴⁵ Murphy, *supra* note 44, at 651; *see* The Emancipation Proclamation issued by President Lincoln in September, 1862, effective January 1, 1863; *see also* U.S. CONST. amend. XIII (abolishing slavery in 1865).

⁴⁶ State insurance department investigations and litigation have resulted in additional disclosure of post-emancipation practices by insurance companies. Some states have required more comprehensive disclosure of post-slavery race-based practices. For example, in 2000, the State of New York Insurance Department directed each domestic and foreign life insurer and fraternal benefit society to review its past and current underwriting practices regarding race-based underwriting and to report its findings to the Department no later than August 15, 2000. The Department specified that all relevant documents be included in such a review, including, but not limited to, rate charts, mortality tables, certain labor negotiation documents, agent and broker contracts, compensation schedules, underwriting and agent manuals, applications, policy form filings, board of directors (and committee) minutes, and internal memoranda. Memorandum, Supplement No. 1 to Circular Letter No. 19, from State of New York Insurance Department to All Licensed Life Insurers and Fraternal Benefit Societies (June 22, 2000), *available at* http://www.ins.state.ny.us/circltr/2000/cl00_19_s1_00.htm (issued pursuant to section 308 of the New York Insurance Law).

After reviewing information provided pursuant to the disclosure requirements, state insurance departments have conducted more detailed examination of companies suspected of continuing race-based premium structures and underwriting procedures. *See, e.g.*, ACTUARIAL RESOURCES CORP., *ACTUARIAL REPORT, RACE-BASED PRICING ACTIVITIES WITH RESPECT TO THE LIFE INSURANCE BUSINESS OF WESTERN & SOUTHERN LIFE INSURANCE COMPANY* (2003) (prepared for the Ohio Department of Insurance under guidelines and procedures established by the National Association of Insurance Commissioners Race Based Premium Working Group).

⁴⁷ MORTON KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885–1910*, at 7–8 (1963).

⁴⁸ *E.g.*, FAUST, *supra* note 38, at 268 (noting that “executing its obligations to the dead and their mourners” through national cemeteries, pensions, and records that preserved identities “required a vast expansion of the federal bureaucracy and a reconceptualization of the government’s role”); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 102, 135–43 (1992) (noting that over several decades Civil War pensions “evolved from a restricted program to compensate disabled veterans and the dependents of those killed or injured in military service into an open-ended system of disability, old-age, and survivors’ benefits for anyone who could claim minimal service time on the northern side of the Civil War”). Skocpol estimated that by 1910, about twenty-eight percent of all American men aged sixty-five or more received federal benefits averaging \$189 a year, and over three hundred thousand widows, orphans, and other dependents were also receiving benefits. *Id.* at 65. Between 1880 and 1910, she notes, the federal government “devoted over a quarter of its expenditures to pensions distributed among the populace.” *Id.* Survivor’s benefits were based on the veteran’s entitlement. *Id.* at 107, 129.

⁴⁹ SKOCPOL, *supra* note 48, at 130–35, 134 tbl.3 (comparing average pensions in the United States, Germany, and Britain in 1910 and 1912).

⁵⁰ *Id.* at 135–38 (identifying the primary beneficiaries of Civil War pensions to be native-born and earlier-immigrant northerners, mostly from the middle classes, and stating that many workers and poor people were left out altogether).

economic vulnerability. As a result, the American life insurance business expanded dramatically from the antebellum period through the Civil War.⁵¹ A structure for state supervision of the industry also formed at about that time, with the establishment of insurance departments in Massachusetts in 1865,⁵² and the formation in 1871 of a National Convention of Insurance Commissioners.⁵³ By 1873, twelve states had some form of insurance regulation.⁵⁴

¶22 Following the Civil War, race-based practices first emerged in a specialized form of life insurance marketed to low-income working people. Beginning in the 1870s, newly formed American life insurance companies, including Prudential, Metropolitan Life, and John Hancock,⁵⁵ known later as the “Big Three,”⁵⁶ sold small individual policies to a growing market of low-income wage earners.⁵⁷ This type of life insurance, called “industrial” or “burial” insurance, provided protection against the financial burden of a last illness and burial for the “industrious” classes.⁵⁸

¶23 Although rates and benefits varied by age, they did not vary, at least initially, by race of the insured, and were typically issued with fewer restrictions than other forms of life insurance.⁵⁹ Policies covered poor workers and their families, including newly emancipated slaves, women, industrial workers, and their children.⁶⁰ Industrial insurance agents typically sold policies door-to-door in an assigned geographical area or “debit,”

⁵¹ KELLER, *supra* note 47, at 2–11 (describing the reasons for the growth of the American life insurance enterprise from in the 1840s through the Civil War); *see also* SHEPARD B. CLOUGH, *A CENTURY OF AMERICAN LIFE INSURANCE: A HISTORY OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, 1843–1943*, at 4–16 (1946).

⁵² KELLER, *supra* note 47, at 194; *see also* discussion *supra* at note 22.

⁵³ KELLER, *supra* note 47, at 194.

⁵⁴ *Id.*

⁵⁵ The John Hancock Mutual Life Insurance Company was formed during the Civil War, in 1862, several years prior to the other two companies. HISTORICAL SKETCH OF THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, A HALF CENTURY COMPLETED, 1862–1912, at 18 (1912) [hereinafter HISTORICAL SKETCH]. Although both Prudential and Metropolitan Life began business selling “industrial” insurance policies in the early 1870s, John Hancock did not sell industrial insurance (also referred to by the company as weekly premium insurance) until 1879. *Id.* at 39, 76 (stating that the first “weekly premium” policy was issued by John Hancock on July 9, 1879).

⁵⁶ Although at least twenty different companies issued industrial insurance in 1905, Metropolitan, Prudential, and John Hancock accounted for ninety-five percent of this business, and industrial insurance constituted about seventeen percent of all life insurance. *See* Roger L. Ransom & Richard Sutch, *Tontine Insurance and the Armstrong Investigation: A Case of Stifled Innovation, 1868–1905*, 47 J. OF ECON. HIST. 379, 385 n.15 (1987).

⁵⁷ *See* discussion *infra* at Part III.B.

⁵⁸ American industrial insurance companies initially patterned their business on the Prudential Friendly Society of Great Britain, which grew out of the “friendly” and insurance societies developed in eighteenth and nineteenth century England. MALVIN E. DAVIS, *INDUSTRIAL LIFE INSURANCE IN THE UNITED STATES* 6 (1944). In America, Prudential began in a basement in Newark in 1875 as the Prudential Friendly Society and two years later changed its name to the Prudential Insurance Company of America. Metropolitan, which at that time provided life insurance for a mutual assistance and social organization for German immigrants, the Hildise Bund, began selling policies on the English Prudential model several years later. MARQUIS JAMES, *THE METROPOLITAN LIFE, A STUDY IN BUSINESS GROWTH* 43–44, 61, 73–93 (1947); *see also* John F. Dryden, President, The Prudential Ins. Co. of Am., Statement on “Industrial Insurance” Made to A Select Committee of the New Jersey Senate Appointed to Investigate Life Insurance 24 (July 19, 1906). *See also* discussion *infra* at Part III.

⁵⁹ *See* discussion *infra* at Part III.

⁶⁰ *See* discussion *infra* at Part III.B.

and collected premiums of a few cents each week to cover each insured member of the household.⁶¹

¶24 By the beginning of the twentieth century, as observed by Louis Brandeis in his Progressive-era study of industrial insurance, industrial policies were “considered a prime necessity among the working people,” and constituted approximately three-fourths of then existing level premium life insurance policies.⁶² Industrial insurance remained an important form of life insurance for low-income wage earners until the mid-twentieth century, when the business began to decline.⁶³

¶25 After Reconstruction, Prudential and other newly formed industrial insurance companies began classifying former slaves as “excessive” mortality risks.⁶⁴ Prudential introduced a race-distinct rate and benefit structure in 1881, followed later the same year by Metropolitan Life.⁶⁵ Soon thereafter, certain states began prohibiting life insurance companies from charging race-differentiated rates.⁶⁶ Prudential withdrew business from those states and later stopped soliciting black business everywhere.⁶⁷ Metropolitan withdrew its business from states with anti-discrimination laws but continued to sell race distinct policies elsewhere. Metropolitan later resumed business in states with anti-discrimination laws, but adopted other less visible race-based practices in those markets.⁶⁸ Black self-help organizations and black-owned insurance companies formed during the late nineteenth and early twentieth centuries to respond to economic needs unmet by white companies.⁶⁹ As a result, insurance markets became highly race-segregated.

¶26 As discussed in greater detail in Part III below, following improvements in living standards after World War II and the reforms sought by the Civil Rights Movement, insurance markets became more integrated, black insurance companies faced new competitive pressures, and explicit race-based rates for newly issued life insurance policies were rejected as a vestige of the Jim Crow past.⁷⁰ By the 1970s, “ordinary” life insurance⁷¹ business had surpassed the industrial business for most major insurers. The

⁶¹ DAVIS, *supra* note 58, at 7.

⁶² See Louis D. Brandeis, *Wage-Earners’ Life Insurance*, COLLIER’S: THE NAT’L WKLY., Sept. 15, 1906, reprinted in ALPHEUS THOMAS MASON, *THE BRANDEIS WAY: A CASE STUDY IN THE WORKINGS OF DEMOCRACY* 311, 312–13 APPENDIX II (1938) (proposing legislative reforms aimed at industrial insurance). Under level premium life insurance policies, premiums remain the same every year throughout the term of the contract but vary by the age at which the insured makes the contract with the insurer. CLOUGH, *supra* note 51, at 13 (noting that level premium policies were introduced from England and established in America between 1843 and 1870).

⁶³ Despite its importance in proportion to overall numbers of policyholders, industrial insurance remained a small proportion of the dollar amount of insurance in force. KELLER, *supra* note 47, at 286 tbl.11 (showing life insurance in force from 1900 to 1960, and comparing the amounts of ordinary and industrial life insurance in force during those years with credit and group insurance in force from 1920 to 1960).

⁶⁴ See discussion *infra* at Part III.B.1.

⁶⁵ *Id.*

⁶⁶ See discussion *infra* at Part III.B.2.

⁶⁷ *Id.*

⁶⁸ See discussion *infra* at Part III.B.3.

⁶⁹ See discussion *infra* at Part III.C.

⁷⁰ After newly issued policies with explicit race-based rates or benefits were eliminated, the battle to eliminate discriminatory practices in insurance then shifted to the more subtle ground of underwriting and “red-lining” issues. See *infra* notes 260 and 291 and accompanying text.

⁷¹ Ordinary life insurance policies were generally sold in increments of \$1,000, with premiums payable by mail on a monthly or less frequent basis. The premiums on ordinary life insurance policies were beyond

original “Big Three” discontinued selling new industrial policies, leaving the industrial market to smaller companies.⁷² Some of the remaining industrial companies did not revise their policies until the early 1980s, or later for a few small companies based in the South.⁷³ A few Jim Crow era policies, issued with higher premiums or lower benefits for black policyholders, may remain in force even today.⁷⁴

III. THE RISE AND FALL OF RACE-BASED LIFE INSURANCE POLICIES

¶27 One of the first studies of race-based practices in the insurance industry to reach a wide audience was *An American Dilemma*,⁷⁵ a comprehensive survey of American race relations cited by the Supreme Court in *Brown v. Board of Education*.⁷⁶ The Carnegie-funded study,⁷⁷ directed over a five-year period in the late 1930s and early 1940s by the Swedish economist Gunnar Myrdal,⁷⁸ examined the issue of race relations across a wide range of categories, including demographics, economics, politics, justice, social stratification, and social inequality. Myrdal’s detailed analysis of the conflict between American democratic ideals and racism influenced a generation of judges⁷⁹ and policymakers during World War II and the Cold War period.⁸⁰

¶28 In his analysis of the financial industry, Myrdal described how early mutual aid and benevolent societies⁸¹ and post-slavery race-based practices of major insurance

the economic reach of the poor and working class until living standards more generally improved in the later part of the twentieth century.

⁷² ROBERT A. MARSHALL & ELI A. ZUBAY, *THE DEBIT SYSTEM OF MARKETING LIFE AND HEALTH INSURANCE* 24 (1975).

⁷³ Scott J. Paltrow, *Past Due: In Relic of ‘50s and ‘60s, Blacks Still Pay More For a Type of Insurance—Companies Ended Dual Rates on New ‘Burial Policies But Didn’t Fix Old Ones—‘White Risks’ & ‘Negro Risks’*, WALL ST. J., Apr. 27, 2000, at A1 (discussing investigation of five companies by Florida’s insurance department).

⁷⁴ As explained in Part III.B.4, although explicit race-based rates and benefits were largely eliminated for newly issued policies by the early 1980s, some African-Americans still pay higher premiums or receive lower benefits under race-differentiated policies issued in the past. See cases cited *infra* notes 180–182.

⁷⁵ MYRDAL, *supra* note 2.

⁷⁶ 347 U.S. 483, 494 n.11 (1954) (rejecting the doctrine of “separate but equal” and holding that race segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment). Writing for the unanimous Court in *Brown*, Chief Justice Earl Warren observed that segregation is usually interpreted as denoting inferiority and cited as support psychological studies published by Kenneth Clark and others, and more generally, Myrdal’s *An American Dilemma*. *Id.* at 494 n.11.

⁷⁷ See F.P. Keppel, *Foreword* to MYRDAL, *supra* note 2, at v–viii (describing the genesis and scope of the study).

⁷⁸ See MYRDAL, *supra* note 2, at ix–xx. Thirty years after his study was published, Myrdal was awarded the Nobel Prize in Economics in 1974, shared with Friedrich August von Hayek, “for their pioneering work in the theory of money and economic fluctuations and for their penetrating analysis of the interdependence of economic, social and institutional phenomena.” See Nobelprize.org, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1974, <http://nobelprize.org/economics/laureates/1974/> (last visited Sept. 23, 2009).

⁷⁹ Myrdal’s book was first cited by Justice Frankfurter in *Hughes v. Superior Court of California*, 339 U.S. 460, 463 (1950) (noting that “[d]iscrimination against Negroes in employment has brought a variety of legal issues before this Court in recent years” and citing cases and Myrdal’s *An American Dilemma*).

⁸⁰ See, e.g., MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 119 (1987); see also KLARMAN, *supra* note 10, at 355, 426; see generally MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 7–9, 79–114 (2000).

⁸¹ MYRDAL, *supra* note 2, at 955. Mutual aid and benevolent societies provided forms of self-help to their members. They generally were funded through membership fees for the purpose of caring for the sick and providing burial at death. E.g., JOHN SIBLEY BUTLER, *ENTREPRENEURSHIP AND SELF-HELP AMONG BLACK*

companies led to the development of African-American owned and managed insurance companies.⁸² Although Myrdal's summary goes into little detail of the use of race classifications by the insurance business, the underlying survey paper from which he drew his conclusions provides more background and context.⁸³

¶29

Additional historical information now available, and events occurring after the 1944 publication of *An American Dilemma*, tell a story of the insurance business responding to legal and social changes over a period of more than a century. Social and economic changes occurring after the publication of *An American Dilemma*, including the victory over the Nazi regime in World War II, pressure from the NAACP Legal Defense Fund and other civil rights groups on the issue of race-based rates and benefits, as well as integration of economic markets more generally, led to changes in race-based insurance practices.

A. Legal and Economic Context: After Reconstruction

¶30

Many of the race-based practices of life insurance companies developed after Reconstruction, during a period of social and political retrenchment following the civil rights reforms of the 1860s and 1870s. Shortly after the Civil War, during the short-lived Reconstruction era, Congress established the Freedman's Bureau⁸⁴ and enacted civil rights legislation.⁸⁵ The financial panic of 1873, followed by a severe economic depression and political changes in the North, impeded further efforts at reconstruction in the South.⁸⁶ After 1877, the federal government withdrew its troops from southern statehouses and federal supervision of elections ceased.⁸⁷ Through a combination of terror and violence, including lynching,⁸⁸ and various other less violent means such as poll taxes and literacy tests, white supremacists systematically disenfranchised blacks throughout the South.⁸⁹

AMERICANS: A RECONSIDERATION OF RACE AND ECONOMICS 109–10 (1991).

⁸² See additional discussion *infra* in Part III.C.

⁸³ Ira DeA. Reid, *The Negro in the American Economic System* Vol. I 37–69 (1940) (unpublished manuscript prepared for the study, on file with the Schomburg Collection of the New York Public Library).

⁸⁴ Second Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866) (enacting a federal bureau to assist freedmen and refugees to enable them to become “self-supporting citizens of the United States, and to aid them in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of the States, and by constitutional amendment, available to them and beneficial to the republic”).

⁸⁵ *E.g.*, Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875) (mandating equal access to accommodations regardless of race); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (securing the rights of citizenship to all persons born in the United States and granting those citizens the same rights to enter into contracts as white citizens). In the late twentieth and early twenty-first centuries, civil rights litigators relied on the Civil Rights Act of 1866 to challenge race-based insurance rates. See 42 U.S.C. §§ 1981–1982.

⁸⁶ See, *e.g.*, ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 190 (2005) [hereinafter FONER, *FOREVER FREE*].

⁸⁷ Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867) (establishing military rule over the Rebel States); see also, *e.g.*, ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 575–87 (1988) [hereinafter FONER, *RECONSTRUCTION*] (describing the declining commitment of the federal government to reconstruction and withdrawal of federal troops after the Hayes-Tilden agreement of 1877).

⁸⁸ KLARMAN, *supra* note 10, at 3 (stating that by 1895, Booker T. Washington had acquiesced in black disenfranchisement and segregation and urged southern blacks to instead pursue education and economic advancement, and that from 1895–1900, an average of about one-hundred blacks were lynched a year, mostly in the South).

⁸⁹ *E.g.*, FONER, *FOREVER FREE*, *supra* note 86, at 194–213; PETER KOLCHIN, *AMERICAN SLAVERY 1619–1877*, at 229–36 (1993).

¶31 At the end of the nineteenth century, the United States Supreme Court, which had earlier issued restrictive rulings on post-Civil War constitutional amendments⁹⁰ and civil rights legislation,⁹¹ upheld state Jim Crow laws in *Plessy v. Ferguson*.⁹² *Plessy* ushered in a period of state-sanctioned racial subordination that extended into the latter half of the twentieth century.⁹³

¶32 As discussed in greater detail below, the race-based practices developed by the industrial insurance industry mirrored the dominant racial ideology of white supremacy. Classifying blacks as inferior by “nature,” and thus as “substandard” insurance risks, race-distinct pricing structures became firmly entrenched in the insurance industry during the Jim Crow period.

¶33 The era of state-sanctioned race segregation finally ended at least a decade after the Court’s decision in *Brown v. Board of Education*⁹⁴ with the social and legislative changes accomplished by the Civil Rights Movement during the second Reconstruction.⁹⁵ After a brief introductory discussion of related developments before the Civil War, this section focuses on the rise and fall of race-based insurance practices during the Jim Crow era.

1. Before the Civil War: Self-Help for Free Blacks and Slaves

¶34 In the late eighteenth century, church relief and mutual aid societies were organized by free blacks in the North, and later in the South, to provide a form of self-help for themselves and their families in the event of sickness and death.⁹⁶ Although mutual aid and benevolent societies had come into existence before the Revolution⁹⁷ and were fairly common among master craftsmen, journeymen, and apprentices, white

⁹⁰ *United States v. Reese*, 92 U.S. 214 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

⁹¹ *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating portions of the civil rights act of 1875).

⁹² 163 U.S. 537, 552 (1896) (upholding separate facilities for blacks under the Fourteenth Amendment). In rejecting the proposition that equal rights could be achieved through “an enforced commingling of the two races,” the Court observed that “[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences.” *Id.* at 551.

⁹³ *E.g.*, KLARMAN, *supra* note 10.

⁹⁴ 347 U.S. 483, 493 (1955) (overturning *Plessy*’s “separate but equal” doctrine as a violation of equal protection guaranteed by the Fourteenth Amendment).

⁹⁵ Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957).

⁹⁶ ARMAND J. THIEBLOT, JR. & LINDA PICKTHORNE FLETCHER, *NEGRO EMPLOYMENT IN FINANCE: A STUDY OF RACIAL POLICIES IN BANKING AND INSURANCE, VOL. II—STUDIES OF NEGRO EMPLOYMENT, APPENDIX A, HISTORY OF NEGRO LIFE INSURANCE COMPANIES* 124 (1970) [hereinafter FLETCHER, *THE NEGRO IN THE INSURANCE INDUSTRY*]; E. FRANKLIN FRAZIER, *THE NEGRO IN THE UNITED STATES* 368–69 (1957); James B. Browning, *The Beginnings of Insurance Enterprise Among Negroes*, 22 J. OF NEGRO HIST. 417, 418, 420–24 (1937); George W. Hines & George Wm. Cook, *No. 11 Negro Insurance, Commercial College Studies of Negroes in Business*, 9 HOWARD U. RECORD 9 (1915); see PHILIP S. FONER, *HISTORY OF BLACK AMERICANS* 557 (1975) [hereinafter FONER, *HISTORY OF BLACK AMERICANS*] (stating that the first black mutual aid society was organized in Providence, Rhode Island, as early as 1780; providing details about Philadelphia’s “Free Africa Society,” organized in 1787 by Allen and Jones, including its appeal to the city to rent a portion of Philadelphia’s potter’s field for the burial of its dead; and describing the establishment of similar societies in New York and other Northern and Southern cities).

⁹⁷ See ROBERT A. MARSHALL & ELI A. ZUBAY, *THE DEBIT SYSTEM OF MARKETING LIFE AND HEALTH INSURANCE* 15 (1975).

benevolent and fraternal societies⁹⁸ generally did not open their membership to blacks.⁹⁹ Blacks thus founded their own societies.¹⁰⁰

¶35 Black-founded societies served as centers of religious and social activity, and were important factors in the lives of free blacks¹⁰¹ and, to some extent, the slaves.¹⁰² The societies collected small initiation fees and periodic payments. Free black benevolent societies provided aid to the disabled or aged, as well as burial benefits and annuities for the survivors of deceased members.¹⁰³

¶36 The growth of benevolent organizations, along with black fraternal organizations and lodges,¹⁰⁴ laid the foundation for the structure of the black insurance business.¹⁰⁵

⁹⁸ Although the differences have been labeled as “relatively minor,” mutual benefit (or benevolent) societies differed from fraternal societies in that “they lacked ritual and typically had only a local membership.” DAVID M. FAHEY, *THE BLACK LODGE IN WHITE AMERICA: “TRUE REFORMER” BROWNE AND HIS ECONOMIC STRATEGY* 5 (1994) [hereinafter FAHEY, *THE BLACK LODGE*].

⁹⁹ FONER, *HISTORY OF BLACK AMERICANS*, *supra* note 96, at 557; Alvin Schmidt & Nicholas Babchuk, *The Unbrotherly Brotherhood: Discrimination in Fraternal Orders*, 34 *PHYLON* 275, 276–77 (1973); *see also* Mary Ann Clawson, *Fraternal Orders and Class-Formation in the Nineteenth Century United States*, 27 *COMP. STUD. IN SOC’Y & HIST.* 672, 692–93 (1985).

¹⁰⁰ One of the first black fraternal organizations was formed in 1776 by Prince Hall, of West Indian origin. FONER, *HISTORY OF BLACK AMERICANS*, *supra* note 96, at 559–61. In 1787, a warrant was granted to the Prince Hall freemasons to operate as African Lodge No. 459 by the Grand Lodge of England. *Id.* American Masons refused to recognize the legitimacy of the all-black organization, however, and blacks were also barred from membership in white Masonic lodges. Some white Masonic groups in America refuse to recognize the Prince Hall freemasons even today. *See, e.g.*, Shaila Dewan & Robbie Brown, *Black Member Tests Message of Masons in Georgia Lodges*, *N.Y. TIMES*, July 3, 2009, at A15 (stating that mainstream Masons began recognizing the Prince Hall group in about 1990, when “a thaw began in Connecticut and spread to all but 10 states” and noting that the hold-outs were mostly the former Confederate states, including Georgia); *Black, White Masons in South Struggle with Racial Separation*, *MSNBC ONLINE*, Oct. 24, 2006, <http://www.msnbc.msn.com/id/15405618/> (reporting that grand lodges in thirty-eight states, beginning in the late twentieth century, have granted mutual recognition to the Prince Hall masons but that Masons in North Carolina voted against granting such recognition in the fall of 2006; mutual recognition has not been granted by grand lodges in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and West Virginia).

¹⁰¹ MYRDAL, *supra* note 2, at 317 (noting that New Orleans had several hundred benevolent societies in the mid-1930s, one of which had been founded in the 1780s); Hines & Cook, *supra* note 96, at 8 (noting that a pamphlet issued by the Pennsylvania Society for Promoting Abolition of Slavery in 1838 listed eighty beneficial societies).

¹⁰² Hines & Cook, *supra* note 96, at 7–8 (quoting from a 1904 Hampton Negro Conference Report: “While there are no records available, yet from reliable sources we learn that more than seventy-five years ago there existed in every city of any size in Virginia, organizations of Negroes having as their object the caring for the sick and the burying of the dead”).

¹⁰³ *E.g.*, Robert L. Harris, Jr., *Charleston’s Free Afro-American Elite: The Brown Fellowship Society and the Humane Brotherhood*, 82 *S. CAROLINA HIST. MAG.* 289, 290 (Oct. 1981) (formed in 1790 and 1843, respectively, these societies provided sick and death benefits as well as burial plots and funeral services); *see also* FONER, *HISTORY OF BLACK AMERICANS*, *supra* note 96, at 559.

¹⁰⁴ By 1860, black Masonic lodges could be found in eighteen states and in Canada. *See* Edward Nelson Palmer, *Negro Secret Societies*, 23 *SOC. FORCES* 207, 208 (1944). The Independent Order of Odd Fellows rejected the application for membership by a group of free blacks formed as the Philomathean Institute of New York. Following its acceptance by an Odd Fellow lodge in England, the Philomathean Lodge in New York City was founded in 1843. FRAZIER, *supra* note 96, at 371. Black Odd Fellows lodges later became so widespread that W.E.B. DuBois observed that the Odd Fellows were the “most powerful and flourishing secret order” in America. W.E.B. DUBOIS, *THE PHILADELPHIA NEGRO* 222, 224 (1899, *reprinted in* 1973 ed.) (noting that fraternal organizations provided blacks certain social benefits as well as “insurance from misfortune”).

¹⁰⁵ FLETCHER, *THE NEGRO IN THE INSURANCE INDUSTRY*, *supra* note 96, at 124; *see also* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 287 (7th ed. 1994) (“A logical outcome of the mutual benefit societies was black insurance companies, which

Over time, benevolent societies and fraternal organizations declined in popularity, while life insurance sold by insurance companies grew in importance as a source of economic security.¹⁰⁶

2. After the Civil War: Economic Challenges

¶37 In the post-Civil War period, newly emancipated blacks encountered serious social and economic challenges.¹⁰⁷ After the Freedman’s Savings and Trust Company failed in 1874,¹⁰⁸ many freed blacks became suspicious of banks as repositories for savings.¹⁰⁹ Faced with poverty, illness, and the death of family members, emancipated blacks turned to churches and to fraternal and benevolent organizations for economic and social protection.¹¹⁰ Some former slaves also purchased coverage from industrial insurance companies selling small individual insurance policies designed for low-income wage earners.¹¹¹

¶38 The following three sections discuss the parallel development of race-based practices of white insurance companies and the organization and operation of twentieth century black-owned and managed insurance companies. Black-owned life insurance companies developed from the experience with insurance programs provided by late nineteenth century black fraternal and benevolent societies.

B. Industrial or “Debit” Insurance: Race-Based Rates and Sales Restrictions

¶39 Black policyholders first became an important factor for major white insurance companies in the 1870s, the decade after emancipation.¹¹² During that period, insurance companies began selling industrial policies, a life insurance business characterized by small policies and frequent premiums.¹¹³ Premiums were collected house-to-house in multiples of five or ten cents a week, with variations for different ages in the amount of insurance purchased. Coverage could be purchased for every family member.¹¹⁴ Sometimes referred to as “debit” insurance because premiums were collected by company representatives in an assigned fixed area known as a “debit,”¹¹⁵ industrial

were more economic than social in their functions.”). These developments are discussed in greater detail *infra* at Part III.C.

¹⁰⁶ MYRDAL, *supra* note 2, at 955 (suggesting that one of the reasons for their decline in popularity was their frequent failure to pay sickness and death benefits, especially since the beginning of the depression in 1929).

¹⁰⁷ *E.g.*, FONER, RECONSTRUCTION, *supra* note 87; *see also* EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 132–59 (15th ed. 2007).

¹⁰⁸ FONER, FOREVER FREE, *supra* note 86, at 193.

¹⁰⁹ *Id.*

¹¹⁰ C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN-AMERICAN EXPERIENCE 244–49 (2003); MYRDAL, *supra* note 2, at 955 (noting that the death benefit and sickness insurance features of lodges and benevolent societies made the lodges “of almost equal importance with the churches in the period around 1890”).

¹¹¹ See introductory discussion of industrial insurance *supra* Part II.

¹¹² MARQUIS JAMES, THE METROPOLITAN LIFE: A STUDY IN BUSINESS GROWTH 338 (1947).

¹¹³ FREDERICK L. HOFFMAN, HISTORY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA 3 (1900) [hereinafter HOFFMAN, HISTORY OF THE PRUDENTIAL].

¹¹⁴ DAVIS, *supra* note 58, at 6–7 (noting that children, ages one through ten, could be insured for as little as three cents per week).

¹¹⁵ *Id.* (explaining that the agent would report premium payments in bulk and keep detailed records of

insurance served mainly to provide wage earners funds for a last illness and a decent burial.¹¹⁶ Because industrial insurance was within the reach of poorly paid workers, companies began selling insurance to former slaves.¹¹⁷

1. Emergence of Race-Based Rates

¶40 Both the Prudential Life Insurance Company, beginning in the mid-1870s,¹¹⁸ and Metropolitan Life, which issued its first industrial policy in 1879,¹¹⁹ initially issued such policies on blacks at the same rates as whites.¹²⁰ By the beginning of 1881, however, Prudential had begun to charge higher premium rates to cover black children and reduced benefits of black adults by one-third to cover their “excessive” mortality.¹²¹ Metropolitan had stopped writing insurance on blacks,¹²² but resumed writing policies on blacks later in 1881 at two-thirds the benefits given whites.¹²³

2. Reaction to Early State Laws Prohibiting Race-Based Insurance Rates

¶41 In response to these developments, Massachusetts passed a law in 1884 forbidding race-based life insurance rates or benefits.¹²⁴ According to Metropolitan’s

premium payments on individual policies issued to each family). The novelist Philip Roth, in a memoir published after his father’s death, describes childhood memories of hearing of his father’s work collecting door-to-door on a “colored debit,” stories “of the eerie evenings collecting pennies from the poorest of Newark’s poor, stories from thirty-eight years with the Metropolitan.” PHILIP ROTH, *PATRIMONY, A TRUE STORY* 108–09 (1991). I’m grateful to my colleague, Professor Shari Motro, for this reference.

¹¹⁶ See Brandeis, *supra* note 62, at 311, app. II at 312–13. Brandeis argued that industrial insurance placed an undue burden on working people through the companies’ high management expenses, high lapse rates, and premiums double that payable for any given amount payable on ordinary life nonparticipating policies. *Id.* at 314–15. Brandeis also urged the establishment of “savings bank life insurance” to take the place of industrial insurance. *Id.*

¹¹⁷ JAMES, *supra* note 112, at 338.

¹¹⁸ Reid, *supra* note 83, at 38; see also HOFFMAN, *HISTORY OF THE PRUDENTIAL*, *supra* note 113, at 1, 58.

¹¹⁹ JAMES, *supra* note 112, at 87. The John Hancock Mutual Life Insurance Company also began selling industrial insurance policies at that time. Both companies were already selling ordinary life insurance policies. DAVIS, *supra* note 58, at 6.

¹²⁰ JAMES, *supra* note 112, at 338. In a prospectus of Prudential, which contained the first adult rate table used by the company (covering ages eleven to seventy-five), benefits were limited to a maximum of \$25 per week for sickness and \$500 in case of death. No medical examination was necessary. HOFFMAN, *HISTORY OF THE PRUDENTIAL*, *supra* note 113, at 70–71, 73.

¹²¹ See HOFFMAN, *HISTORY OF THE PRUDENTIAL*, *supra* note 113, at 137–38. Hoffman’s study reproduces a memorandum issued in March of 1881, by John F. Dryden, Secretary of the Prudential, in which he instructed agents that two changes would be made “with respect to colored persons (Negroes) applying for insurance in this company” under policies issued on and after March 28, 1881: 1) “Under adult policies the sum assured will be one-third less than now granted for the same weekly premium”; and 2) “Under infantile policies, the amount insured will be the same as now, but the weekly premiums will be increased to five cents.” *Id.* at 137. The changes were “in consequence of the excessive mortality prevailing in the class above named” and that “rate tables would be sent to them for use with colored applicants.” *Id.* Hoffman’s study also contains the “Adult Rate Table for Colored Risks,” first used April 4, 1881. *Id.* at 138.

¹²² JAMES, *supra* note 112, at 338.

¹²³ *Id.* at 86 (describing that this practice, dictated entirely by the greater mortality risk of “colored persons,” was misconstrued as racial discrimination “in the face of proof that color had nothing to do with it”).

¹²⁴ SUPPLEMENT TO THE PUBLIC STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, ch. 235, §1 (1884), provided as follows: “No life company shall make any distinction or discrimination between white persons and colored persons wholly or partly of African descent, as to the premiums or rates charged for

historian, “[a]fter unavailing protests the companies discontinued soliciting Negro risks in that state.”¹²⁵ When several other states passed similar laws,¹²⁶ “Prudential went further and stopped doing business with Negroes everywhere.”¹²⁷ The laws could not require the companies to solicit black business, as pointed out by a historian writing about the companies’ reaction, and “most companies, Metropolitan included, instructed their agents not to solicit it in those states.”¹²⁸

¶42

By contrast, other coverage restrictions were significantly liberalized during this era.¹²⁹ Prudential discontinued restrictions on hazardous occupations, except for military

policies upon the lives of such persons; nor shall any such company demand or require greater premiums from such colored persons than are at that time required by such company from white persons of the same age, sex, general condition of health and prospect of longevity; nor shall any such company make or require any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of such colored person insured Any such company which shall refuse the application of any such colored person for insurance upon such person’s life shall furnish such person, on his request therefore, with the certificate of a regular examining physician of such company who made the examination, stating that such refusal was not because such applicant is a person of color, but solely upon such grounds of the general health and prospect of longevity of such person as would be applicable to white persons of the same age and sex.”

Three years later, the statute was recodified and amended to add the following additional language at the end of the first sentence above: “nor insert in the policy any condition, nor make any stipulation whereby such person insured shall bind himself or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases; and any such stipulation or condition so made or inserted shall be void.” SUPPLEMENT TO THE PUBLIC STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, ch. 215, § 69 (1887).

¹²⁵ JAMES, *supra* note 112, at 338.

¹²⁶ *Id.* at 338 n.70 (listing Connecticut, 1887; Ohio, 1889; New York, 1891, Michigan, 1893; Minnesota, 1895; New Jersey, 1902; Rhode Island, which had a law by 1894 but repealed it before 1906); *see also* CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 70 (1940).

¹²⁷ JAMES, *supra* note 112, at 338. According to Hoffman’s account, published in 1900, although Prudential “accepts applications from negroes and issues policies without rating, it does not solicit this class of risks, and has, therefore, comparatively few colored persons as policyholders on its books.” HOFFMAN, HISTORY OF THE PRUDENTIAL, *supra* note 113, at 139. He refers readers to his “full discussion of the entire subject of negro mortality” in his book on the race traits and tendencies of the American Negro, published in 1896. *Id.*

¹²⁸ JAMES, *supra* note 112, at 86. Few historical details are available about the early race-based policies of the other member of the “Big Three,” the John Hancock Company, which was the first mutual life company to issue an industrial insurance policy. However, a consulting actuary who served as an expert witness for the company, reported after reviewing company records that John Hancock did not develop dual rate plans; instead, the company established a practice of not soliciting black business and not paying sales commissions on African-American policies. According to the report, the company did not begin to solicit African-American business until sometime around 1953, and after that time paid full sales commissions for African-Americans and whites for either ordinary or industrial policies. The company thereafter monitored the percentage of sales to African-Americans. The expert reported that a total of about seventy million industrial policies were sold by John Hancock through 1967, when it discontinued selling industrial policies. About 550,000 policies of that total were sold to African-Americans during that time, with about 400,000 sold from 1954 to 1967. *See generally* Expert Witness Report of Randall Mire, *Norflet v. John Hancock Fin. Services, Inc. and John Hancock Life Ins. Co.*, No. 04-1099 (D. Conn. Jan. 29, 2007) (rulings on motion to compel discovery).

¹²⁹ Industrial policies were generally less restrictive than ordinary policies, except that initially, adult weekly premium policies contained standard terms (applicable also to the ordinary branch) that “in case of death by the hands of justice or the consequences of violating or attempting to violate law, or in consequence of habits of intemperance, existing at the policy date or acquired afterwards, the policy could be avoided.” *See* HISTORICAL SKETCH, *supra* note 55, at 78. These conditions were dropped for industrial policies issued by the company after July of 1884. *Id.* *See also* DAVIS, *supra* note 58, at 9–10 (discussing more generally these types of restrictive clauses in early industrial policies).

service, in 1884.¹³⁰ It briefly eliminated the military service restriction at the end of the century. Neither Prudential nor Metropolitan charged higher rates for members of the armed forces during the Spanish-American War.¹³¹

¶43 Metropolitan, unlike Prudential, continued selling to blacks at higher rates in states that did not prohibit race-differentiated rates.¹³² Although Metropolitan continued to sell policies to blacks, careful selection of black risks was “deemed necessary,” and “a full medical examination” was required in every case.¹³³ Under those special selection conditions, Metropolitan decided in 1894 that the higher rates for black risks could be discontinued, and blacks were again sold policies at the same premium as whites.¹³⁴ At the same time, solicitation of business in states with anti-discrimination laws resumed.¹³⁵

3. The Influence of Race Ideology: Standard and Substandard Policies

¶44 In 1896, the year of the Supreme Court’s decision in *Plessy v. Ferguson*,¹³⁶ Prudential’s statistician, Frederick Hoffman, a German immigrant who had married into a southern white family and lived for a time in the South,¹³⁷ published a study of black mortality rates.¹³⁸ He found that black mortality rates for most age groups were nearly twice those of whites and that at all age groups blacks had a lower life expectancy than whites.¹³⁹ Although Hoffman’s later work tied the prevalence of certain diseases in the general population, such as cancer and tuberculosis, to social, economic, and environmental conditions, he did not similarly attribute black mortality to such conditions.¹⁴⁰

¶45 Hoffman argued instead that black mortality and black health were the function of innate racial traits of blacks, concluding that the numbers proved that blacks were biologically inferior to whites, and attributed the statistics to their “low state of

¹³⁰ HOFFMAN, HISTORY OF THE PRUDENTIAL, *supra* note 113, at 155. Prudential industrial policyholders included, among other occupations, bartenders, blacksmiths, machinists, carpenters, railway employees, and miners. *Id.* at 304 (noting industrial policyholders dying in 1897 and 1898). In 1898, Prudential was insuring, among many other occupations, nearly 18,000 miners, 16,000 machinists, 30,000 carpenters, and 113,000 laborers on industrial policies. *Id.* at 306. It is not clear from Hoffman’s description of the change in policy whether or not hazardous occupations were at that time treated by Prudential as substandard risks subject to rates different from standard risks.

¹³¹ KELLER, *supra* note 47, at 55–56 (describing the liberalization of policy terms from the 1870s to the 1890s).

¹³² JAMES, *supra* note 112, at 338.

¹³³ *Id.*

¹³⁴ *Id.* See also WINFRED OCTAVUS BRYSON, JR., NEGRO LIFE INSURANCE COMPANIES: A COMPARATIVE ANALYSIS OF THE OPERATING AND FINANCIAL EXPERIENCE OF NEGRO LEGAL RESERVE LIFE INSURANCE COMPANIES 8 (1948) (listing 1893 as the year that Metropolitan Life equalized the benefits for colored and white risks).

¹³⁵ JAMES, *supra* note 112, at 338.

¹³⁶ 163 U.S. 537, 551–52 (1896) (sanctioning “Jim Crow laws”).

¹³⁷ See Paul Finkelman, *Introduction* to FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO i–vii (The Lawbook Exchange, Ltd., 2004) (1896) [hereinafter HOFFMAN, RACE TRAITS].

¹³⁸ *Id.* at v (describing in the preface his ten-year investigation of “longevity and physiological peculiarities among the colored population”). In Hoffman’s view, his study would not be in vain if it led to “more scientific attention to the relations between the superior and inferior races.” *Id.* at viii.

¹³⁹ *Id.* at iv.

¹⁴⁰ *Id.* at ii–vi.

morality.”¹⁴¹ He wrote that “modern educational and philanthropic efforts” had made blacks even more “dependent on the white man” than slavery, and rejected the idea that private charity or public programs could change the social condition of blacks.¹⁴² He viewed blacks as a dying race, and accordingly, not good insurance risks.¹⁴³ Hoffman’s mortality studies also provided a “scientific” justification for race discrimination more generally.¹⁴⁴

¶46 In 1907, new industrial mortality tables were adopted,¹⁴⁵ and the underlying data showed that black mortality rates were substantially in excess of white mortality rates.¹⁴⁶ Rather than continue to write policies on the same premium rates, which the Metropolitan historian noted, “would have been discrimination against the whites,” the company adopted a new policy.¹⁴⁷ A set of plans were prepared “on a basis providing for extra mortality, with cash values computed on [] special tables and dividends based on the actual mortality experience,” along with a line of plans for persons of standard mortality.¹⁴⁸ When a black person was issued a standard policy rather than a policy for substandard risks, the extra mortality was taken into account by allowing no issue commission to the agent.¹⁴⁹

¶47 As a result, race and age again became major defining classifications for Metropolitan in computing rates and benefits provided under the policies. At that time, insurance company experience showed comparable or greater mortality rate differentials at certain ages when industrial policyholders were classified by gender,¹⁵⁰ as by race.¹⁵¹

¹⁴¹ *Id.* at vi.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at vi. In addition, Professor Finkelman notes that there is “some evidence that some southern white politicians used Hoffman’s work to argue for black disfranchisement.” *Id.* at iv.

¹⁴⁵ Prior to 1907, industrial companies based their premium rates on mortality tables compiled by individual companies from their own experience. HENRY MOIR, ET AL., SOURCES AND CHARACTERISTICS OF THE PRINCIPAL MORTALITY TABLES 40 (1919), available at <http://www.archive.org/stream/sourcesandchara00wolfgoog#page/n4/mode/1up>. The valuation of industrial policies for regulatory purposes, on the other hand, was based on the tables used for ordinary policies, the Actuaries, or Combined Experience for policies issued prior to 1901 and the American Experience Table for policies issued after 1900. *Id.* After modification of New York state laws in 1906, the Superintendent of Insurance for New York State adopted a table, based exclusively on the experience of industrial policies, for regulation of industrial companies.

The Standard Industrial Mortality Table was based on the 1896–1906 experience of the Metropolitan Life Insurance Company in records classified according to the year of issue and the age at entry. *Id.* The rate of mortality shown by the table is lower than the American Experience table “from ages 10 to 21, then higher to age 87 inclusive; and at the very old ages it of necessity becomes lower again” because of the limit of life in the American Experience table. *Id.* at 41.

¹⁴⁶ JAMES, *supra* note 112, at 339.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* See also NAT’L ASS’N OF INS. COMM’RS, REPORT OF THE COMMITTEE TO STUDY THE NEED FOR A NEW MORTALITY TABLE AND RELATED TOPICS 87 (June 21, 1939) (stating that the mortality tables used for valuation purposes by companies writing the most business was then the Standard Industrial Table, with a Sub-Standard Industrial Table used for “special classes and sub-standard risks,” but that many of the smaller companies still used the American Experience Table, which did not produce “sufficiently high margins at ages over 40”).

¹⁴⁹ JAMES, *supra* note 112, at 339.

¹⁵⁰ For example, the industrial mortality experience for Prudential policyholders at the end of the nineteenth century was more favorable for women ages twenty-five through fifty-four than for men at the same ages. HOFFMAN, HISTORY OF THE PRUDENTIAL, *supra* note 113, at 311 (noting the industrial mortality experience between 1891–1898 for white males and females, particularly the proportion of deaths at various ages). An early twentieth century mortality study conducted by Metropolitan Life found greater mortality of white

However, despite those mortality differentials, the industrial companies did not adopt gender differentiated premiums or benefits. White men were generally treated more favorably as a group for pricing purposes than white women, who had lesser average mortality than white men at many age ranges, or than black women, who had average mortality nearly comparable to that of white men at certain age ranges.¹⁵² Accordingly, despite men's greater average mortality risk when compared to women, men other than black men were not generally treated as "substandard" risks for life insurance. The companies thus treated white men as the "norm" for standard pricing purposes.

¶48 The 1907 industrial mortality table remained in general use until 1948.¹⁵³ In the early 1940s, a new updated industrial table was created.¹⁵⁴ At that time, a separate "substandard" table was also constructed.¹⁵⁵ As described by a leading insurance textbook, the substandard table was "for the use of companies that write predominantly Negro lives."¹⁵⁶ A study of mortality rates experienced by industrial companies published prior to adoption of the new tables showed overall improvement in mortality for both blacks and whites. The race differential remained, however, averaging eighty-three percent higher than white mortality, but well over twice as high at certain ages.¹⁵⁷

males than white females at all ages. LOUIS I. DUBLIN, ET AL., MORTALITY STATISTICS OF INSURED WAGE-EARNERS AND THEIR FAMILIES: EXPERIENCE OF THE METROPOLITAN LIFE INSURANCE COMPANY INDUSTRIAL DEPARTMENT, 1911–1916, *in* THE UNITED STATES AND CANADA 4 (1919) (observing that 47.8% of Metropolitan's insured lives were white females and 12.5% were "colored policyholders," of which slightly more than half were female). Beginning with the age period of twenty to twenty-four years, the excess of white male over white female mortality was over thirteen percent; between twenty-five and thirty-four years, white males showed a mortality rate thirty-eight percent in excess of the rate for white females; between thirty-five and forty-four years, was "the maximum point of excess in the mortality of white males over that of white females, namely over seventy-two per cent [sic]." *Id.* at 20. The relative excess of white male mortality began to decline after that age period, but never approached a figure nearer than twelve percent at the highest significant age period in the study. *Id.* at 21.

¹⁵¹ See DUBLIN, *supra* note 150, at 15. The excess mortality rate for black males was highest for ages fifteen to twenty-four years, over twice the rate for white males. *Id.* at 16. Between twenty-five and thirty-four years, black males showed a mortality rate fifty-four percent in excess of the rate for white males; between thirty-five and forty-four years, twenty percent in excess of the rate for white males; between forty-five to sixty-four years, sixteen to seventeen percent in excess of the rate for white males; between sixty-five to seventy-four, an excess of nearly six percent; and after age seventy-five, the rate of mortality for white males exceeded that of black males. *Id.* at 16 tbl.7 ("Mortality from All Causes of Death Combined: White Males and Colored Males Compared, Death Rates per 1,000 Persons Exposed, 1911–1916").

¹⁵² Although the death rate of black men was higher than for black women at all ages between ages twenty-five and seventy-five (with lower mortality among black males than black females from ages five to twenty-four), the excess was never more than twenty percent, and thus, the excess was more moderate than that observed between white men and women. *Id.* at 21–22.

¹⁵³ DAN M. MCGILL, LIFE INSURANCE 149 (rev. ed. 1967).

¹⁵⁴ This table was known as the 1941 Standard Industrial Table and was constructed based on the industrial experience of the Metropolitan Life Insurance Company for the period 1930–1939. *Id.* McGill describes industrial insurance as follows: "It is sold to the lower income groups, with no medical examination, many of the policyholders being employed in hazardous or unhealthful occupations and living in the less desirable neighborhoods. Moreover, a large percentage of the policyholders are Negroes, particularly in the South. As a result, the death rate among industrial policyholders is considerably higher than that among ordinary insureds; and special mortality tables must be used in the calculation of premiums, reserves, and surrender values." *Id.*

¹⁵⁵ This table was known as the 1941 Substandard Industrial Mortality Table. *Id.* at 150.

¹⁵⁶ *Id.* (pointing out that no table is prescribed by law for calculation of minimum reserves or cash surrender values for substandard insurance, but that the regulatory authorities usually review and approve the basis actually used).

¹⁵⁷ A study of mortality rates experienced by industrial insurance companies published prior to the adoption

4. Equalizing Rates and Benefits and the Adoption of Race-Merged Tables

¶49 From the mid to late 1930s, Metropolitan and other white insurance companies had been under increasing pressure from the civil rights community to end their race-based practices in various markets.¹⁵⁸ In 1947, the United Office and Professional Workers of America, a union affiliated with the Congress of Industrial Organization (CIO), began a campaign against race discrimination in insurance by writing letters to Metropolitan, the CIO Committee to Abolish Discrimination, the National Urban League, the NAACP, and state insurance commissioners around the country, reporting the results of its survey finding that black applicants were restricted in certain cases to substandard forms of insurance and that limitations were put on commissions to agents.¹⁵⁹

¶50 For Metropolitan, the rates for policies issued under the new industrial mortality tables were more favorable than the rates on policies issued under both the former standard and substandard industrial policies. In 1948, the company began equalizing the future death benefits on all existing premium paying and paid-up industrial policies, and eliminated substandard risk plans prospectively.¹⁶⁰ In 1963, guaranteed nonforfeiture values on premium paying industrial policies were also increased for older policies in the same proportion.¹⁶¹

¶51 In the early 1960s, a new “race-merged” or “integrated” industrial table, the Commissioners 1961 Standard Industrial Mortality Table, was developed and constructed from the 1954–1958 mortality experience of white males and females from eighteen companies.¹⁶² Rather than produce separate standard and substandard tables, “[s]ubstantial margins were introduced into the basic data to allow for difference in company underwriting standards and the racial composition of the policyholder group,” with the level of margins determined “in part by an examination of the experience for the same period of eleven smaller companies, as well as some combined white and nonwhite data.”¹⁶³

of the new tables reported general improvement in industrial mortality experience for both white and black lives, with greatest improvement at infantile ages and greater overall improvement than was shown by the ordinary insurance experience. See NAT’L ASS’N OF INS. COMM’RS, REPORT OF THE COMMITTEE TO STUDY THE NEED FOR A NEW MORTALITY TABLE AND RELATED TOPICS 91 (June 21, 1939) (observing that “mortality on colored lives improved considerably during the thirteen year period, but it remained at approximately the same level as compared to white industrial mortality, for the latter improved also,” and reporting that “[c]olored mortality averaged 83% higher than white, but at the important insurance ages between 10 and 40 it was well over twice as high”). *Id.*

¹⁵⁸ Also see the discussion of pressures by civil rights groups on their “ordinary” insurance divisions *infra* at Part III.D.

¹⁵⁹ Report of Henry M. McKiven, Ph.D., *Norflet v. John Hancock Financial Services Inc. and John Hancock Life Insurance Co.*, No. 04-1099 (D. Conn. Jan. 29, 2007) (rulings on motion to compel discovery). McKiven cites an article in the *Amsterdam News* dated April 26, 1947, reporting that the union demanded that insurance be sold to “colored applicants on the basis of their insurability without restrictions on the grounds of color” and that “agents be compensated for the sale of insurance to colored applicants on the same basis as for the sale of insurance to white applicants.” *Id.*

¹⁶⁰ See N.Y. INS. DEP’T, REPORT ON EXAMINATION OF METROPOLITAN LIFE INSURANCE COMPANY REGARDING RESPONSE TO SUPPLEMENT NO. 1 TO CIRCULAR LETTER NO. 19, at 16–17 (Mar. 1, 2002) [hereinafter N.Y. INS. DEP’T, REPORT ON METROPOLITAN LIFE].

¹⁶¹ *Id.* at 17.

¹⁶² MCGILL, *supra* note 153, at 160.

¹⁶³ *Id.* at 160–61.

¶52

In its report to the National Association of Insurance Commissioners on the development of the proposed new table,¹⁶⁴ the industry advisory committee noted the difficulty of determining suitable margins when developing a valuation table for general use throughout the country.¹⁶⁵ The report observed that it had been common practice in the past to price policies by race.¹⁶⁶ However, the report also noted “a greater tendency” to depart from past practice:

In the past, it has been common practice to use substandard rates and values for non-white lives, and many companies still follow this practice. While the evidence which your Committee has developed demonstrates conclusively an improvement in Industrial Mortality on standard lives over the past twenty-five years, there is a greater tendency for companies to use the same policy forms, valuation and non-forfeiture bases, etc., for non-white as for white business and, in many companies, there is an increasing proportion of Industrial business written on non-white lives. It is conceivable, therefore, that Industrial mortality, overall, in the future may not improve but may, in fact, become higher. In their deliberations on the appropriate level of loading, the Committee, therefore gave some consideration as to what the level of mortality in the valuation table should be to cover experience of the companies on all of their Industrial business, white and non-white combined.¹⁶⁷

¹⁶⁴ REPORT OF THE INDUSTRY ADVISORY COMMITTEE TO THE INDUSTRIAL MORTALITY TABLE SUBCOMMITTEE OF THE N.A.I.C., *in 2* PROCEEDINGS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 92ND ANNUAL MEETING 521–43 (1961) [hereinafter REPORT OF THE INDUSTRY ADVISORY COMMITTEE] (noting that “[i]n Executive Session it was voted to accept the report and postpone any action until the December [1961] meeting,” so that there would be “ample opportunity for the companies to study the report, and for adequate discussion by the Actuaries”). The Superintendent of Insurance for the State of New York and Chair of the Industrial Table Study Subcommittee of the Life Insurance Committee of the National Association of Insurance Commissioners, Thomas Thacher, appointed an Industry Advisory Committee of company actuaries to work with the technicians of the insurance departments to develop a modern mortality table to replace the 1941 Commissioners Standard Industrial Mortality Table. The Industry Advisory Committee was comprised of actuaries from six life insurance companies, including the Colonial Life Insurance Company of America, the National Life and Accident Insurance Company, the American National Insurance Company, the Commonwealth Life Insurance Company, the Life Insurance Company of Georgia, and the Western and Southern Life Insurance Company. *See* INDUSTRIAL MORTALITY TABLE STUDY SUBCOMMITTEE REPORT, *in 2* PROCEEDINGS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 91ST ANNUAL MEETING 535 (1960) (reporting on the formation and membership of the Industry Advisory Committee and on the plans for the project agreed upon at a meeting attended by members of the Industry Advisory Committee and of the Technicians’ Committee, comprised of representatives of the Insurance Departments of California, Nebraska, New Jersey, New York, and Pennsylvania).

¹⁶⁵ REPORT OF THE INDUSTRY ADVISORY COMMITTEE, *supra* note 164, at 525.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* *See also* William C. Brown, *A Proposed New Industrial Valuation Table*, 13 TRANSACTIONS OF SOCIETY OF ACTUARIES 457 (1960), available at <http://www.soa.org/library/research/transactions-of-society-of-actuaries/1961/january/tsa61v13pt1n37ab27.pdf>. The Industry Advisory Committee collected information from all industrial companies with at least \$50 million of outstanding life insurance in force in 1958, including data on the proportions of nonwhite and female business. *Id.* at 457. The industry committee assumed that if business were issued on a “substandard” basis, a different valuation table could be used with the permission of state authorities, and thus, a separate “substandard” table need not be prepared. *Id.* at 469–70.

¶53 Although industrial insurance remained an important form of insurance for private insurance companies at least into the 1950s,¹⁶⁸ the industrial business began to decline thereafter.¹⁶⁹ In the first half of the twentieth century, the increased wages of workers led to an expanding market of potential policyholders as well as a gradual merging of the industrial and group insurance markets.¹⁷⁰ Thus, companies increasingly aimed their marketing efforts at members of the middle class.¹⁷¹

¶54 As incomes of workers increased, they could more often afford to purchase intermediate, ordinary, or other forms of insurance that provided greater coverage than industrial policies.¹⁷² By the late 1960s, Metropolitan, Prudential, and John Hancock, formerly known as the “Big Three,” had discontinued writing new industrial policies,¹⁷³ and held only about thirty percent of the industrial insurance in force at the end of 1970.¹⁷⁴ Of the remaining companies selling industrial insurance, as well as ordinary life insurance, most were located and principally operated in the southeast United States.¹⁷⁵ Of the companies selling industrial insurance exclusively, many were located in Louisiana because of specific provision under Louisiana state law for the operation of burial insurance and industrial companies.¹⁷⁶

¶55 Civil rights litigation in Louisiana,¹⁷⁷ involving nearly three hundred companies that sold industrial policies over a fifty to sixty-five year period during the twentieth century,¹⁷⁸ reveals the continuing impact of prior race-based practices in the industrial insurance market.¹⁷⁹ Although facts that developed in the course of the litigation indicate

¹⁶⁸ In 1948, it was estimated that of the seventy-eight million insurance policyholders in the United States, about two-thirds of them owned industrial policies. Malvin E. Davis, *Modern Industrial Life Insurance*, in LIFE INSURANCE TRENDS AT MID-CENTURY 115 (David McCahan ed., 1950).

¹⁶⁹ MCGILL, *supra* note 153, at 715–16.

¹⁷⁰ *See, e.g., id.* at 715.

¹⁷¹ *Id.*

¹⁷² MARSHALL & ZUBAY, *supra* note 97, at 23. By that time, the “Big Three” industrial companies had been selling ordinary insurance for many years. *See* KELLER, *supra* note 47, at 20–21 (noting that “Prudential created an ordinary insurance branch in 1886 which did 3 percent of the company’s business in 1890 and 37 percent by 1905,” that Metropolitan revived its ordinary business in 1892, and that John Hancock did so in 1902).

¹⁷³ MARSHALL & ZUBAY, *supra* note 97, at 23–24.

¹⁷⁴ *Id.* at 33.

¹⁷⁵ *Id.* at 39.

¹⁷⁶ *Id.* at 28, 34 n.5. Of 161 companies reporting industrial insurance policies in force at the end of 1970, only 10 for which information was available wrote industrial policies exclusively. *Id.* at 34.

¹⁷⁷ *See In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) (class certification issue), *cert. denied*, 125 S.Ct. 277 (2004). The NAACP Legal Defense and Education Fund has participated in the litigation as *amicus curiae*.

¹⁷⁸ Three insurance companies are defendants in the consolidated litigation. Over the years, each of the companies acquired other companies and assumed blocks of in-force insurance issued by them. The Judicial Panel for Multidistrict Litigation consolidated the actions against the insurance companies and transferred them to the Eastern District of Louisiana for pretrial proceedings. *Id.* at 412.

¹⁷⁹ The Fifth Circuit opinion in *Monumental Life Ins. Co.* reversed and remanded the district court’s denial of plaintiffs’ motion to certify a class pursuant to Fed. R. Civ. P. 23(b)(2). *Id.* at 421. The plaintiffs sought certification of a class comprised of “all African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate.” *Id.* at 413. The plaintiffs limited the class to “industrial policies sold at a substandard (i.e., higher) rate for African-Americans and a lower rate for Caucasians, or as a substandard plan (i.e., a more costly plan) for African-Americans and a corresponding less expensive plan for Caucasians.” *Id.* at 414. Plaintiffs define industrial life insurance policies as “(1) policies labeled as ‘industrial’ or (2) those policies with a face amount of less than \$2,000.00 and weekly or month home premium collection.” *Id.*

that none of the companies sold policies with race-based premiums or race-based benefits after the early 1970s,¹⁸⁰ many older policies still remained in force.¹⁸¹ Beginning in 1988, some insurers voluntarily adjusted premiums and/or benefits to equalize the amount of coverage per premium dollar, but some policies were terminated without adjustment, and other existing policies were not adjusted.¹⁸² Some policies sold in the Jim Crow era containing racially unequal premiums or benefits thus remained in force in the twenty-first century.

¶56 During the last decade, certain states have required disclosure of historical race-based practices of companies licensed to do business in their states.¹⁸³ Although some states have focused their investigations on slavery-era practices, other state regulators, including the New York State Insurance Department, have required disclosure of post-slavery and twentieth century practices.¹⁸⁴ Following those disclosures and follow-up investigations, several major life insurers, including Metropolitan and Prudential, settled class action lawsuits alleging racially discriminatory past practices in the industrial insurance market.¹⁸⁵

C. *Black Self-Help After the Civil War*

¶57 As the race-based policies of white insurance companies¹⁸⁶ in the late nineteenth century evolved, black fraternal and benevolent societies¹⁸⁷ added insurance features to their benefit programs.¹⁸⁸ This section describes the development of an innovative fraternal insurance program¹⁸⁹ that led to development of a major black insurance

¹⁸⁰ Other cases have involved race-based practices that were discontinued as late as the year 2000. *See, e.g.,* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311 (4th Cir. 2006) (affirming denial of class certification of approximately 1.4 million African-American policyholders).

¹⁸¹ The number of policies in force is in dispute. The plaintiffs in *Monumental Life Ins. Co.* estimated that over 4.5 million of the 5.6 million industrial policies issued by defendants remained in force; many other policies have been terminated, surrendered, or paid-up without remediation. 365 F.3d at 416. However, defendants' expert estimated that the ratio of terminated policies to outstanding policies is approximately five-to-one, leaving slightly more than one million policies remaining in force. *Id.*

¹⁸² Plaintiffs claimed violation of 42 U.S.C. §§ 1981 and 1982, and sought the following relief: 1) an injunction prohibiting the collection of discriminatory premiums; 2) reformation of policies to equalize benefits; and 3) restitution of past premium overcharges or benefit underpayments. *In re Monumental Life Ins. Co.*, 365 F.3d at 412–13.

¹⁸³ *See* discussion *supra* Parts I, II, particularly at notes 9 and 46. As described in greater detail there, some disclosures by companies have been required under state law (slavery-era registers). Some state insurance departments have conducted investigations of individual companies under procedures established by a National Association of Insurance Commissioners (NAIC) working group on race-based premiums following the results of a survey of life insurers published by NAIC in 1988.

¹⁸⁴ *See* discussion *supra* Parts I, II.

¹⁸⁵ *See supra* note 4.

¹⁸⁶ *See* discussion *supra* Part III.B. By the early part of the twentieth century, as reported by Louis Brandeis, about ninety-four percent of all industrial insurance in the United States was furnished by three companies: Metropolitan of New York at forty-nine percent, Prudential of New Jersey at thirty-six percent, and John Hancock of Massachusetts at nine percent. Each company also issued ordinary life policies. Brandeis, *supra* note 62, at 313.

¹⁸⁷ A mutual benefit (benevolent) society could evolve into a fraternal society, which tended to have rituals and a broader membership base. FAHEY, *supra* note 98, at 5 (noting that in the late nineteenth century most fraternal societies provided life insurance).

¹⁸⁸ *See* Reid, *supra* note 83, at 40–42.

¹⁸⁹ *See generally* KELLER, *supra* note 47, at 10–11 (explaining that “the great age of the fraternalism began in the 1870’s [sic], and they grew with the ensuing decades of industrialization and immigration until by 1895

company. It focuses on the story of one fraternal organization as an example of the type of economic and racial dynamics that led to significant segregation of markets during the Jim Crow era.

1. Black Fraternal and Benevolent Societies

¶58 One of the largest and most successful black benevolent organizations, the Grand Fountain, United Order of the True Reformers (hereinafter “True Reformers”), was formed in 1881, and headquartered in Richmond, Virginia.¹⁹⁰ The True Reformers, described by Booker T. Washington as “one of the first large secret orders formed by Negroes,”¹⁹¹ and by W.E.B. Du Bois as “probably the most remarkable Negro organization in the country,”¹⁹² established an extensive insurance program.¹⁹³ Between its founding and the year it failed, its lodges paid out to its members nearly three million dollars in sick and death benefits.¹⁹⁴

¶59 Organized by a former slave named William Washington Browne,¹⁹⁵ the True Reformers developed out of Browne’s involvement with a group associated with the Independent Order of Good Templars, a fraternal organization known for its promotion of temperance and prohibition.¹⁹⁶ Through this association with the Good Templars, Browne became aware of the benefits, such as burial and life insurance, provided to the members of white fraternal organizations. During the 1870s, there was a growing division within the Good Templars regarding racial integration of the organization.¹⁹⁷

their insurance in force surpassed that of the regular life companies,” but their very nature prevented individual societies from attaining any considerable size because their “essence was exclusivity” or “protection from the surrounding milieu,” while regular life insurance companies provided “an adaptation to an urban, industrial society”).

¹⁹⁰ E.g., James D. Watkinson, *William Washington Browne and the True Reformers of Richmond, Virginia*, 97 VA. MAG. OF HIST. AND BIOGRAPHY 375 (1989); C.G. Woodson, *Insurance Business Among Negroes*, 14 J. OF NEGRO HIST. 202, 206 (1929).

¹⁹¹ BOOKER T. WASHINGTON, *THE NEGRO IN BUSINESS* 162 (1907).

¹⁹² ATLANTA UNIVERSITY, *ECONOMIC CO-OPERATION AMONG NEGRO AMERICANS* 101 (W.E.B. Du Bois ed., 1907).

¹⁹³ FRAZIER, *supra* note 96, at 397–98.

¹⁹⁴ Reid, *supra* note 83, at 40.

¹⁹⁵ Browne was born in 1849 and died in 1897. The seventh son of field slaves who had been purchased in Virginia, Browne became a house servant in Georgia, a companion of his first owner’s son. He later was hired out, first to a shopkeeper and then to an attorney. Browne escaped while in his early teens, and made his way to Union troops in Memphis, where he became an officer’s servant. When he discovered that Union forces surrendered escaped slaves at the request of slave owners, he left Memphis and worked at various jobs until he found farm work in Wisconsin, where he had learned that he could attend school. In 1864, he joined a Union infantry division as a paid substitute and served until 1866. He returned to Wisconsin to continue his schooling and in September 1869, he traveled to Georgia to visit his mother. He studied for the ministry in Atlanta, worked as a schoolteacher in Georgia and Alabama, spoke out against the Ku Klux Klan, and in 1876, was ordained a minister in the Colored (later Christian) Methodist Church. When the bishop of the Colored Methodist Church demanded that he give up his True Reformer work, Browne became a minister in the African Methodist Episcopal Church, but never held a pastorate. FAHEY, *supra* note 98, at 14–15, 17.

¹⁹⁶ It was also known for its universalism. The Independent Order of Good Templars accepted women as members with full rights to hold office, and also accepted an occasional black member in the North. In addition, the Order avoided any mandatory insurance program that might prevent the membership of the poor, the old, or the sickly. *Id.* at 13.

¹⁹⁷ *Id.* (explaining that the division came from differing racial views of members in the southern states and of those overseas, especially those in England and Scotland).

The American lodges resisted integration,¹⁹⁸ and by 1876, Browne had organized an Alabama branch of the all-black True Reformers.¹⁹⁹ After accepting an invitation in 1880 to become leader of the True Reformers organization in Virginia, Browne settled in Richmond, Virginia.²⁰⁰

¶160 Under Browne's leadership, and that of his successor, W.L. Taylor, the True Reformers expanded greatly. By 1903, according to contemporary reports, there were 2097 Fountains across the country and 269 employees.²⁰¹ Seven years later, the membership roll of the True Reformers had grown to over 50,000, and the organization could be found in over twenty states.²⁰² The organization established its own bank, the True Reformers' Savings Bank of Richmond, Virginia.²⁰³ It also operated its own newspaper,²⁰⁴ old-age home,²⁰⁵ retail stores,²⁰⁶ a 150 room hotel,²⁰⁷ and developed land for an all-black community in Richmond called Brownesville.²⁰⁸

¶161 Recognizing the difficulties blacks encountered with white insurance companies, Browne sought to provide insurance coverage to members, including policies that would provide relief to beneficiaries and cover burial costs.²⁰⁹ Utilizing mainstream financial practices in insurance and other businesses, he initiated several important innovations.

¹⁹⁸ *Id.* at 13–14. Later, American fraternal orders and lodges also resisted imitation by black orders. Some fraternal orders sued, with mixed success, their black counterparts seeking to enjoin the black orders from practicing such imitation. See CHARLES S. MAGNUM, JR., *THE LEGAL STATUS OF THE NEGRO* 75–76 (Johnson Reprint Corp 1940) (collecting cases). In 1909, the governor of Georgia signed a bill that forbid the “use by Negro Secret Societies of the insignia, ritualistic work, grips, etc. of orders composed of whites.” JOHN DITTMER, *BLACK GEORGIA IN THE PROGRESSIVE ERA, 1900–1920*, at 56 (1977).

¹⁹⁹ Watkinson, *supra* note 190, at 376 (the Grand Lodge of Good Templars offered Browne a charter and sponsorship under a separate name, the United Order of True Reformers).

²⁰⁰ FAHEY, *supra* note 98, at 16.

²⁰¹ W.P. BURRELL & D.E. JOHNSON, *TWENTY-FIVE YEARS HISTORY OF THE GRAND FOUNTAIN OF THE UNITED ORDER OF THE TRUE REFORMERS* 315, 319 (1909).

²⁰² By 1909, the True Reformers had “60,000 men and women paying dues of from fifty-five to sixty cents per month; 15,000 men and women [in the Classes] paying from \$1.20 to \$2.85 cents each, every quarter, and 20,000 children paying sixteen cents per month, each.” FAHEY, *supra* note 98, at 38.

²⁰³ The Saving Bank of the Grand Fountain, United Order of True Reformers, which was established by an Act of Virginia's General Assembly in 1888, was the first black-owned, black-operated bank to be chartered in the United States. Watkinson, *supra* note 190, at 386 (noting, however, that a bank in the District of Columbia was the first such bank to begin operations).

²⁰⁴ FRAZIER, *supra* note 96, at 373 (stating that *The Reformer* had a weekly circulation of approximately 8000 subscribers by 1900).

²⁰⁵ The Old Folks Home, built on 634 acres purchased in Westham in the west end of Richmond, was incorporated in 1898. Watkinson, *supra* note 190, at 392.

²⁰⁶ In 1899, the Reformers obtained a charter for the Reformers' Mercantile and Industrial Association, which permitted it to establish stores, build and operate a hotel, carry on a printing and newspaper business, and deal in real estate as a former companying, bringing “under one roof the workings of the real estate department, the *The Reformer* offices and printing department, and the regalia department.” Watkinson, *supra* note 190, at 394. The Association opened its first store in Richmond in 1900, with others added later in Virginia and in Washington. FAHEY, *supra* note 98, at 30.

²⁰⁷ FAHEY, *supra* note 98, at 21 (located in Richmond, the hotel also served in part as a boarding house for True Reformer employees).

²⁰⁸ David T. Beito, *To Advance the “Practice of Thrift and Economy”: Fraternal Societies and Social Capital, 1890–1920*, 29 J. OF INTERDISC. HIST. 585, 603 (1999). Between 1899 and 1902, about 200 acres of the Westham property was divided into 130 small lots to support the home and create a black settlement that was connected by an electric streetcar with Richmond. FAHEY, *supra* note 98, at 30. When segregated streetcars were introduced in 1904, True Reformers helped lead protests in the black community and several protest meetings took place in True Reformers' Hall. *Id.*

²⁰⁹ FAHEY, *supra* note 98, at 17.

Soon after its formation, the True Reformers became the first black benevolent society to disburse insurance benefits through a national office.²¹⁰ He also instituted a sliding scale for insurance policies dependent upon the age and premium paid by the policyholder.²¹¹ When the True Reformers began this practice in 1885, it was customary for such organizations to charge everyone below the maximum age for membership the same premium or assessment regardless of age or risk.²¹² The True Reformers would later require applicants to take a medical questionnaire and, in some cases, undergo a medical examination.²¹³

¶162 Although the True Reformers developed their insurance program into one of the most advanced enterprises of its kind undertaken by a black benevolent society, the revenues earned by the organization from its insurance policies also played a role in the financial collapse of the organization. The money collected for insurance was used, through the bank, to finance other business enterprises that the Order managed.²¹⁴ Through a combination of unprofitable investments, poor recordkeeping, and poor management by officials of the bank, the True Reformers Savings Bank became bankrupt in 1910, and a court ordered the directors of the bank to close in late October of that year.²¹⁵

¶163 After the savings bank was ordered to close, the insurance commissioner barred the organization from accepting any new members in the state.²¹⁶ Although the insurance commissioner reissued the True Reformers an insurance license in April of 1911, the organization could not overcome the problems it faced following the bank's bankruptcy.²¹⁷ The True Reformers never regained its earlier prominence. Membership declined dramatically in 1911; by 1912, there were only five thousand members, and after the Great Depression, it became virtually nonexistent.²¹⁸ Its legacy survived, however, through the influence of many of its former employees, including Richmond's Maggie L. Walker,²¹⁹ who used the skills and vision she developed with the True

²¹⁰ Beito, *supra* note 208, at 602.

²¹¹ *Id.* See also BRYSON, *supra* note 134, at 8 (1948) (observing, however, that the True Reformers used a mortality table which was actuarially unsound). The True Reformers also were one of the first benevolent organizations to have a children's section within the organization. By paying monthly dues for membership in the Rosebud Nursery, children could become eligible for sickness and burial insurance. By 1906, there were nearly 15,000 children on the Rosebud Nursery's membership roster. Beito, *supra* note 208, at 603–04.

²¹² FAHEY, *supra* note 98, at 16–17.

²¹³ *Id.* at 19.

²¹⁴ *Id.* at 32.

²¹⁵ *Id.* at 33. The organization made unsecured loans to many True Reformer business projects. When the businesses defaulted on loan payments, the bank could not pay claims brought against insurance policies issued by the order. Watkinson, *supra* note 190, at 396.

²¹⁶ FAHEY, *supra* note 98, at 34.

²¹⁷ The order issued insurance until 1934, when its name no longer appeared in state insurance records. See Watkinson, *supra* note 190, at 396.

²¹⁸ FAHEY, *supra* note 98, at 37.

²¹⁹ Walker often referred to the True Reformers as the model for the Independent Order of Saint Luke, which she led from 1899, after leaving the employ of the True Reformers, until her death in 1934. The Order established a children's auxiliary, which grew to over 15,000 by the 1920s, to provide insurance for children. In addition, under her leadership, the Order established a number of other businesses, including a newspaper, a department store, and in 1903, the Saint Luke Penny Savings Bank. Although the Order severed ties to the bank in 1911 because of state laws, it continued as the renamed Consolidated Bank and Trust Company of Richmond, Virginia. In 1998, it ranked as the thirteenth largest black-owned bank, with assets exceeding \$100 million. Beito, *supra* note 208, at 607, 612 (citing the *Black Enterprise* for

Reformers to create other black businesses and insurance enterprises during the Jim Crow era.²²⁰

2. Black Life Insurance Companies

¶164 In the section of *An American Dilemma* dealing with economics and finance, Myrdal observed that black businesses tended to operate in highly race-segregated markets, and that many insurance companies were founded by blacks in response to race discrimination by white insurance companies.²²¹

¶165 During the period between 1880 and 1910, many insurance companies founded by blacks began selling insurance in the South and in urban areas with large African-American communities.²²² At least initially, they operated under fraternal assessment and mutual benefit charters, which had smaller initial capital requirements than those of legal reserve companies.²²³

¶166 Black-owned companies faced difficulty in attracting capital, in part due to the negative effect of Hoffman's 1896 book, *Race Traits and Tendencies of the American Negro*.²²⁴ Later, some of these companies were converted to legal reserve companies. In other cases, officers and employees of these early relatively unregulated and undercapitalized companies left them to found legal reserve companies.²²⁵ These early companies built on the earlier experiences and traditions of black fraternal and benevolent societies, especially those of the True Reformers.²²⁶

¶167 Several former True Reformers founded and became presidents of some of the most successful black insurance companies that emerged in the first half of the twentieth century.²²⁷ For example, North Carolina Mutual, the nation's oldest black insurance company, was founded in 1898 as an assessment association by former True Reformers John Merrick and A.M. Moore,²²⁸ and converted to a legal reserve life insurance

information on the Consolidated Bank and Trust Company).

²²⁰ *Id.*

²²¹ MYRDAL, *supra* note 2, at 316.

²²² *See id.*

²²³ BRYSON, *supra* note 134, at 7. Legal reserve life insurance companies “agree to pay a stipulated benefit, collect prescribed rates therefore, and by law maintain a reserve for each policy.” CLOUGH, *supra* note 51, at 3 n.1. Level premiums “made necessary an invested reserve fund” to compensate for the decline in the insured's life expectancy. KELLER, *supra* note 47, at 60. The main variables in calculating a reserve included the proportion of the premium to be charged against the reserve, the assumed mortality rate, and the interest that the reserve would be expected to earn. *Id.* at 60–62 (describing the state regulatory requirements for life insurance reserves during 1858–1905).

²²⁴ BRYSON, *supra* note 134, at 7; *see also* Joseph A. Pierce, *The Evolution of Negro Business, in* BLACK BUSINESS ENTERPRISE: HISTORICAL AND CONTEMPORARY PERSPECTIVES 25, 32 (Ronald W. Bailey ed., 1971). *See also* discussion *supra* at Part III.B.3.

²²⁵ BRYSON, *supra* note 134, at 7.

²²⁶ JOHN SIBLEY BUTLER, ENTREPRENEURSHIP AND SELF-HELP AMONG BLACK AMERICANS: A RECONSIDERATION OF RACE AND ECONOMICS 119 (rev. ed. 2005) (“[I]f one were to choose a secret society which had a direct impact on the establishment of Afro-American insurance, it would be the Grand United Order of the True Reformers . . .”).

²²⁷ For example, former True Reformers either founded or became leaders of the North Carolina Mutual Life Insurance Company, the National Benefit Life Insurance Company, the American Beneficial Insurance Company, the Southern Aid Society, the Richmond Beneficial and Insurance Company, and the American Beneficial Insurance Company. FAHEY, *supra* note 98, at 22; *see also* Beito, *supra* note 208, at 606.

²²⁸ WILLIAM JESSE KENNEDY, THE NORTH CAROLINA MUTUAL STORY: A SYMBOL OF PROGRESS 1898–1970, at 1–6 (1970).

company in 1913.²²⁹ North Carolina Mutual weathered the Great Depression, a time when many insurance companies failed, and at the beginning of the twenty-first century was licensed to do business in twenty-four states and the District of Columbia, with over \$12 billion of insurance policies in force.²³⁰

¶168 Myrdal reported that in 1939, there were sixty-seven black-founded insurance companies that had survived the Great Depression, giving employment to about eight thousand workers.²³¹ However, he concluded that it was “difficult to see a real future for a segregated Negro financial system,” and that it was a “poor substitute” for what was really needed—employment in white-dominated financial institutions and “more consideration for them as insurance or credit seekers.”²³²

¶169 By the late 1960s, the forty-six company members of the National Insurance Association (formerly the National Negro Insurance Association)²³³ employed twelve thousand workers, including eight thousand agents.²³⁴ They “had assets of \$418 million, insurance in force of \$2,330 billion, and a premium income in excess of \$115 million.”²³⁵ As insurance markets became more integrated following the Civil Rights Movement, however, black companies encountered increasing competitive pressures from white companies in the products offered to their traditional customer base, as well as work

²²⁹ BRYSON, *supra* note 134, at 13 tbl.3.

²³⁰ North Carolina Mutual Life Insurance Company, <http://www.ncmutuallife.com/newsite/pages/about.html> (last visited Sept. 23, 2009). For discussion of the role played by sales agents and headquarters staff in the North Carolina Mutual Life Insurance Company and other black financial businesses after 1880, see, for example, Angel Kwolek-Folland, *The African American Financial Industries: Issues of Class, Race and Gender in the early 20th Century*, 23 *BUS. & ECON. HIST.* 85, 85–107 (1994).

²³¹ MYRDAL, *supra* note 2, at 317, 1263 (stating that the modern history of that business centered around four institutions, the North Carolina Mutual Life Insurance Company of Durham founded in 1898, the Standard Life Insurance Company of Atlanta organized in 1913 and dissolved in the 1920s, the National Benefit Life Insurance Company of Washington, D.C., which failed in 1931, and the Supreme Liberty Life Insurance Company of Chicago); see also, e.g., ALEXA BENSON HENDERSON, *ATLANTA LIFE INSURANCE COMPANY: GUARDIAN OF BLACK ECONOMIC DIGNITY* (1990); Robert Christian Puth, *Supreme Life: The History of a Negro Life Insurance Company* (Aug. 1967) (unpublished Ph.D. dissertation, Northwestern University) (on file with the Northwestern University Library).

²³² MYRDAL, *supra* note 2, at 318.

²³³ The National Negro Insurance Association was founded in 1921 in Durham, North Carolina, by leaders of black-owned insurance companies to encourage, foster, and stimulate the business of insurance. In addition to the member companies, the Association reported in the late 1960s that there were at least seven other Negro life companies and a number of fraternal benefit associations that provide life insurance for their members. The major life insurance company members in the late sixties included North Carolina Mutual Life Insurance Company, the largest member of the Association, as well as Golden State Mutual Life Insurance Company, Los Angeles; Supreme Life Insurance Company of America, Chicago; Atlanta Life Insurance Company, Atlanta; and Universal Life Insurance Company, Memphis, Tennessee. FLETCHER, *supra* note 96, at 128–29, 128 n.15. In 1978, the Association’s roster reported only thirty-six member companies and four other non-member minority insurance companies. U.S. COMM’N ON CIVIL RIGHTS, *DISCRIMINATION AGAINST MINORITIES AND WOMEN IN PENSIONS AND HEALTH, LIFE, AND DISABILITY INSURANCE, VOL. II: EXHIBITS*, Exhibit No. 12, at 1145–73 (1978) (letter of May 5, 1978 from Chris H. Howard, Associate Director, National Insurance Association, National Insurance Association 1978 Member Roster).

²³⁴ FLETCHER, *supra* note 96, at 128.

²³⁵ *Id.* By comparison, in 1945, the 44 member companies of the National Negro Insurance Association had an aggregate of over 3.9 million policies in force, “of which 232,441 were ordinary policies, and [3.8 million] were industrial or health and accident policies. The average size of ordinary policies was \$690 and the median size of all industrial contracts was \$140.28.” *Id.* at 126–27.

opportunities available to their workforce. Black companies thus sought new customers and business, including group life coverage sold to employers.

¶70 A study of black insurance companies, published in 1970, noted that black firms were major targets for white insurers; white firms were “anxious to increase their ratio of Negro employees”²³⁶ and “capture the Negro market.”²³⁷ The study concluded that “the combined effect of these two events will ultimately have an impact—and probably detrimental—on those Negro firms that have pioneered in developing both the Negro life insurance market and employment skills and opportunities among black employees.”²³⁸

¶71 By 1979, black insurance companies had responded to changes in the marketplace by yielding the relatively small market for black ordinary insurance to big companies with superior marketing capabilities and by concentrating their activities on the larger market segment of home service and industrial insurance business that the big companies had abandoned.²³⁹ At that time, only three out of the forty or so remaining minority life insurance companies sold ordinary insurance exclusively; they were small companies or confined primarily to a single state market.²⁴⁰

¶72 At the end of the twentieth century, when an executive of a black insurance company predicted that in ten years, “only five African American-owned insurance firms will remain” and the rest will die or merge with other National Insurance Association members,²⁴¹ Myrdal’s prediction of a limited future for a segregated financial system had largely come to pass.

D. Ordinary and Intermediate Life Insurance: Race-Based Rates, Restrictions

¶73 Race-based rates did not generally arise in the intermediate²⁴² or ordinary life insurance market²⁴³ until the twentieth century, when companies like Metropolitan

²³⁶ *Id.* at 129. In 1969, one white-owned insurance company hired nearly five hundred black sales representatives, a number twice as great as the number of employees hired that year by all black-owned insurance companies combined. Jacob M. Duker & Charles E. Hughes, *The Black-Owned Life Insurance Company: Issues and Recommendations*, 40 J. RISK & INS. 221, 228 (1973).

²³⁷ FLETCHER, *supra* note 96, at 129.

²³⁸ *Id.*

²³⁹ *Debit Life Insurance Industry: Hearings Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Comm. on the Judiciary*, 96th Cong. app. at 233, 237 (Mar. 12 and 16, 1979) (statement of the National Insurance Association).

²⁴⁰ *Id.* at 238.

²⁴¹ Frank McCoy, *Life Sustaining Measures*, BLACK ENTERPRISE, June 1998, at x, 182 (quoting Larkin Teasley, the CEO of Golden State Mutual, and noting that in the late 1990s, Gold State Mutual started pursuing the Latino market); see also Jeffrey McKinney, *Bold Players New Strategies 33rd Annual Report on Black Business: Holding Their Ground*, BLACK ENTERPRISE, June 2005, at x (noting that companies like North Carolina Mutual are “adopting plans to buy other companies, sell products more aggressively to win affluent customers, and exit money-losing businesses”).

In addition, some minority insurance companies merged with major white insurance companies. For example, United Mutual, which formed as a fraternal organization in 1933 and converted to a mutual life insurance company in 1945, merged with Metlife in 1992. In 2002, the New York Insurance Department examined available surviving United Mutual records from 1937 to 1980, as well as several hundred application files from both their industrial and ordinary departments. Among the 203 files from which the race of the policyholder could be determined, only eight were other than African-American and the “premiums each was charged was consistent with the premiums charged to similarly situated African-Americans.” See NY INS. DEPT., REPORT ON METROPOLITAN LIFE, *supra* note 160, at 12, 26 (finding no race distinct underwriting practices).

²⁴² Intermediate policies are a cross between industrial and ordinary insurance. S.S. HUEBNER, LIFE INSURANCE 322–23 (4th ed. 1950) (For example, “[i]n 1927 one large company introduced industrial

noticed that the proportion of black lives in the intermediate branch “had grown to a point where the over-all mortality of the group was being raised significantly.”²⁴⁴ The same general approach as in the industrial branch was applied in 1930, but discontinued at the beginning of 1935.²⁴⁵ At that time, a simpler rule was adopted under which the excess mortality was offset by paying only partial commissions on policies issued to blacks.²⁴⁶

¶74

In 1935, the New York anti-discrimination law was amended to disallow any distinction due to race in the amount of commissions paid for writing the policy.²⁴⁷ In response, Metropolitan reacted the same way it did in its industrial business when Massachusetts passed a law prohibiting race-based premiums in 1884.²⁴⁸ It discontinued soliciting black customers for any kind of life insurance in New York.²⁴⁹ The black press in New York ran a series of articles complaining about Metropolitan’s refusal to sell blacks its full range of products,²⁵⁰ and the New York Temporary Commission on the Condition of the Urban Colored Population announced that it planned to investigate Metropolitan and other companies for alleged “discriminatory practices against Negroes.”²⁵¹ Outside of New York, the company continued to maintain its dual race-based commission structure,²⁵² explaining that “where possible” the company had tried to insure black lives but “at rates commensurate with mortality experience.”²⁵³

insurance on a monthly plan, the size of policies ranging from \$500 to \$800.”).

²⁴³ Prudential established its ordinary insurance branch in 1886, and by the end of 1890, was selling more than two thousand ordinary policies a year. WILLIAM H. A. CARR, *FROM THREE CENTS A WEEK . . . : THE STORY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA* 40 (1975). In the late nineteenth century, the “Big Three” companies selling ordinary life insurance were the Mutual Life Insurance Company, the Equitable Life Assurance Society, and the New York Life Insurance Company. KELLER, *supra* note 47, at 12–13. By the turn of the century, Prudential and Metropolitan had rapidly growing ordinary and intermediate life insurance departments “which appealed with great success to a lower middle class market untouched by the Big Three.” *Id.* at 14.

²⁴⁴ JAMES, *supra* note 112, at 339 (beginning in the 1920s). In its examination of Metropolitan’s race-based underwriting practices, the New York Insurance Department found that among the policyholders in the 1920s whose race could be determined, about eighty-two percent of whites received ordinary policies and seventeen percent received intermediate policies. In contrast, twelve percent of blacks received ordinary policies and eighty-eight percent received intermediate policies. After analyzing a sample of application files, the examiner concluded that the company classified black applicants seeking policies by the ordinary department as “intermediate” based on race. *See* NYS INS. DEPT., *REPORT ON METROPOLITAN LIFE*, *supra* note 160, at 15.

²⁴⁵ JAMES, *supra* note 112, at 339.

²⁴⁶ *Id.*

²⁴⁷ N.Y. CONSOL. LAWS ch. 30, §90 (Cahill 1930), *amended by* N.Y. Laws of 1935, ch. 736 (1931–35 cumulative supplement) (providing that “[n]o life insurance corporation doing business in this state shall reject any application for a policy of life insurance issued and sold by it, or refuse to issue such policy after proper application therefore, nor shall any lower rate be fixed or discrimination made by it in the fees or commissions of its agents for writing such policy, solely by reason of the applicant being wholly or partially of African descent,” and providing for a fine of one thousand dollars for violation of the provision).

²⁴⁸ *See* discussion *supra* Part III.B.2.

²⁴⁹ JAMES, *supra* note 112, at 339.

²⁵⁰ Report of Henry M. McKiven, Ph.D., *Norflot v. John Hancock Financial Services Inc. and John Hancock Life Insurance Co.*, No. 04-1099 (D. Conn. Jan. 29, 2007) (rulings on motion to compel discovery, citing articles from the *Amsterdam News* on September 24 and July 23, 1938, and on January 28 and November 11, 1939, and from the *New York Age* on September 24 and October 15, 1938, and February 28, 1939).

²⁵¹ *Id.*

²⁵² *See* NYS INS. DEPT., *REPORT ON METROPOLITAN LIFE*, *supra* note 160, at 22 (finding that from 1935 through at least 1949, agents outside New York received twenty percent of full scale commissions on ordinary policies issued to African-Americans, and agents received no issue credit and no first-year

¶75 In 1938, when a black policyholder in Brooklyn complained to Metropolitan and the NAACP that he was unable to buy additional insurance from his neighborhood insurance representative, the company explained by letter to the policyholder that “in New York we have found it necessary to assign the collection of colored debits to collectors who are not authorized to sell life insurance to any one, regardless of color” and that “the only change in our practice in New York is that we do not actively solicit applications for insurance from colored persons.”²⁵⁴ However, the letter continued, “[s]uch persons may apply at one of our district offices, of which there are a large number conveniently located, and they will receive fair and courteous treatment when they so apply.”²⁵⁵

¶76 Shortly thereafter, the NAACP issued a press release reporting that Metropolitan, which had “written millions upon millions of dollars of insurance upon Negroes in this country,” had ceased to solicit business from blacks in New York,²⁵⁶ and publicized the company’s statement that applications for such business would be accepted at the company’s district offices.²⁵⁷

¶77 The NAACP was also receiving complaints about discrimination against blacks with regard to other types of insurance coverage, including automobile insurance.²⁵⁸ Although the NAACP compiled information and urged investigation of such practices by state agencies, it did not challenge them through litigation. As Thurgood Marshall explained in a letter to Roger Baldwin of the American Civil Liberties Union²⁵⁹ when Travelers insurance company had denied Marshall auto insurance coverage, the company stated that this was because he lived “in a ‘congested area,’ meaning Harlem, and ‘not’

commissions for intermediate policies issued to African-Americans).

²⁵³ JAMES, *supra* note 112, at 339.

²⁵⁴ Letter from Charles J. Taylor, Jr., Second Vice President, The Metropolitan Life Insurance Company, New York City, to Z. Marshall Cochrane of Brooklyn, New York, July 27, 1938 (from NAACP files, reproduced from the Collections of the Manuscript Division, Library of Congress) (explaining that the change in the company's practice was due to legislation enacted in 1935, which was "introduced and sponsored by Assemblyman Stephens of New York City, a colored man").

²⁵⁵ *Id.*

²⁵⁶ Press Release, NAACP, Metropolitan Life Not Seeking Negro Business in New York State, Anti-Jim Crow Law Cited by Company as Reason for Its Failure to Permit Agents to Solicit New Policies; Prospects Must Apply at Company Offices (Sept. 16, 1938) [hereinafter NAACP Press Release] (from NAACP files, reproduced from the Collections of the Manuscript Division, Library of Congress). The NAACP's press release explained the 1935 legislation as follows: “It has been known for years that some insurance companies have refused to sell certain types of policies to Negroes, no matter how qualified Negroes might be to purchase the same. It was this policy which prompted Assemblyman Stephens to sponsor his law in the 1935 legislature outlawing jim crow treatment.” *Id.* See also *supra* note 254.

²⁵⁷ The press release also observed as follows: “The N.A.A.C.P. so far has had no complaints about treatment of colored people who apply to district offices. It is not known whether they are having any extra difficulty securing the same types of policies as are issued to whites.” NAACP Press Release, *supra* note 256.

²⁵⁸ See Confidential Memorandum for the NAACP Re: Refusal of Insurance Companies to Accept Applications for Automobile Risks When Cars are Owned by Negroes (May 27, 1941) (reproduced from the Collections of the Manuscript Division, Library of Congress).

²⁵⁹ Letter from Roger Baldwin, American Civil Liberties Union, to Thurgood Marshall (Apr. 18, 1940) (from NAACP files, reproduced from the Collections of the Manuscript Division, Library of Congress) (enclosing a clipping entitled “Why the Color Line in Automobile Insurance?” (quoting the *St. Louis Post-Dispatch* as reporting that “the attitude of insurance companies generally is that Negroes are not good risks for public liability and property damage insurance”) and containing a hand-written note at the bottom of the clipping stating, “[h]ere’s a topic you folks might look into”).

because I am a Negro.”²⁶⁰ In many cases, the insurance companies relied on facially neutral underwriting factors to explain the denial of coverage, rather than explicit race-based classifications.²⁶¹ Although in Marshall’s view, the problem was growing rather than diminishing, it was “practically impossible to work out a court case because the insurance is usually refused on some technical ground.”²⁶²

¶78 About a decade later, however, a case involving an explicit race-based denial of life insurance coverage came to the NAACP’s attention.²⁶³ In the late 1940s, a Wisconsin resident named James Rancher, a student who worked at a shoe repair shop, applied for \$1,000 of ordinary life insurance²⁶⁴ under the State of Wisconsin’s life insurance fund.²⁶⁵ The state’s life insurance fund had been established in 1911 in response to certain problems identified with industrial insurance.²⁶⁶

¶79 The state’s application form asked for Rancher’s nationality and race, which he completed as “American Negro.”²⁶⁷ Although legislation forbidding life insurance companies to engage in rate or other discrimination between blacks and whites had been

²⁶⁰ Letter from Thurgood Marshall, Special Counsel, to Roger Baldwin, American Civil Liberties Union (Apr. 19, 1940) (from NAACP files, reproduced from the Collections of the Manuscript Division, Library of Congress) (thanking Baldwin for a clipping from the *St. Louis Post-Dispatch* of April 15, 1940, and explaining that it “is a difficult problem to handle,” and that “we expect a conference for some time in the near future with State officials and the leading Insurance companies on the question”); Letter from Louis Pink, Superintendent of Insurance, State of New York, to Walter White of the NAACP (Oct. 8, 1941) (from NAACP files, reproduced from the Collections of the Manuscript Division, Library of Congress) (inviting White to a conference to discuss the problem that “colored people often find it difficult to procure life and health and accident insurance and that there is discrimination against them”). *See also* Memorandum from Herbert Hill to Robert Carter (Aug. 2, 1954) (from NAACP files, reproduced from the Collections of the Manuscript Division, Library of Congress) (requesting advice for the Jewish Labor Committee from the NAACP Legal Department as to the “possibilities of some action regarding this matter,” and referring to an attached “application form distributed by The Commercial Travelers Mutual Accident Association which contains a box requesting a ‘color’ designation”).

²⁶¹ Sometimes the policies were more explicit. Historian John Hope Franklin, in his recently published autobiography, recounts a conversation he had in 1957 with his life insurance agent about the company’s loan program to help policyholders who sought assistance in purchasing a home. The agent explained that the company could not lend him the money because the loan would mean that “he would have helped Negroes ‘jump’ over the line into a ‘white’ neighborhood. His company’s standing rule was never to directly facilitate such a jump. I promptly informed him that I was canceling my insurance with him, and if I needed any in the future I would seek it with a company that had the courage to loan me the money to purchase a home where my family wished to live and not where the insurance company wished us to live.” JOHN HOPE FRANKLIN, *MIRROR TO AMERICA: THE AUTOBIOGRAPHY OF JOHN HOPE FRANKLIN 177–79* (2005). I am grateful to Professor Evelyn Brooks Higginbotham for bringing Franklin’s home loan experience to my attention.

²⁶² Letter from Thurgood Marshall, Special Counsel, to Roger Baldwin, American Civil Liberties Union (Apr. 19, 1940) (from NAACP files, reproduced from the Collections of the Manuscript Division, Library of Congress).

²⁶³ *See* NAACP, *Discrimination Insurance Companies 1940–1954* (reproduced from the Collections of the Manuscript Division, Library of Congress).

²⁶⁴ Trial Record at Exhibit 14, Jimmie Rancher’s Application for Insurance, *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953) (No. 2).

²⁶⁵ *See* Appellant’s Brief at Statement of Facts 3, *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953) (No. 2). The state life fund had been established “to be administered by the state without liability on the part of the state, beyond the amount of the fund, for the purpose of granting life insurance . . . and annuities” to residents and others within the state. *Id.* at 7 (quoting from WIS. STAT. § 210.05).

²⁶⁶ The fund was established by the state legislature in 1911, as part of a reform movement to protect poorer policyholders from exorbitant insurance premiums and other abusive practices of the insurance industry. *See* MCGILL, *supra* note 153, at 811.

²⁶⁷ Appellant’s Brief, *supra* note 265, at 7.

introduced in Wisconsin several times during the 1930s, those bills were not enacted into law.²⁶⁸

¶180 Rancher's application was rejected by the state insurance commissioner in 1949, on the ground that all Negroes and other non-Caucasian races were "substandard" insurance risks, and thus ineligible for coverage.²⁶⁹ In making that determination, the commissioner relied on the greater mortality experience of insured blacks, which in 1940, was approximately 150% of the mortality among insured whites.²⁷⁰ In addition, the commissioner maintained that under the governing statute, he was not authorized to issue policies at rates other than those based on the American Experience Table of Mortality,²⁷¹ except for those in hazardous occupations.²⁷² The commissioner therefore rejected all non-white applications.²⁷³

¶181 Rancher challenged the denial of coverage in federal court, and when the state insurance commissioner sought a declaratory judgment in state court regarding his interpretation of the governing statute, Rancher filed a counterclaim.²⁷⁴ The state trial court held that the rejection of his application on the basis of race constituted a proper interpretation of the statute, and that the statute did not violate the Equal Protection Clause under either the state or federal constitution.²⁷⁵

¶182 The trial court found as a factual matter that the commissioner's classification of blacks as substandard risks was based on the substantially higher mortality rate among blacks than among whites.²⁷⁶ Although extensive testimony was received at trial tending to show that higher mortality rate of blacks as a group was due to environmental rather than physical differences,²⁷⁷ the trial court found that evidence to be inconclusive.²⁷⁸

²⁶⁸ See SPENCER L. KIMBALL, *INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS 1835–1959*, at 126 (1960). Similarly, according to Kimball, bills were introduced in 1951 and 1953 to forbid the state life fund to discriminate on the basis of race, but were not enacted. *Id.* Discrimination on the basis of race in auto insurance, however, had been banned by the state legislature since the early 1930s. Act of Mar. 26, 1931, ch. 21, 1931 Wis. Sess. Laws 20 (providing that "any person who . . . shall refuse to sell or furnish any type of automobile insurance or charge a higher rate for such insurance because of race or color, shall be liable to the person aggrieved thereby in damages").

²⁶⁹ Appellant's Brief, *supra* note 265, Statement of Facts at 3. See also Trial Record at Exhibit 11, Letter from John Lange, Commissioner of Insurance, to Jimmie Rancher, plaintiff, dated April 21, 1949, *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953) (No. 2) (informing Rancher that he was a substandard risk because he was not Caucasian).

²⁷⁰ Respondent's Brief at 8–9, *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953) (No. 2) (summarizing the trial court's findings).

²⁷¹ According to the briefs filed before the Wisconsin Supreme Court, the statutory provisions establishing the state life fund and specifying premiums based on the American Experience Table of Mortality were enacted by the state legislature in 1911 as part of a reform movement to protect poorer policyholders from exorbitant insurance premiums and other abusive practices of the insurance industry. Respondent's Brief, *supra* note 270, Argument at 25; Appellant's Brief, *supra* note 265, at Argument at 26–28. As described by the appellant's brief, the American Experience Table of Mortality was authorized, and sometimes required, by a number of states to set premiums for life insurance sold between approximately 1902 and 1948, when it was replaced in many states by the Commissioners Standard Ordinary Mortality Table. Appellant's Brief, *supra* note 265, Argument at 24–25.

²⁷² Respondent's Brief, *supra* note 270, Argument at 13–14.

²⁷³ *Id.*

²⁷⁴ Appellant's Brief, *supra* note 265, Statement of Facts at 3–4.

²⁷⁵ *Id.* at 4.

²⁷⁶ Respondent's Brief, *supra* note 270, Questions Presented at 3.

²⁷⁷ The trial record in *Rancher* contains testimony that the variations in group mortality rates between whites and blacks are related to environmental factors, not biology. This testimony includes statements

Although the evidence also showed that a few insurance companies granted life insurance to blacks upon the same basis as whites,²⁷⁹ the trial court found that most large private companies had not accepted classifying risks without regard to race. Life insurance companies would generally differentiate between blacks and whites by charging a higher premium for insuring blacks, or allowing a lesser commission to agents for selling insurance to blacks, or limiting the solicitation of blacks.²⁸⁰ The trial court viewed the classification as reasonable and germane to state statutory requirements, which did not permit the commissioner to insure blacks at premiums in excess of the standard premium rates.²⁸¹

¶83 On appeal, the Wisconsin Supreme Court, in *Lange v. Rancher*,²⁸² reversed the trial court ruling and held that the insurance commissioner had “failed to show that the racial classification [was] the only one which will achieve the purposes for which the State Life Fund was created.”²⁸³ The court required the commissioner to use a race-neutral classification, unless he could show that race itself was a decisive factor in the unfavorable mortality experience.

¶84 Unlike the trial court, the Wisconsin Supreme Court did not view the practices of private insurance companies to be controlling and emphasized that the case involved an individual applicant, not a group.²⁸⁴ There was evidence in the record that some blacks “whose applications [were] properly screened and evaluated would have a mortality equal to that of white persons.”²⁸⁵ The court concluded that the summary rejection of Rancher’s application without investigation or evaluation, under standards applied to white applicants, did not comply with the provisions of the statute.²⁸⁶

¶85 Because the statute itself, properly construed, required equal treatment of black and white insurance applicants, the court did not base its conclusion on equal protection grounds under the federal or state constitutions.²⁸⁷ In addition, because the case dealt only with the state-sponsored insurance fund, the Wisconsin Supreme Court’s 1953

from professors of Anthropology, Zoology, and Genetics at the University of Wisconsin, a Professor of Anthropology at the University of Chicago, and the Assistant Director of the Chicago Community Inventory, who had researched mortality rates in Chicago.

²⁷⁸ *Lange v. Rancher*, 56 N.W. 2d 542, 547 (Wis. 1953) (dissenting opinion); see also Respondent’s Brief, *supra* note 270, Statement of Facts at 5.

²⁷⁹ *Rancher*, 56 N.W. 2d at 544. Examples of private companies with race-neutral policies included the Mutual Life Insurance of New York, TIAA-CREF, which sold insurance policies to professors, and the CUNA Mutual Insurance Company, which sold insurance to members of credit unions. In addition, the record includes other insurance organizations that did not differentiate in rates or benefits on the basis of race, including policies sold by the government to members of the armed forces in World Wars I and II. Respondent’s Brief, *supra* note 270, Argument at 24; see also Trial Record at Exhibit 23, Letter from R.D. Peck, Director, Veterans Administration, to William Gold, attorney, dated March 3, 1950, *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953) (No. 2) (explaining that none of the data used in obtaining mortality rates under either the United States Government Life Insurance or National Service Life Insurance are subdivided by race or color of the insured).

²⁸⁰ *Rancher*, 56 N.W. 2d at 543-44 (majority opinion), 547 (dissenting opinion); Respondent’s Brief, *supra* note 270, Statement of Facts at 6-7.

²⁸¹ *Rancher*, 56 N.W. 2d at 545-47 (dissenting opinion); Respondent’s Brief, *supra* note 270, Questions Presented at 4.

²⁸² 56 N.W.2d 542 (Wis. 1953).

²⁸³ 56 N.W.2d at 544.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

decision in *Lange v. Rancher* did not reach the race-based practices of private commercial insurance companies.

¶186 However, by the early 1950s, private insurance companies began modifying their race-based ordinary insurance practices. For example, in 1951, Metropolitan authorized its agents to solicit African-American business in New York, subject to the same rules on commissions that applied to white lives.²⁸⁸ By the end of 1954, it had eliminated most of its rules on race-based commissions,²⁸⁹ and by 1958, with the possible exception of agents operating under old renewal agreements, all race-based practices with regard to dual commissions had ceased.²⁹⁰ Nevertheless, at least through the mid-1960s, the company engaged in other race-based practices, including collecting information about the race of insurance applicants, imposing different policy limits and medical examination requirements on black applicants, and applying different financial reporting standards for non-white applicants or for white applicants in interracial marriages.²⁹¹

E. *The Discrediting of Scientific Racism after World War II*

¶187 When Myrdal conducted his influential survey of race relations in America,²⁹² prominent individual American scientists, including anthropologist Franz Boas and several of his former students, had for several decades been challenging the biological understanding of race in various scientific circles.²⁹³ In the 1930s and early 1940s, Boas and his associates began organizing and writing statements aimed at the general public against the “scientific” racism of the Nazi regime.²⁹⁴

¶188 The broader scientific community also began to take a public position against the Nazi regime’s racial theories in anti-racist declarations. In December 1938, an anti-racist Scientists’ Manifesto was released at a news conference with over twelve hundred signatures, including three Nobel laureates and sixty-four members of the National Academy of Scientists.²⁹⁵ In addition to statements signed by individual scientists, American academic organizations and scientific societies began issuing anti-racist statements in 1938. These included the American Association of University Professors, which protested against totalitarian persecution of teachers “on account of their race, religion, or political ideas,”²⁹⁶ the American Anthropological Association, which

²⁸⁸ See NYS INS. DEPT., REPORT ON METROPOLITAN LIFE, *supra* note 160, at 22–23.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 23.

²⁹¹ *Id.* at 18–20, 24. In addition, see the description of Metropolitan’s policies, adopted in the late 1940s and early 1950s, which discouraged the sale of standard ordinary policies to black customers, including “occupational” and “area” underwriting, mercantile reports, and controls on the volume and quality of policies held by African-American policyholders in *Thompson v. Metropolitan Life Ins. Co.*, 149 F. Supp. 2d 38, 43–47 (S.D.N.Y. 2001).

²⁹² See discussion *supra* at the beginning of Part III.

²⁹³ E.g., BARKAN, *supra* note 18, at 66–134 (discussing the work of Franz Boas and his associates).

²⁹⁴ See, e.g., RUTH BENEDICT, RACE AND RACISM viii (1942) (describing racism as “a travesty” of scientific knowledge); RUTH BENEDICT, RACE: SCIENCE AND POLITICS 151–218 (1940).

²⁹⁵ BARKAN, *supra* note 18, at 337.

²⁹⁶ *Id.* at 338–39. The texts of the resolutions are reproduced in BENEDICT, RACE AND RACISM, *supra* note 294, at 166–71 (including resolutions by the American Association of University Professors from December 28, 1938, the American Anthropological Association from December 1938, the Executive Council of the Society for the Psychological Study of Social Issues, Annual Meeting of the American Psychological Association, December 1938, and the Manifesto from the Seventh International Genetics Congress at Edinburgh, August 28–30, 1939).

approved a resolution against Nazi classification of race, and the Society for the Psychological Study of Social Issues.²⁹⁷ The repudiation of scientific racism continued into 1939 when a group of leading geneticists at the International Congress of Genetics issued an anti-racist Geneticists' Manifesto,²⁹⁸ and culminated in the 1950 U.N. Educational, Scientific, and Cultural Organization (UNESCO) declaration on "The Race Question."²⁹⁹ Representing the "most modern views of biologists, geneticists, psychologists, sociologists, and anthropologists,"³⁰⁰ the UNESCO statement declared: (1) that the mental capacities of all races are similar; (2) that no evidence for biological deterioration as a result of racial mixing or hybridization existed; (3) that "genetic differences are not of importance in determining the social and cultural differences" between groups of people; and (4) that for all practical social purposes, "race is not so much a biological phenomenon as a social myth."³⁰¹

¶189 Fifteen years earlier, as explained in the introduction to UNESCO's statement on race, the European scientific community had failed to issue a definitive statement on the race question at a conference organized by the International Institute of Intellectual Cooperation, a project that it "had to abandon in deference to the appeasement policy of the pre-War period."³⁰² As noted by Elazar Barkan in his study of the refutation of scientific foundations for racism, the UNESCO statement illustrates the major shift that occurred between the two world wars, when biological explanations of race were largely replaced by cultural or environmental analysis.³⁰³

¶190 When scientists rejected the notion of innate or "natural" racial traits, the original rationale for race-distinct pricing in insurance was undermined. If race-classified mortality differentials were largely related to the social, economic, and environmental conditions experienced by black Americans—conditions that were then under attack by the Civil Rights Movement as closely tied to the Jim Crow system of legalized racial separation and subordination—then pricing differentials based on the race of individual policyholders could no longer be justified or sustained by the industry.

¶191 As discussed above,³⁰⁴ in the early 1960s, race-merged industrial mortality tables were developed with the assistance of private industry actuaries³⁰⁵ and approved by

²⁹⁷ BARKAN, *supra* note 18, at 338–39; *see also* BENEDICT, SCIENCE AND POLITICS, *supra* note 294, at 166 (reproducing the resolution, which decried distortion of anthropological data "to serve the cause of an unscientific racialism" rather than "the cause of truth").

²⁹⁸ BARKAN, *supra* note 18, at 280–81.

²⁹⁹ U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. (UNESCO), THE RACE QUESTION, UNESCO Pub. No. 791 (July 18, 1950) [hereinafter THE RACE QUESTION] (originally drafted by Ashley Montagu, Claude Levi-Strauss, and six other scientists from various countries, and revised by Montagu after criticism submitted by Hadley Cantril, E.G. Conklin, Gunnar Dahlberg, Theodosius Dobzhansky, L. C. Dunn, Donald Hager, Julian S. Huxley, Otto Klineberg, Wilbert Moore, H. J. Muller, Gunnar Myrdal, Joseph Needham, and Curt Stern).

³⁰⁰ BARKAN, *supra* note 18, at 341; *see also* *No Scientific Basis for Race Bias Found by World Panel of Experts*, N.Y. TIMES, July 18, 1950, at 1 (cited and quoted by Barkan in his Epilogue).

³⁰¹ THE RACE QUESTION, *supra* note 299, at 8–9.; *see also* U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. (UNESCO), THE RACE CONCEPT: RESULTS OF AN INQUIRY, U.N. Sales No. SS.52.II.9.A (1952).

³⁰² THE RACE QUESTION, *supra* note 299, Introduction at 2.

³⁰³ BARKAN, *supra* note 18, at 342.

³⁰⁴ *See* discussion *supra* Part III.B.

³⁰⁵ Brown, *supra* note 167, at 457 (The Superintendent of Insurance for the State of New York, chair of the Industrial Table Study Subcommittee of the Life Insurance Committee of the National Association of Insurance Commissioners, appointed an Industry Advisory Committee of company actuaries to work with the technicians of the insurance departments to develop a modern mortality table to replace the 1941

industry regulators to replace the racially identified “standard” and “substandard” mortality tables first adopted in 1907, and later revised in 1941. The influence of professional societies of actuaries in this process under the supervision of the National Association of Insurance Commissioners permitted change on an industry-wide basis. These changes brought the industry more in line with prevailing scientific views. In addition, the industry’s rejection of race-based practices and the adoption of race-merged tables showed growing responsiveness to civil rights concerns.

¶92 In sum, the development of a standard race-integrated or race-merged table followed in the decade after a consensus developed within the politically involved scientific community that racial difference reflected cultural rather than biological difference. The consensus of important figures in the scientific community, which could not be achieved in the mid-1930s given the political context in pre-war Europe, was finally reached following World War II. Because of the role of industry groups within the profession of actuarial science, prospective change could be made on a broad industry-wide basis. Although insurance companies would continue to factor mortality experience of their policyholders into their overall cost analysis, the biggest “mainstream” companies no longer used race-distinct mortality tables to maintain dual-rate pricing structures.

IV. CONCLUSION

¶93 As Oliver Wendell Holmes observed in *The Path of the Law*, published shortly after the United States Supreme Court decided *Plessy v. Ferguson*, “[w]e do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.”³⁰⁶ A similar dynamic applies to reconsideration of private commercial practice.

¶94 Race-based insurance practices both mirrored and reinforced the racial assumptions and hierarchies of the surrounding political, scientific, economic, and social culture of the times.³⁰⁷ Reflecting “the habit of the public mind,” they proved highly resistant to change until the underlying racial assumptions were challenged by the transformative event of World War II and by the post-war Civil Rights Movement.³⁰⁸

¶95 Like Jim Crow state-sanctioned race segregation, which prevented “an enforced co-mingling of the two races,”³⁰⁹ the insurance industry justified and enforced Jim Crow race-based practices by reference to inherent or natural racial differences.³¹⁰ After Reconstruction, life insurance companies began insuring emancipated slaves at two-thirds the benefits provided to white policyholders.³¹¹ Although the values echoed slavery era racial hierarchies, the companies explained the change by reference to the “excessive

Commissioners Standard Industrial Mortality Table.). Information was collected from all industrial companies with at least \$50 million of outstanding life insurance in force in 1958, including data on the proportions of non-white and female business. *Id.* at 457. See discussion *supra* Part III.B.4.

³⁰⁶ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

³⁰⁷ See discussion *supra* Part III.B.3.

³⁰⁸ See discussion *supra* Part III.B.4, III.D–E.

³⁰⁹ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

³¹⁰ *Id.* (observing also that legislation is “powerless to eradicate racial instincts or to abolish distinctions based on physical differences”); see HOFFMAN, RACE TRAITS, *supra* note 137, at v (describing the “longevity and physiological peculiarities among the colored population”).

³¹¹ See discussion *supra* Part III.B.1.

mortality” and “innate” racial traits of former slaves. Race-categorized mortality differentials quantified those differences and classified policyholders as “standard” and “substandard” risks. Race-based pricing structures thus underscored the dominant ideological assumptions about racial superiority and inferiority.³¹²

¶96 By contrast, where observable mortality differentials did not reinforce background status hierarchies, they tended to be disregarded for pricing purposes. For example, the industry’s mortality experience in the late nineteenth century and beginning of the twentieth century showed mortality differentials among industrial policyholder groups classified by gender that approached, and at certain ages exceeded, the differentials observed in groups categorized by race. Although males on average experienced greater mortality than females, the industry maintained sex-merged mortality tables and gender-neutral pricing in those markets.³¹³ Thus, the industrial companies generally did not charge males, other than black males, higher rates as “substandard” risks.

¶97 When Jim Crow segregation came under attack in the second Reconstruction following World War II, the underlying justifications for race-based pricing were finally discredited. The repudiation of scientific racism after the defeat of the Nazi regime led to a fundamental rethinking of race. Cultural and environmental understandings replaced “natural” and “biological” explanations of race. When the Civil Rights Movement successfully attacked Jim Crow for its role in creating and maintaining unequal social and environmental conditions, the insurance industry could no longer sustain higher rates or coverage restrictions for black Americans based on “substandard” mortality categorized by race.

¶98 Beginning in the late 1940s, a leading industrial life insurance company, under increasing pressure from the Civil Rights Movement, began equalizing rates despite continuing race-correlated mortality differentials. Later, the industry achieved a form of collective action in the early 1960s, with the development of race-integrated tables by industry professional groups, approved for state regulatory purposes by the National Association of Insurance Commissioners. Thus, by the time the Civil Rights Movement achieved landmark legal and legislative reforms in the mid-1960s, the life insurance industry had adopted a race-integrated mortality table and the leading companies had voluntarily discontinued explicit race-based pricing practices for newly issued policies.

¶99 Shortly thereafter, the former “Big Three” industrial companies (Prudential, Metropolitan, and John Hancock) withdrew from the industrial insurance market by discontinuing the sale of new industrial policies. They left that business to smaller or historically black companies operating primarily in southern markets. The bigger companies aimed their future marketing efforts at the more prosperous middle class, including black policyholders who could afford ordinary life insurance.

¶100 Earlier state legislative efforts to eliminate explicit race-based pricing had been largely ineffective in accomplishing lasting reform. Beginning in the late nineteenth

³¹² See discussion *supra* Part III.B.3.

³¹³ See discussion *supra* Part III.B.3. The story of race-based insurance practices thus provides important context for understanding the development of gender-based rates, which today are commonly encountered in private commercial life insurance and annuities. The range of life insurance products and characteristics of the markets where gender-based rates developed requires a more thorough investigation of practices in life insurance and annuity markets aimed at the middle class. However, any such study should consider sex-neutral pricing practices in the working class insurance markets where race-based practices first developed.

century, several Northern states passed laws prohibiting differentials in life insurance premiums or benefits solely on the basis of race. These state laws rejected race as a classification category. Although individuals could be classified on some other basis such as health or habits, they could not be placed in a lesser rating category solely on the basis of race.³¹⁴

¶101 Some companies responded by adopting other types of less visible practices to limit their risk, such as more stringent medical examinations or credit checks for all black applicants. Others pulled their business from those states or thereafter declined to solicit black business anywhere.³¹⁵ The resulting market segmentation led to racial segregation of insurance markets and the development of black-owned insurance companies, mirroring patterns of race separation, subordination, and segregation found more generally in America during the Jim Crow era.³¹⁶ Not until the end of the twentieth century did many of the smaller companies change their dual rate practices; some did not eliminate them until faced with state insurance department investigations or lawsuits by black policyholders.³¹⁷

¶102 In conclusion, as history shows, given the structure and regulation of life insurance markets, lasting reform could not be accomplished state-by-state or market-by-market. Change came from a form of collective action by life insurance industry professional groups, which was achieved only after a fundamental rethinking of race, a “change in the habit of the public mind” that led to reconsideration of long-established commercial practice.

³¹⁴ See discussion *supra* Part III.B.2.

³¹⁵ *Id.*

³¹⁶ See discussion *supra* Part III.C.

³¹⁷ See discussion *supra* Part III.B.4 (discussing civil rights cases brought under Civil War-era federal statutes).