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OF GIVING AND TAKING: APPLICATIONS AND
IMPLICATIONS OF *CITY OF LOS ANGELES*,
DEPARTMENT OF WATER & POWER v. MANHART

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*Fortune's a right whore.
If she give aught, she deals it in small parcels,
That she may take away all at one swoop.¹*

IN *City of Los Angeles, Department of Water & Power v. Manhart*,² the United States Supreme Court held that an employer's retirement plan violated title VII of the Civil Rights Act of 1964,³ as amended by the Equal Employment Opportunity Act of 1972,⁴ because a female employee was charged a higher rate of contribution than her male counterpart.⁵ The case appeared to be a significant victory for women in their battle for equality. If the rationale of the opinion is applied consistently to other practices of retirement plans, women will be entitled to equal monthly benefits as well as equal rates of contribution. Nevertheless, women may have won the battle and lost the war: an unnecessary piece of obiter dictum in the opinion authorizes an employer to maintain a severance pay plan into which equal contributions for male and female counterparts are deposited. The Court thus may have taken with one hand what it gave with the other, because the coexistence of conventional retirement plans and severance pay plans could create two unwholesome forces: (1) a motive, based on a desire to increase profit, for employers to discriminate against women; and (2) a tendency, based on a desire to maximize compensation, for employees to segregate themselves by sex according to the nature of employers' retirement plans.

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¹ John Webster, *The White Devil*, I. i. 4 (J. Brown ed. 1960).

² 435 U.S. 702 (1978).

³ 42 U.S.C. §§ 2000e to -17 (1976).

⁴ Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§ 2000e to -17 (1976)).

⁵ Counterparts are a man and a woman who share the same birthdate, entered the employer's service on the same day, have identical employment histories, and either are still working or retired on the same date.

After discussing the background and the rationale of the *Manhart* opinion, this article presents a brief description of the various types of retirement plans. Attention then centers on practices of retirement plans that treat men and women differently. The first issue is whether defined contribution plans should be treated differently from defined benefit plans. This article argues that the two types of plans should be treated alike because both are operated on insurance principles. The focus then shifts to the issue whether a woman is entitled to the same monthly retirement benefit as her male counterpart. Based in part on the distinction—which is commonly ignored—between the nominal and the real contributors to a retirement plan, this article asserts that monthly benefits must be equal for counterparts. Next considered are options commonly offered by retirement plans, such as the joint and survivor annuity. This article argues that the sex of beneficiaries must be disregarded in the allocation of benefits.

This article next explores the economic implications of the various applications of *Manhart*. Because women outlive men, equal contributions and equal monthly benefits for counterparts make women more costly employees than men. Employers who realize this fact will be tempted to hire fewer women or to pay them less money. Equal contributions and equal monthly benefits also often mean that men must subsidize women's benefits. A man therefore can increase his compensation by working for an employer who has either no retirement plan or a severance pay plan, while a woman can increase her remuneration by working for an employer who maintains a conventional plan. Rational employees will tend to go where their compensation is maximized, producing two results: (1) men and women will work for different employers, according to the nature of their retirement plans; and (2) to the extent that this process is completed, women will receive lower monthly benefits than their male counterparts. Each of these consequences occurs because the Supreme Court distinguished in *Manhart* between conventional retirement plans and severance pay plans, a distinction that this article argues is unnecessary and should be abandoned in favor of a policy of treating all retirement plans according to the same rules.

I. BACKGROUND AND RATIONALE

The risk of longevity is the chance that a person will outlive his ability to support himself. Without a retirement plan (and ignoring

the social security system), each individual bears the risk of longevity on his own. Some people assess the risk as substantial, and others do not. Members of the latter class do not save money from current income to use during old age, and they are of no further interest here. Those individuals who do perceive a substantial risk of longevity believe that they should save a portion of their income. A few succeed in saving adequately for the future. They accurately judge how much to save, discipline themselves to reach their goals, and have the good fortune either to choose productive investments or to purchase and remain current on substantial annuity contracts from reputable insurance companies. This group too is of no further interest. However, many members of the class that believes in protecting itself against the risk of longevity try to save for the future and fail. Some simply misjudge the amount needed; their savings or annuities turn out to be inadequate. Others run afoul not of the risk of longevity itself, but of the risk of *providing for* the risk of longevity: they are unable to save money or make payments on annuity contracts, or they lose their savings in bad investments.⁶ To protect against the risk of longevity, and the risk of providing for the risk of longevity, many employers—including the Department of Water and Power of the City of Los Angeles⁷ (the

⁶ The distinction between the risk of longevity and the risk of providing for the risk of longevity can be illustrated in hypothetical terms. Suppose A, who is concerned about the possibility of living beyond his employable years, provides for the risk of longevity by investing 10% of his monthly income in corporate stock. The risk of providing for the risk of longevity is the possibility that the stock will become worthless. The risk of the stock's becoming worthless is independent of the risk of A's living past age 65. A would invest in the stock, however, only if he perceived a significant risk of longevity. Although the probabilities are statistically independent, from A's perspective the risks are closely related: A will take the risk of providing for the risk of longevity only if the risk of longevity appears significant.

⁷ None of the courts that heard the *Manhart* case ruled on the effect of the Department's status as a public, as opposed to a private, employer. The Department did raise the issue in its opening brief to the Supreme Court, advancing the theory suggested in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 n.11 (1976), that applying title VII to a public employer is an improper exercise of congressional authority. The Department posited (1) that Congress may apply anti-discrimination laws to the states and their agencies only to the extent authorized by the fourteenth amendment, and (2) that *Washington v. Davis*, 426 U.S. 229 (1976), held that the fourteenth amendment prohibits only intentional discrimination, provided that rational classifications are used. The argument concluded that, in light of the rationality of the Department's plan and the absence of discriminatory intent, application of title VII in this case would not be a permissible exercise of congressional power. Brief for Petitioner at 38, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). A counterargument would maintain that the enabling clause of the fourteenth amendment gives Congress power to interpret and apply the amendment, see *Katzenbach v. Morgan*, 384 U.S. 641, 648-56 (1966), and that the courts should respect the judgment of another equal branch of government.

Regardless of whether title VII constitutionally may be applied to require a state to aban-

"Department")—have established retirement plans for their employees.

Rather than involve an insurance company, the Department maintained its own retirement plan.⁸ The risk of providing for the risk of longevity was handled by withholding a percentage of each eligible employee's compensation, adding money from the Department's budget, and depositing the two contributions into a fund that was invested by prudent advisors. The risk of longevity⁹ was managed by operating the retirement plan on insurance principles. The Department's actuaries computed how much money was needed to provide pensions for the entire class of covered employees. Knowing that some retirees would outlive others, the actuaries took account of this fact in determining how much money had to be contributed in regular increments in order to have sufficient funds on hand to meet future liabilities. The Department then raised the necessary money through employer and employee contributions. Comparably situated employees made equal contributions, though some certainly would outlive others. Thus for the purpose of estimating the plan's liabilities, the varying longevity of retirees was important but, for the purpose of funding the plan, the varying longevity of retirees was ignored. Each employee traded the chance that he would predecease the average person, and thus receive in benefits less than he and the Department had contributed on his behalf, for (1) the certainty that after retiring he would continue to receive an income for life, and (2) the possibility that he would outlive the average person and receive total benefits exceeding the contributions. In one sense, the risk of longevity was not fully eliminated because the retiree's monthly check might not be as much money as he truly needed. Yet because the monthly benefit was calculated with reference to, among other things, his final year's

don practices having the effect—but not the intent—of discriminating against protected classes, surely the fourteenth amendment permits the use of title VII against a state practice intended to discriminate. In *Manhart* the Department undoubtedly intended to treat women and men differently. Perhaps in the courts' view, the purposeful nature of the discrimination pretermitted the need to decide the constitutional issue.

⁸ The plan was not entered into the record. 435 U.S. at 705 n.3. The author is familiar with the contents of the plan because he was co-counsel to the plaintiffs in the trial court. See *Manhart v. City of Los Angeles, Dep't of Water & Power*, 387 F. Supp. 980, 981 (C.D. Cal. 1975), *aff'd*, 553 F.2d 581 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978).

⁹ The plan insured against various risks, but only the risk of longevity was at issue in the case.

salary, there was presumably at least some relationship between the retiree's needs and his benefits. In another sense, however, the risk of longevity was completely eliminated: whether the retiree lived four years or forty years past retirement age, his monthly checks would continue to arrive.

This description of the Department's plan gives the misleading impression that all employees were treated as part of the same group. In fact, the Department effectively operated separate retirement funds for its male and female employees. Mortality tables showed that women, as a class, outlive men. A 65-year-old woman whose date of death would ultimately coincide with the sum of the ages at death divided by the number of deaths for her sex—the "average woman"—was expected to outlive the "average man" by five years.¹⁰ Although the Department could not know that a given woman would outlive a given man, it felt that equity and fairness required that no man contribute money used toward a woman's pension. Of course, the Department also could not know which of two men would live longer, yet it evidently felt no compunction in requiring one man to contribute money that might be used toward another man's pension.

A retirement plan operated on insurance principles can take account of extra female longevity in one of three ways. First, if the plan is to pay male and female counterparts the same benefit each month, more money must be raised to fund the woman's benefits because she will draw them for a longer period of time. If the employer is the sole nominal contributor to the plan, he must contribute more on behalf of the woman than on behalf of the man. If employees contribute to the plan, the woman may be required to contribute more than her male counterpart. Second, if the employer's contributions are to be divided equally between the man and the woman and—if employees contribute—counterparts are to make equal contributions, the reserve accounts of the counterparts will contain equal amounts of money when they retire. Because the woman's money must be divided into a greater number of monthly payments than the man's, the woman will receive a lower monthly benefit. Third, if counterparts' monthly benefits are to be equal and contributions by and on behalf of counterparts also are to be equal, some of the money contributed by or on behalf of men must be used

¹⁰ *Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581, 583 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978).

to subsidize benefits for women. The Department elected the first of these possibilities. Each woman was required to contribute approximately 15% more to the plan than her male counterpart, the Department matched employee contributions at the rate of 110%, and counterparts received equal monthly benefits in retirement.

The class of the Department's female employees brought suit to equalize the monthly contributions of counterparts, claiming that the Department's retirement plan discriminated against women in violation of title VII. The district court granted a preliminary injunction,¹¹ the Court of Appeals for the Ninth Circuit affirmed,¹² and the Supreme Court granted certiorari.¹³

The Department's principal argument before the Supreme Court asserted that "the differential in take-home pay between men and women was not discrimination within the meaning of § 703(a)(1) because it was offset by a difference in the value of the pension benefits provided to the two classes of employees."¹⁴ Women did indeed pay more in contributions and receive more in total benefits,¹⁵ and the Court recognized that although there are fictional as well as real differences between men and women, one real difference is that women, as a class, outlive men. The Court also recognized, however, that "[m]any women do not live as long as the average man and many men outlive the average woman."¹⁶ Because, as the statutory language reveals, Congress focused on the individual, the

¹¹ See *Manhart v. City of Los Angeles, Dep't of Water & Power*, 387 F. Supp. 980, 984 (C.D. Cal. 1975), *aff'd*, 553 F.2d 581 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978).

¹² See *Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581, 592 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978).

¹³ See *City of Los Angeles, Dep't of Water & Power v. Manhart*, 434 U.S. 815 (1977).

¹⁴ 435 U.S. at 706. The statute provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (1976).

¹⁵ If male and female counterparts began working for the Department at age 30 for \$1,000 per month, and continued at the same salary until retirement at age 65, the male would have contributed \$22.20 per month for 35 years (for a total of \$9,324) while the female would have contributed \$25.49 per month for the same period (for a total of \$10,705.80). See Brief for Petitioner at 5, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). Each would receive a monthly benefit of \$700, *id.*, but, because the male's life expectancy was 14 years while the female's was 19 years, the male's total benefits would be \$117,600 and the female's would be \$159,600.

¹⁶ See 435 U.S. at 708.

Court held that an employer may not treat individuals "as simply components of a racial, religious, sexual, or national class."¹⁷ The Court elaborated: "If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."¹⁸ It follows that a woman may not be charged a higher rate of contribution simply because she is a woman, one to whom a generalization about longevity may not necessarily apply.

The Department responded that equal contributions would be unfair to men because on the whole they die sooner than women and would inevitably be subsidizing the benefits of the longer-lived sex.¹⁹ The Court rejoined:

But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute which was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification.²⁰

The law for race would seem to hold for sex as well, but the Department maintained that Congress intended to afford women less protection than other protected classes. The Department argued that the Bennett amendment to § 703(h),²¹ which incorporates into title VII the Equal Pay Act's exemption²² for an employment practice based on "any other factor other than sex,"²³ protected its plan because the differential contribution rates were

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 708-09.

²⁰ *Id.* at 709 (footnotes and citation omitted).

²¹ [I]t shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

110 Cong. Rec. 13647 (codified at 42 U.S.C. § 2000e-2(h) (1976)).

²² 29 U.S.C. § 206(d) (1976).

²³ *Id.*

based not on sex, but on longevity. The Court disagreed that the Department's practice was based on a factor other than sex:

It is plain, however, that any individual's life expectancy is based on a number of factors, of which sex is only one. The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84% differential between the respective contributions by men and women.²⁴

The Department further argued that the Supreme Court's 1976 decision in *General Electric Co. v. Gilbert*²⁵ authorized differential contribution rates, but the Court distinguished *Gilbert* on the ground that "[o]n its face, [the Department's] plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability."²⁶ Thus the Department's differential contribution rates were simply sexually disparate treatment: men were treated one way and women, another. A showing that there was no discrimination against the class of women—in that their extra contributions purchased extra benefits—might have rebutted a disparate impact argument, but it had no effect on a demonstration of disparate treatment.²⁷

Finally, the Court reported the Department to have argued that monetary relief was unjustified in this case.²⁸ Accepting this argument, the Court denied the plaintiffs' prayer for restitution of the amount by which their contributions exceeded their male counterparts' contributions on the grounds that (1) pension fund administrators might reasonably have believed such plans were lawful; (2) no reason existed to believe that the threat of monetary awards was necessary to keep retirement fund administrators' behavior within the law; and (3) such awards might jeopardize the solvency of retirement plans, on which millions of workers and retirees rely.²⁹

²⁴ 435 U.S. at 712. Chief Justice Burger felt that the Department's practice [fell] squarely under the exemption provided by the Equal Pay Act The "other factor other than sex" is longevity; sex is the umbrella-constant under which all of the elements leading to differences in longevity are grouped and assimilated, and the only objective feature upon which an employer—or anyone else, including insurance companies—may reliably base a cost differential for the 'risk' being insured.

Id. at 727 (Burger, C.J., concurring in part and dissenting in part).

²⁵ 429 U.S. 125 (1976) (holding that General Electric's employee disability plan did not violate title VII by failing to include pregnancy-related disabilities).

²⁶ See 435 U.S. at 715.

²⁷ See *id.* at 716.

²⁸ See *id.* at 707.

²⁹ See *id.* at 719-21. Justice Marshall dissented from the denial of restitution. See *id.* at 729-33 (Marshall, J., concurring in part and dissenting in part).

II. TYPES OF RETIREMENT PLANS

Two classification schemes are necessary to take account of retirement plans' various features.³⁰ One scheme focuses on whether the plan promises a specific level of benefits, and the other scheme is sensitive to the identity of the nominal contributors to the plan.

Retirement plans may be classified as either defined benefit or defined contribution plans. In a defined benefit plan, beneficiaries are promised certain levels of benefits,³¹ varying according to specified factors. Many collectively bargained plans, for example, award benefits as a function of years of service in the industry; other plans take into account factors such as average compensation over a period of time.³² Thus a defined benefit plan might provide that a 70-year-old employee with thirty years of service and a final year's salary of \$15,500 would be entitled to a monthly benefit of \$1,000. In a defined contribution plan, on the other hand, no particular level of benefits is promised. Rather, a specific sum is contributed regularly to a theoretically separate account kept for each employee, and upon retirement the employee is entitled to whatever level of benefits his account can purchase.³³ Thus a defined contribution plan might provide that the employee will contribute 5% of his wages and that the employer will match it. If the employee averaged wages of \$15,620 per year over thirty years, total contributions under this plan would be \$48,860. Five per cent compound interest earned on the contributions over the years would bring the account to approximately \$109,000. Based on annuity tables, a 70-year-old male retiree with this account would be able to purchase an annuity that yielded a monthly benefit of approximately \$1,000.³⁴

³⁰ A relevant distinction may exist between a plan that is self-insured, paying benefits from its own reserves, and a plan that pays premiums to an insurance company, which pays out the benefits. A plan that is provided by an insurance company and that discriminates against men or women arguably is not the responsibility of the employer. When an employer uses an insurance company to provide retirement benefits for his employees, however, the insurance company is an agent of the employer for this purpose. *Cf. id.* at 718 n.33 ("[A]n employer [cannot] avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer."). If one insurance company refuses to provide a nondiscriminatory plan to an employer, a competing company is likely to offer a lawful plan.

³¹ J. MELONE & E. ALLEN, *PENSION PLANNING* 32 (rev. ed. 1972).

³² *See id.* at 37-38.

³³ *Id.* at 34-35.

³⁴ The monthly benefit level was calculated using a table published in *INSTITUTE FOR BUSINESS PLANNING, LIFE INSURANCE DESK BOOK* 366 (4th ed. 1976). A comparable sum would purchase a monthly benefit of approximately \$880 for a 70-year-old female retiree.

In the theoretical model of defined benefit plans, the level of benefits is determined at the outset; the promised benefits then become the basis for calculation of the amount that must be raised in contributions. The potential beneficiary of a defined benefit plan knows in advance exactly how much he will receive in retirement—given assumptions about such factors as length of service and final average salary. The contributors to a defined benefit plan, however, do not know exactly how much they will have to pay in; the necessary level of contribution may need adjustment if the composition of the work force changes, if the return on investment varies from predictions, or if the actuary's computations are erroneous. In contrast, in the theoretical model of defined contribution plans, the level of contribution—rather than the level of benefits—is determined at the outset. As a result, the contributors enjoy certainty; they never need to contribute more than they have agreed. The beneficiary, however, cannot know how much he will receive until he retires because benefits are a function of the size of his account at retirement.³⁵

In practical application, the distinction between defined benefit and defined contribution plans is apt to break down. The benefits in a defined benefit plan may be changed—indeed, they are likely to be increased—between the first and last years of a long-tenured employee's service. Factors like final average salary are also variable. Thus in a defined benefit plan an employee has little more advance knowledge of the amount of his actual retirement allowance than does a member of a defined contribution plan. Also, the level of contribution to a defined benefit plan may be quite specific: in many collectively bargained plans, the parties to the contract decide exactly how much the employer will contribute to the plan. The actuary calculates the benefits that can be provided with this level of income, and these benefits are written into the labor agreement or plan.³⁶ Thus the contributors to such plans know the precise

³⁵ As in the case of profit-sharing plans that allocate a fraction of profit to employees' accounts, the contributor may not know the exact amount of the contribution before he makes it. Once the periodic contribution is deposited, however, the obligation to contribute is fully satisfied.

³⁶ The Supreme Court recently focused on a collectively bargained defined benefit plan in *International Brotherhood of Teamsters v. Daniel*, 98 S. Ct. 790 (1979). Based on an initial weekly employer contribution of \$2 per employee, the level of benefits was set at \$75 per month. "Subsequent collective bargaining agreements," however, "called for greater employer contribution, which in turn led to higher benefit payments for retirees." *Id.* at 793-94. See J. MELONE & E. ALLEN, *supra* note 31, at 37.

scope of their obligation to contribute. Despite the partial collapse, in practice, of the defined benefit/defined contribution distinction, this classification scheme does provide a useful approach to problems of sex discrimination in retirement plans.

Retirement plans may also be classified according to the identities of the nominal contributors to the plan. A plan may call for employees alone to contribute ("contributory plans"), employers alone to contribute ("noncontributory plans"), or both to contribute ("joint contribution plans").³⁷ This classification cuts across the defined benefit/defined contribution scheme: there are noncontributory and joint contribution defined benefit plans³⁸ as well as contributory, noncontributory, and joint contribution defined contribution plans.

The Department's plan in *Manhart* was a joint contribution defined benefit plan: both the employer and the employees contributed money,³⁹ and employees were promised a specific level of benefits.⁴⁰ Employee contributions were fixed, but employer contributions were not; the Department generally made a substantial extra contribution in order fully to fund benefits at the time an employee retired.⁴¹

III. APPLICATIONS

A. *Defined Benefit Plans Versus Defined Contribution Plans*

Manhart involved a defined benefit plan. Although the Court did not rely on the type of facts that distinguish defined benefit from defined contribution plans, the question arises whether this distinction is relevant to sex discrimination analysis. Clearly it is not: the rationale of *Manhart* applies with equal force to defined

³⁷ For a discussion of the relative advantages and disadvantages of contributory and non-contributory plans, see J. MELONE & E. ALLEN, *supra* note 31, at 57-60. The term "contributory plan" frequently refers to any plan to which employees contribute, regardless of whether the employer also contributes. For clarity, "contributory plan" hereinafter refers only to plans to which employees are the sole nominal contributors.

³⁸ The author is aware of no contributory defined benefit plans. Raising money to meet a funding shortfall would be difficult when only employees contribute.

³⁹ See 435 U.S. at 705.

⁴⁰ See *id.* The most common benefit was calculated by multiplying the employee's average monthly salary during his last year of service, his total years of service, and a specific fraction (0.021) applicable to all employees. See Transcript of Oral Argument at 58, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

⁴¹ Brief for Petitioner at 5, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

contribution plans and, moreover, a close analysis reveals that there is no relevant difference between these two types of plan.

As noted above, the difference between these two conventional retirement plans is the degree of certainty enjoyed by the contributors and the beneficiaries. In defined benefit plans, the beneficiaries know in advance that a certain number of years of service at a particular rate of pay produces a specific monthly benefit. Although the plan's actuaries attempt to foresee liabilities so that adequate contributions can be collected, ultimately any shortfall in funding becomes the obligation of the contributors. In defined contribution plans, in contrast, the contributors enjoy certainty: they are obliged to make only the stated contributions, while the beneficiaries do not know their exact level of benefits until they retire. The difference between defined benefit and defined contribution plans obviously is unrelated to whether an employee is a man or a woman. This conclusion alone seems sufficient reason to reject any attempt to except defined contribution plans from the rule of *Manhart*. Moreover, the logic of the case applies to defined contribution plans. A defined contribution plan that pays a woman a lower monthly benefit than her male counterpart⁴² rests on the assumption that she will survive him because women tend to outlive men. The Supreme Court, however, clearly decided that average class characteristics cannot lawfully be applied to individuals in this context.⁴³

The disparate treatment of women in defined contribution plans may arguably be justified because the theory of such plans is different from the theory of defined benefit plans. All beneficiaries are grouped into a single class in defined benefit plans⁴⁴ but, in theory, each beneficiary has his own separate account in defined contribution plans. If fact conformed to theory, a defined contribution plan would be essentially the same as the severance pay plan expressly approved by the Supreme Court in *Manhart*, in which an employer is permitted to "set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open

⁴² Alternatively, a defined contribution plan could charge the woman a higher contribution than her counterpart and provide equal monthly benefits. The author is not aware of any such plans, but they would be the actuarial equivalent of the plans described in the text. The two schemes should be treated in the same manner by the law.

⁴³ See 435 U.S. at 708.

⁴⁴ As noted above, there actually were two classes—men and women.

market."⁴⁵ Facts, however, do not conform to theory. Defined contribution plans are similar to defined benefit plans and different from severance pay plans in three important respects.

First, beneficiaries of severance pay plans acquire control over the assets of their separate accounts at the time they retire. Such control is clearly implied in the Supreme Court's statement that retirees can shop in the open market for the best contract available. In contrast, beneficiaries of defined benefit and defined contribution plans never acquire control over the assets of their funds. Whether the plan is self-funded or funded through an insurance company,⁴⁶ retirees receive monthly checks and nothing more.

Second, because beneficiaries of defined benefit and defined contribution plans lack title to the assets of their plans, they cannot make a purchase on the open market. Their range of choices is limited to the options offered by their plans. Beneficiaries of severance pay plans have title to a sum of money and can do anything with it they choose. Some may follow the Supreme Court's suggestion and purchase an annuity contract from an insurance company, but others may invest in real estate or travel to Pago Pago.

Third, and most important, defined contribution plans do not involve truly separate accounts because (1) assets are mingled for investment purposes, and (2) risks are pooled for benefit purposes. That assets are mingled for investment is obvious: managing thousands of separate investment accounts would be impractical and unprofitable. That risks are pooled is equally clear. When an employee retires with a certain balance in his account, some method must be used to parcel out the money over time. The basic practice⁴⁷ computes the monthly benefit by dividing the total in the account by the number of months lived by the average retiree of the same sex.⁴⁸ If accounts were truly separate, an employee's benefits would cease at the average age of death for his sex, and any man or woman who outlived the average would have no pension thereafter. This does not happen, of course. Both defined benefit and defined contribution plans offer a retiree a straight annuity that guarantees him

⁴⁵ 435 U.S. at 717-18 (footnote omitted).

⁴⁶ J. MELONE & E. ALLEN, *supra* note 31, at 108.

⁴⁷ Options are generally available, but they are typically actuarial equivalents of the basic practice, so that what is said in the text about the basic practice is also true of options.

⁴⁸ See J. MELONE & E. ALLEN, *supra* note 31, at 108. Because the declining balance in the account continues to earn interest, the actual monthly benefit is somewhat larger than this formula indicates.

benefits for life. If he elects this option and dies early, he gets no refund⁴⁹ but, if he outlives the average, he continues to draw benefits until he dies. Plainly, both defined contribution and defined benefit plans are operated on insurance principles; the risk of longevity is shared by the class of retirees. In contrast, a severance pay plan that distributes a lump sum upon retirement does not spread the risk of longevity. Because no relevant difference exists between defined benefit and defined contribution plans, they should be treated alike for the purpose of sex discrimination analysis.

B. Equal Monthly Benefits Versus Equal Total Benefits

There appear to be no open questions concerning employee *contributions* to the three types of conventional retirement plans. Employees contribute nothing to noncontributory plans. *Manhart* holds that counterparts' contributions to a joint contribution plan must be equal, and there is no reason to treat employee contributions to a contributory plan differently from those to a joint contribution plan.

A serious question does arise, however, concerning *benefits* under all varieties of conventional retirement plans. The question is not whether counterparts' benefits must be equal. If a woman cannot be required to pay more in contributions than her male counterpart, surely she cannot be required to accept less in benefits. Rather, the question is how to measure equality of benefits. The problem occurs in choosing the appropriate period of time for measuring equality. One of two time periods may be used: a fixed number of days (for example, one month) or the entire span of years in which the relevant events (making contributions or receiving benefits) take place. When the question is equality of contributions, the result will be the same regardless of which period is used: counterparts who are identical in all ways except sex make contributions over the same number of years and, if their rates of contribution are equal, their total contributions will also be equal. The results differ, however, when the issue is equality of benefits. If the appropriate period is one month, monthly benefits received by counterparts must be equal. Because women outlive men, the total of monthly benefits received

⁴⁹ Contributory and joint contribution plans ordinarily guarantee that the employee and his estate will receive at least the employee's contributions plus interest. Such plans frequently assume that the employee's contributions are paid as benefits before the employer's contributions are used. *See id.* at 52.

by the average woman will exceed the total received by her counterpart. If the appropriate period is the entire span of years during which benefits are received, counterparts must receive the same total sum of retirement benefits.⁵⁰ Because the woman will draw her benefits over a longer period of time, however, her monthly benefits will be less than her counterpart's. Which is the correct measuring period?

1. An Evaluation of the Argument in Favor of Equal Total Benefits

Those who favor equal total benefits argue that the alternative of equal monthly benefits is unfair because it requires men to subsidize women. This argument assumes that men and women are treated equally by retirement plans if each sex pays the same proportion of the cost of its own benefits and none of the cost of the other sex's benefits. The force of this argument would diminish (1) if each sex does not pay the same proportion of the cost of its own benefits in an equal total benefits plan, or (2) if one sex does not subsidize the other's benefits in an equal monthly benefits plan. As the following economic analysis demonstrates, both of these conditions can occur.

a. Distinguishing Between Nominal and Real Contributors to Retirement Plans

The first step in analyzing the argument for equal total benefits distinguishes between the nominal and the real contributors to a retirement plan, for the party who makes the contribution is not necessarily the one who bears the incidence of its cost. Regardless of who appears to pay into a retirement plan, the real contributors may be the employer, the employees, customers, or any combination of them.

In noncontributory plans, the employer is the sole nominal contributor in the sense that he is the only party who directly remits payments to the plan. The employer, however, does not necessarily bear the true incidence of the cost of contributions. He may choose

⁵⁰ In practice, a woman receives greater total benefits because her contributions are on deposit for a longer period of time than her counterpart's and thus earn more interest. Men generally do not object to this disparity. That men's monthly benefits still exceed their counterparts' may obscure the difference. In addition, men may recognize that any claim to the interest generated by women's contributions would be inconsistent with denying women's claims against their own contributions.

to take the cost of contributions entirely out of his profits. Alternatively, he may pass some or all of the cost on to customers in the form of higher prices for his products, or he may shift some or all of the cost back to his employees in the form of reductions in other types of compensation.⁵¹ To the extent that retirement costs are shifted back to employees—by granting smaller wage increases, for example—the employer does not change the total amount of money he expends for employee compensation. He merely reduces the amount he puts into other types of compensation by the sum that he contributes to the retirement plan. In this case, the employees effectively pay for their own pensions. To the extent that retirement costs are passed on to customers, wages hold steady and the employer makes his contribution to the retirement plan from the increased revenue generated by higher prices.⁵² The employees pay nothing toward their pensions. Rather, employees' total compensation is increased and customers pay for pensions. To the extent that retirement costs are taken out of profits, the effect on employees is much the same as passing these costs on to customers. Only the source of the money—the identity of the party who bears the incidence of the cost—differs. In this third case, the employer pays for pensions.

In contributory plans, too, the true incidence of the cost of retirement benefits may fall on the employer, the employees, or the customers. The cost falls on the employees if wages are held constant and contributions are subtracted from take-home pay. The employer may shift the cost to customers by funding the retirement plan through increases in the price of the company's products; wages are increased in accordance with the product price increases, and the additional wages are then withheld as the required employee contribution. The employer bears the cost if wages are increased—with money taken from profits—by the amount of the employee's contribution.

Similarly, in joint contribution plans—a hybrid of contributory and noncontributory plans—the true incidence of the cost of

⁵¹ The employer possibly could meet this cost by reducing another cost, such as his expenditure on rent, raw materials, or services. From the employees' standpoint, however, use of these alternatives would be the same as using profits.

⁵² This implicitly assumes that an employer can unilaterally raise prices and that the overall elasticity of demand is such that the price increase will result in increased revenues. For a discussion of employer alternatives in a competitive market, see text accompanying notes 110-17 *infra*.

retirement benefits is independent of the identity of the nominal contributors to the plan. Joint contribution plans will not be addressed in the following discussion because what is true of contributory and noncontributory plans is, of course, true of joint contribution plans.

In any given situation, it is difficult to determine who is truly paying for retirement benefits. The real cost often is shared in varying proportions among employer, employees, and customers, regardless of the identity of the nominal contributors. For the sake of simplicity of expression, the following discussion will treat the three possible real contributors separately, with the understanding that what is true when a given party is the sole real contributor is true *pro tanto* when that party is one of several real contributors.⁵³

b. The Intent Behind and the Effects of Equal Total Benefits

The second step of an economic approach to evaluating the argument in favor of equal total benefits identifies the intent underlying and the effects of disparate treatment of women in retirement plans. When actuaries tell plan administrators that women outlive men, and that therefore women's benefits cost more, employers like the Department must decide who should pay the "extra cost" of "extra female longevity." In many cases, it has been decided that men should be spared this extra cost, that it should be assessed to the class of women alone instead of being spread over the class of all employees.⁵⁴ In order to assess the extra cost only to women in noncontributory plans, to which only the employer (at least nominally) contributes, a woman is paid a lower monthly benefit than her male counterpart. In contributory plans, to which only employ-

⁵³ The government is a fourth real contributor, operating through the tax system. For example, if an employer takes some of the cost of retirement benefits out of profits, he will pay less income tax, and the government will effectively bear part of the cost of the benefits. Thus, if gross profits are \$100,000 and the employer bears none of the cost of retirement benefits, net profits after a 46% tax are \$54,000. If the employer bears \$10,000 of the real cost of retirement benefits, reducing gross profits to \$90,000, \$48,600 remains after taxes. The employer effectively pays only \$5,400 of the cost of the benefits; the government bears \$4,600 in the form of reduced tax revenues. Because the role of government *qua* real contributor does not appear to affect sex discrimination analysis of retirement plans, it is ignored hereafter.

⁵⁴ For example, nearly 2,200 educational institutions subscribe to the Teachers' Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF), which provides smaller monthly payments to female members than to their male counterparts. See *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Spirit v. Teachers' Ins. & Annuity Ass'n*, 416 F. Supp. 1019 (S.D.N.Y. 1976); *Pension Problems of Older Women: Hearings Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging*, 94th Cong., 1st Sess. (1975).

ees (at least nominally) contribute, a woman can be charged a higher rate of contribution than her counterpart and be paid equal monthly benefits, or counterparts can be charged equal contributions and the woman can be paid lower monthly benefits. The intent of both approaches is to assess the cost of women's extra benefits to women alone. When contributions are equal, they are set at a level that will produce a sum of money sufficient to fund the benefits of the male counterpart. This sum must be stretched over a greater number of years for the female counterpart, and she is required to pay for the cost of her extra longevity by receiving a lower monthly benefit in retirement. When the woman contributes more than the man, counterparts' monthly benefits are equal, but the woman has already paid for the cost of her extra longevity by receiving lower take-home pay during her working years. In either case, it is thought that men and women are treated equally because the class of each sex bears the same proportion of the cost of its own longevity and none of the cost of the other's.

Equal total benefits make it appear that each sex pays for the same proportion of its own retirement benefits but for none of the other's, but this appearance is false because the distinction between the nominal and the real contributors to a retirement plan is ignored. Consideration of this distinction reveals that equality—as defined by proponents of equal total benefits—depends not on whether counterparts receive equal monthly or equal total benefits, but on the identity of the real contributors to the retirement plan. Sometimes each sexual class does pay for the cost of its own benefits and nothing more; other times, men pay nothing and women still bear the real cost of their extra longevity.

In noncontributory plans, administrators who seek to assess the extra cost of female longevity to women alone pay the woman a lower monthly benefit than her male counterpart. When the cost of retirement benefits is shifted back to the employees, counterparts' wages (which are identical because they are counterparts) are lowered in equal amounts by the cost of the man's benefits. The man pays the full cost of his retirement benefits in the form of reduced wages. The woman pays only part of the cost of her retirement benefits in the form of reduced wages; the remainder she bears in the form of a lower monthly benefit. For example, assume the employer is able to pay total compensation of \$1 per employee per unit of production. In a defined benefit plan, if the cost of funding the man's benefits is 10 cents per unit and the cost of funding the

woman's benefits is 10.14 cents per unit,⁵⁵ the employer would reduce both counterparts' wages by 10 cents. If this level of contribution would support a monthly benefit of \$1,000 for a man aged seventy, his female counterpart's benefit might be \$880.⁵⁶ In a defined contribution plan, if the employer contributes 10 cents per unit per counterpart (with wages falling correspondingly by 10 cents) and if the balance in the man's account is \$109,000, which is sufficient to fund a monthly benefit for a 70-year-old male of \$1,000, his female counterpart would receive \$880 because of her greater life expectancy. In both types of plan, each employee effectively pays for the full cost of his own retirement benefits and for none of the cost of his counterpart's.

When the cost of funding benefits is passed on to customers in noncontributory plans, it is not necessary to reduce employees' wages because the money for the employer's contribution comes from increased prices. Assuming that the woman is paying for the cost of her extra longevity by receiving lower monthly benefits, the employer needs to pass on to customers only the amount that would be necessary to fund the benefits for an exclusively male work force. The man therefore pays none of the cost of his retirement benefits, while the woman pays part of the cost of hers.⁵⁷ Thus in either a defined benefit or a defined contribution plan, if a man's benefits cost 10 cents per unit of production, the employer would raise the price of the product by 10 cents times the number of employees and contribute this money to the retirement plan. Wages would be unaffected. The man's monthly benefit might be \$1,000 and the woman's, \$880.

When the cost of funding the retirement benefits is taken out of profits, the counterparts are treated as they are when the cost is

⁵⁵ While the plan in *Manhart* used a 15% cost differential, industry figures demonstrate that a 70-year-old woman would pay 14% more than a man would pay for an identical annuity. See INSTITUTE FOR BUSINESS PLANNING, *supra* note 34, at 366. To maintain consistency in illustrations below, the 14% figure is used hereafter.

⁵⁶ Derived from *id.* at 366.

⁵⁷ Arguably, the man does pay for his benefits with his labor. Nevertheless, the statement that the man pays for none of the cost of his benefits is correct because although the man's compensation is increased by 10 cents per unit, his productivity remains constant. As an economically comparable alternative to paying lower monthly benefits, a plan might offer women the opportunity to receive equal monthly benefits by paying for the incremental cost of longevity outright, *i.e.* by accepting a wage decrease of 14 cents per unit. In light of this option, it is clear that women do pay for their additional longevity under plans paying lower monthly benefits. Positing a benefits package of \$1,000 per month, it is clear that men receive their benefits for nothing while women bear part of the cost of their benefits.

passed on to customers. Only the source of the money differs. Men pay for none of their retirement benefits, and women pay for part of theirs.

In contributory plans, there are two possibilities: (1) charging counterparts equal contributions and paying the woman a lower monthly benefit, or (2) charging the woman a higher contribution (prior to *Manhart*) and paying counterparts equal monthly benefits. The following discussion uses only the second possibility, but is equally applicable to the first because both approaches are intended to place the cost of extra female longevity on the woman alone and both have the same actual—if not intended—effects.

When the true incidence of the cost of funding retirement benefits remains on the employees—where of course it begins in contributory plans—wages remain constant and take-home pay is reduced by the required contribution to the plan. The woman contributes more than her counterpart and bears the cost of her extra longevity. For example, in a defined contribution plan the man might contribute 10 cents per unit of production and the woman, 10.14 cents. In retirement they would receive equal monthly benefits; each person would pay for the full cost of his own retirement benefits and for none of the cost of his counterpart's.

When the cost of retirement benefits is passed on to customers, the employer raises prices by an amount sufficient to allow an increase in wages to match the decrease in take-home pay occasioned by employee contributions to the plan. Because the employer is assessing the cost of extra female longevity to the woman alone, it is necessary to increase prices (and wages) only by an amount sufficient to fund the benefits for an all male work force. The result is that the man pays for none of the cost of his retirement benefits, while the woman must pay for part of hers. Thus if the male employee's contribution to the plan is 10 cents per unit of production, the price of the product would be raised by an amount sufficient to increase each counterpart's wages by 10 cents. The man would bear none of the cost of his retirement benefit, but the 10 cents would not fully offset the woman's 10.14 cent contribution and she would pay part of the cost of her benefits.

Again, from the standpoint of counterpart employees, funding the benefits out of profits is comparable to passing the cost on to customers; only the source of the money is different. Men pay for none of their retirement benefits, and women are required to pay for part of theirs.

Identifying the intent behind and the effects of disparate treatment of women leads to the conclusion that, although the practice of equal total benefits may succeed in protecting men against paying any subsidies to women, it is attended by the unexpected consequence—revealed by the distinction between nominal and real contributors to retirement plans—that men sometimes pay nothing for their benefits while women must pay for a substantial portion of theirs. The significance of this observation depends on two factors: (1) the identity of the bearers of the true incidence of the cost of retirement benefits, and (2) the intent underlying and the consequences of the alternative practice of equal monthly benefits. Protecting men from subsidizing women is perhaps more pressing a need if employees generally bear most of the cost of benefits than if the cost is generally passed on to customers or taken out of profit.⁵⁸ Even if the cost tends to fall on employees, however, it is still important to evaluate the practice of equal monthly benefits. Examination of this practice is the third step in an economic evaluation of the argument in favor of equal total benefits.

⁵⁸ William A. Frey, a student at the New York State School of Industrial and Labor Relations at Cornell University, has argued that the extra cost of women's extra benefits almost invariably will fall on men. See W. Frey, *A Review of Michael Evan Gold's Economic Analysis in: Giving and Taking: Applications and Implications of City of Los Angeles v. Manhart* (Spring 1979) (unpublished paper on file with the Virginia Law Review Association). Frey applies the distinction drawn in this article between the nominal and real contributors to a pension plan to two situations, one in which firms participate in competitive markets for both labor and products and the other in which a firm, while participating in a competitive labor market, enjoys a monopoly position in the market in which it sells its products. Frey maintains that in the first case employers themselves could not absorb the extra cost of women's extra benefits because, the market being competitive, any reduction in profit would drive them out of business. Likewise, the extra cost could not be passed on to customers because higher prices would result in sales being lost to competitors. Frey concludes that in the model of perfect competition, the extra cost of women's extra benefits would fall on the employees alone. Presumably, the monopolist is already selling his product at the highest price the market can bear and therefore cannot pass the extra cost on to customers. The monopolist has no reason to take the extra cost out of profits, for (assuming a competitive labor market) he will find an adequate supply of employees who will work for lower wages because of the value they place on pension contributions. Therefore, employees of monopolists will also bear the full cost of women's extra benefits.

Mr. Frey's contribution to discussion of the issue is valuable, for it undertakes application of this article's theoretical constructs to more practical situations. Conclusions based on Frey's analysis, however, would be premature because additional important variables have not been taken into account. One such variable, as suggested by Professor Olivia Mitchell of the Labor Economics Department of the New York State School of Industrial and Labor Relations at Cornell University, is the elasticity of demand. If the product is gasoline, and customers will buy roughly the same amount at 85 cents per gallon as they did at 83 cents, much of the extra cost of women's extra benefits may well be passed on to the consuming public.

c. *The Intent Behind and the Effects of Equal Monthly Benefits*

Plans that provide equal monthly benefits for counterparts, and charge them equal or no contributions, implicitly assume that the appropriate period for measuring equality of benefits is one month, not the total span of years during which benefits are received. Although this practice might be expected to require men to subsidize benefits for women, distinguishing between nominal and real contributors shows that men sometimes do subsidize women's benefits, but that at other times they do not. Moreover, in no event is one class, and not the other, required to pay for its own benefits.

In noncontributory plans, if monthly benefits for counterparts are to be equal, more money must be contributed on behalf of the woman. The employer is the nominal source of the contribution, yet there are three possible real sources. If the cost of benefits is shifted back to employees, counterparts' wages are reduced equally.⁵⁹ The man subsidizes the woman's benefits because each counterpart effectively makes an equal contribution to the plan, although the woman's benefits are 14% more costly than the man's. For example, if total compensation is \$1 per employee per unit of production and the cost of funding retirement benefits averages 10 cents per unit for counterparts, wages would fall to 90 cents. Because the man's benefits actually cost only 9.3 cents, he is subsidizing the woman by paying 10 cents for 9.3 cents worth of pension benefits.⁶⁰ If the cost of benefits is passed on to customers, there is no need to reduce wages because increased prices generate the employer's contribution. Likewise, wages remain unchanged if the cost of benefits comes out of profits. In both of these cases, neither counterpart bears any of the cost of his retirement benefits because someone else, customers or employer, pays for it. Thus if the price of the product is increased by 10 cents per employee per unit of production, or if profit falls by that amount, employees' wages will be unaffected. Total compensation increases, with the woman's increasing more than the man's, but neither increase comes at the expense of the counterpart's compensation.

In contributory plans, if contributions and monthly benefits are to be equal for counterparts, some of the money nominally

⁵⁹ To comply with title VII and the Equal Pay Act, 29 U.S.C. § 206(d) (1976), the reduction presumably must be equal.

⁶⁰ This discussion assumes that the work force is composed of 50% male and 50% female workers.

contributed by the man must be used to help pay for the woman's extra benefits. If the true cost of benefits falls on the employees, wages hold steady and contributions are subtracted from take-home pay. Because counterparts make equal contributions but the woman receives a greater total benefit, the man is subsidizing her. For example, if each contributed 10 cents, the man will eventually receive 9.3 cents worth of retirement benefits, while the woman will receive 10.7 cents. If the true cost of benefits is either passed on to customers or taken out of profit, counterparts' wages are increased by the size of their contributions and the contributions are then withheld from take-home pay. In neither case does a counterpart bear any of the cost of his retirement benefits.

d. The Equities of Equal Monthly Benefits and Equal Total Benefits

The final step in this economic evaluation is to ask whether equal total benefits or equal monthly benefits are more equitable. Neither approach is beyond criticism: equal monthly benefits mean that men sometimes subsidize women; equal total benefits mean that women sometimes pay for a portion of their benefits when men pay for none of theirs. Designation of the lesser evil ultimately may depend on empirical studies that measure the effects on employees. If most employers either pass the cost of retirement benefits on to customers or take the cost out of profit, men would not be subsidizing women in an equal monthly benefits plan and there would be no justification for the practice of equal total benefits. Even if it were demonstrated, however, that the full incidence of retirement costs always falls on employees, and that therefore men always subsidize women in an equal monthly benefits program—which would be the strongest case for the practice of equal total benefits—the burden that the subsidy places on men is much less than the burden women bear in paying the cost of their extra longevity. Equal monthly benefits spread the cost of extra female longevity throughout the class of all male and female employees, while equal total benefits place the full cost of extra female longevity on women alone—as the following example illustrates.

Assume an employer has no retirement plan and pays wages of \$1 per employee per unit of production. The employer initiates a noncontributory defined benefit plan providing that counterparts aged seventy who have been covered by the plan for thirty years will receive equal monthly benefits of \$1,000. If counterparts produce

eight units per hour, the cost of benefits (assuming a 5% interest factor) will be approximately 10 cents per unit. If the full cost is shifted back to employees, wages will fall to 90 cents. If the work force is half female, women's benefits will consume 53% of all contributions, and a man would subsidize his female counterpart in the amount of \$107 per annum.⁶¹ In contrast, if this same employer operates an otherwise identical plan but provides for equal total benefits for counterparts, there will be no subsidy: a man's monthly benefit will go up to \$1,070, but his counterpart's monthly benefit will fall to \$940.⁶² Thus equal total benefits—assessing the cost of extra female longevity to women alone—cost a woman more in *one month* of retirement than equal monthly benefits—that is, spreading the cost of extra female longevity throughout the class of all employees—cost a man in *one year* of work. A given work force, of course, generally is not half female. Nationally, women represent approximately 40% of the total work force.⁶³ The amount of money a man must pay to subsidize women's benefits obviously decreases as the percentage of women covered by his plan decreases. If the cost of extra female longevity is borne by women alone, however, the decrease in a woman's monthly benefit is the same no matter how many other women are covered by the same plan. The lesser of the evils seems clear.

It has been seen that two periods of time can be used to measure equality of benefits in retirement plans: one month (resulting in equal *monthly benefits*) or the *entire span of years* during which benefits are received (resulting in equal total benefits). The foregoing discussion has been an evaluation of the argument in favor of equal total benefits. This argument, that each sex should pay for its own benefits and neither should subsidize the other, essentially

⁶¹ For example, funding a 70-year-old man's benefit of \$1,000 per month requires \$109,000. For his female counterpart, \$124,000 is required. Thus for a 50% male work force, an equal monthly benefit plan would require an average contribution of \$116,500 per employee. With a 5% compound interest rate, this sum can be accumulated over 30 years at \$1,670 per year. Because a man's benefits alone could be funded by \$1,562 per year, while a woman's benefits require \$1,777 per year, men subsidize each of their counterparts \$107 per year. The \$1,670 figure breaks down into \$32 per week, or 80 cents per working hour, making the cost per unit approximately 10 cents. When an equal total benefits approach is used, men receive a higher monthly benefit for the identical \$116,000 contribution because of the difference in longevity. Derived from INSTITUTE FOR BUSINESS PLANNING, *supra* note 34, at 366.

⁶² Of course, much of this difference is attributable to the impact of years of compounding interest.

⁶³ See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 25 EMPLOYMENT AND EARNINGS, No. 11, at 23, 24 (1978).

concerns economic equity, so that an economic evaluation of the argument appropriate. It was shown that the argument loses much of its force in light of the distinction between nominal and real contributors to retirement plans: men do not necessarily subsidize women in equal monthly benefits programs; and men sometimes do not pay at all for their benefits in equal total benefits programs, while women must pay for a significant portion of theirs. But vitiating the argument for one proposition does not create an argument for its alternative, and it is necessary to articulate a rationale in favor of equal monthly benefits for counterparts. Such a rationale can be constructed from the logic of the *Manhart* case.

2. *The Argument for Equal Monthly Benefits*

The choice between equal monthly and equal total benefits was not at issue in *Manhart* because the Department's plan provided for equal monthly benefits for counterparts. Nevertheless, the Department consistently maintained that requiring equal employee contributions to a plan that offered equal monthly benefits would be unfair because men would be forced to subsidize women.⁶⁴ Although the Supreme Court did not rule on benefits, it did refute the subsidy argument in justifying its holding that contributions must be equal for male and female counterparts. The Court said that employees must be treated as individuals, not as members of groups. A woman may not be charged a higher rate of contribution because she is a woman, even if the class of women does tend to outlive the class of men. If as a result of this rule men have to subsidize women, as blacks already subsidize whites and single persons now subsidize married persons, that is a policy judgment that Congress has reached.⁶⁵

This reasoning, which the Court applied to the issue of contributions, bears with full force on the issue of benefits. An equal total benefits plan involves no serious pretense of equality for individuals. Rather, equality for groups is considered sufficient: the class of men receives the same total benefits, proportionate to its membership and pension credits, as the class of women. Under an equal total benefits plan, equality for individuals occurs only in the unusual case in which each counterpart happens to die on the average date of death for his sexual class. An advocate who tried to justify an

⁶⁴ See Brief for Petitioner at 47, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); Transcript of Oral Argument at 10, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

⁶⁵ See 435 U.S. at 708-11.

equal total benefits plan in light of *Manhart's* standard of individual treatment would have to assume that each individual possesses the relevant characteristic of his class (average longevity), but the assumption itself treats employees as members of groups rather than as individuals and therefore would defeat the argument.

In contrast, individual equality exists in an equal monthly benefits plan because each counterpart receives exactly the same monthly benefit. The class of women may receive proportionately more total benefits than the class of men, just as the class of whites will likely receive proportionately more benefits than the class of blacks, but the focus of the law is on individuals, not classes.⁶⁶ Choosing one month as the appropriate period of time for measuring equality of benefits eliminates the need to assume that individuals possess class characteristics. Each individual, whatever his racial and sexual characteristics, is treated exactly the same as his counterpart during the relevant period of time. Only equal monthly benefits can satisfy title VII's emphasis on individual treatment.

Two arguments can be advanced against equal monthly benefits. According to the first argument, equal monthly benefits would require an employer to violate the Equal Pay Act.⁶⁷ Because more money is needed to fund the woman's benefits, the employer is arguably giving the woman greater compensation than her counterpart. In a defined benefit plan, the employer might expressly contribute more on behalf of the woman or, if he contributes equally on behalf of counterparts, some of the money contributed as consideration for the man's work would in reality be used to fund the woman's benefits. In a defined contribution plan, the woman's account would actually be larger than the man's. This argument, however, is nothing more than a restatement of the discredited proposition that men should not subsidize women's benefits. Moreover, the argument is plainly wrong if the true cost of benefits is borne by employees in the form of lower wages because, in this event, the employer really is not paying for pensions.

The argument ostensibly is valid if the funds for benefits come out of profits, but it still is erroneous because it assumes that an employer's contributions to a retirement plan are a form of wages covered by the Equal Pay Act. In fact, there is an important distinction

⁶⁶ In such event, the benefits differential is based on actual longevity, rather than on gender, and is not proscribed by the Equal Pay Act. See *id.* at 710 n.20.

⁶⁷ 29 U.S.C. § 206(d) (1976).

between wages and employer contributions. An employee who performs forty hours of satisfactory work has an absolute right to his wages. He can do with the money as he likes and, if he dies before actually receiving it, his estate is entitled to it. In contrast, an employee who performs forty hours of satisfactory work, as the result of which his employer contributes money to a retirement plan, has only a limited and contingent right to benefit from the contribution. He has no right to control the contribution before he retires and, if he dies before retiring, his estate has no right to receive even a fully vested pension.⁸⁸ A comparison between wages and retirement benefits is more appropriate. A retiree who lives for a period of time is entitled to receive his pension, just as an employee who performs satisfactory work for a period of time is entitled to receive wages. An employee can spend his wages as he likes; a retiree can dispose of his pension as he pleases. An employee's estate is entitled to the employee's wages if he dies before receiving them. Similarly, a retiree's estate would be entitled to a benefit that covered a period of time when the retiree was alive but was delayed in payment until after the retiree died. If the Equal Pay Act is concerned not with the employer's contributions, but with the retiree's benefits, a retirement plan must offer equal monthly benefits to male and female counterparts.⁸⁹

A second argument against equal monthly benefits asserts that such benefits would violate title VII by having a disparate impact on men, who would receive proportionately less in benefits than women. In *Manhart* the Supreme Court expressly dealt with this argument and, in doing so, lent support to the argument that the Equal Pay Act is concerned with monthly benefits, rather than employer contributions:

A variation on the Department's fairness theme is the suggestion

⁸⁸ Pooling of risks is unrelated to vesting of rights. A vested right cannot be forfeited by, for example, an employee's changing jobs. An employee may have a vested right to an annuity in a plan that pools the risks of longevity, or he may have a vested right to a lump-sum distribution in a plan that does not pool the risks of longevity. For a discussion of vesting and its advantages, see J. MELONE & E. ALLEN, *supra* note 31, at 54-57.

⁸⁹ The Wage and Hour Administrator, who is responsible for enforcing the Equal Pay Act, formerly approved fringe benefit plans that either provided equal benefits to counterparts (regardless of the cost to the employer), or provided disparate benefits (so long as the cost to the employer was the same for counterparts). 29 C.F.R. § 800.116(d) (1978). It has been proposed, however, that this construction be withdrawn. The Administrator has proposed for comment an interpretation of the Equal Pay Act making clear that benefits are "wages" within the meaning of the Act. The effect would be to permit only plans which pay equal monthly benefits to counterparts. 43 Fed. Reg. 38,029 (1978).

that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees. This suggestion has no force in the sex discrimination context because each retiree's total pension benefits are determined by his *actual life span*; any differential in benefits paid to men and women in the aggregate is thus "based on [a] factor other than sex," and consequently immune from challenge under the Equal Pay Act. . . . Even under Title VII itself—assuming disparate impact analysis applies to fringe benefits—the male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.⁷⁰

Read with the Court's indication that it is not unfair to group men with women in an insurance scheme,⁷¹ this language makes it reasonably clear that the Court will not countenance any objection to equal monthly benefits for counterparts.⁷²

If the courts hold that title VII entitles a woman to the same monthly benefits as her male counterpart, interesting questions of remedy will arise. Three classes of employees would be affected: women who retired before the effective date of title VII and are presently receiving lower monthly benefits than their male counterparts; women who retired after the effective date of title VII and are receiving lower monthly benefits than their counterparts; and women who either retired after the announcement of *Manhart* or have not yet retired. Although distinctions may be drawn among these classes, the controlling fact is that *Manhart* awarded only prospective relief. The Court denied restitution of the amount by

⁷⁰ 435 U.S. at 710 n.20.

⁷¹ See *id.* at 710.

⁷² The Equal Employment Opportunity Commission, which is responsible for administrative interpretation of title VII, has ruled that a retirement plan may not differentiate benefits on the basis of gender, 29 C.F.R. § 1604.9(f) (1978), and that it is immaterial that the cost of the benefits is greater for one sex than for the other, *id.* § 1604.9(e). In a specific decision, the Commission found unlawful discrimination in a plan that paid a woman a lower monthly benefit than her male counterpart. EEOC Decision No. 73-118 (*cited in* Decision No. 75-147, [1975] EMPL. PRAC. GUIDE (CCH) ¶ 6447).

The First Circuit, albeit reluctantly, has endorsed this conclusion. In *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), *rev'g* 439 F. Supp. 631 (D. Me. 1977), the appellate court held that *Manhart* required reversal of a district court judgment that had upheld an employer's practice of requiring equal contributions of counterparts while paying women lower monthly benefits in a joint contribution defined contribution plan.

which a woman's contribution exceeded her male counterpart's, even though title VII was in effect when the excess contribution was extracted.⁷³ The Court's concern about the solvency of retirement plans accounted in substantial part for the denial of monetary relief.⁷⁴

The possibility of increasing retirement benefits earned by pre-*Manhart* service raises even greater concern about the financial stability of retirement plans: raising retirement benefits would cost much more than refunding excess contributions. Assume, for example, that a man contributed \$1 per year and his female counterpart contributed \$1.15. If five years elapsed between the date two years preceding the filing of a title VII charge⁷⁵ and the date of final judgment, the plan would have to refund only 75 cents to the woman. In comparison, assume the benefit for a man is \$1 per year and for his counterpart, 74 cents. Ignoring interest, this would yield them equal total amounts if he survived fourteen years and she survived nineteen years. The cost of raising the woman's monthly benefit to the level of the man's would be 24 cents for each year she draws benefits. If the average retiree had lived out half of her life expectancy, the average cost of raising benefits would be \$2.28 per woman. Most retirement plans could easily use present contributions to fund this new liability, and thus the solvency of few plans would be jeopardized. Nevertheless, the denial of monetary relief seems just because the money awarded would not be available to fund pension credits for presently working employees. The burden of monetary relief most likely would fall not on the employers who caused the discrimination, nor on the men who benefited from it, but on younger employees who neither caused the discrimination nor benefited from it. Of course, all service rendered after *Manhart* must generate equal retirement benefits for counterparts. A woman who retires five years after *Manhart* with twenty-five years of service will have four-fifths of her benefit calculated according to the old, discriminatory formula, and one-fifth of her benefit calculated according to a nondiscriminatory formula.⁷⁶

⁷³ See 435 U.S. at 720.

⁷⁴ See *id.* at 721.

⁷⁵ See title VII § 706(g), 42 U.S.C. § 2000e-5 (1976).

⁷⁶ The Third Circuit has reached this result in cases with analogous issues regarding remedy. See *Stuppiello v. IIT Avionics Div.*, 575 F.2d 430 (3d Cir. 1978); *Rosen v. Public Serv. Elec. & Gas Co.*, 11 FEP Cases 330 (D.N.J.), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1974), *cert. denied*, 429 U.S. 835 (1976).

C. Options

Few retirement plans offer only straight annuities. Most offer the retiree a number of options, including early retirement, joint and survivor annuities, and stock options. Some plans also allow employees to contribute additional sums beyond the required contributions. *Manhart's* effect on these options will now be addressed.

1. Early Retirement Options

Many retirement plans allow an employee to retire before the normal retirement date, for example at age fifty-five or sixty instead of sixty-five or seventy. A defined contribution plan simply allocates the balance in the account of an early retiree over his life expectancy, as it would if he retired at the normal retirement age. Defined benefit plans customarily calculate the monthly benefit that the early retiree's hypothetical analogue (having the same sex, years of service, final average salary, contributions on deposit, etc.) would receive if the analogue retired at the normal retirement age; this sum is then discounted to allow for the actual age of the retiree.⁷⁷ Because greater longevity characterizes women aged sixty as well as women aged seventy, many plans discount a woman's early retirement benefit more⁷⁸ than they discount her male counterpart's benefit.⁷⁹ Obviously, this practice must be discontinued after *Manhart*.

⁷⁷ Assume *M* decides to retire at age 60 after 25 years of service. His salary during his final year of work was \$1,800 per month. According to the plan, *M's* hypothetical analogue (that is, a male employee who retires at the normal retirement age of 70 with a final salary of \$1,800 per month) would receive \$1,000 per month in benefits. The amount of money needed to fund the analogue's benefits is approximately \$109,000. *M* is entitled to whatever level of benefits can be provided over his longer life expectancy by \$109,000, or approximately \$752 per month. In a sense, early retirement in a defined benefit plan converts the plan into a defined contribution plan, and the employee's account contains the sum of money that would have been set aside by the defined benefit plan to fund the benefits of the early retiree's hypothetical analogue.

⁷⁸ Not all plans discount early retirement more for women than for men. In *Manhart* the Department had in the past discounted a woman's early retirement benefit less than her male counterpart's. This costly feature, along with other discriminatory provisions of the plan (for example, women were required to retire at age 62, while men could work to age 65), affected contribution rates significantly. At times between 1938 and 1970, women were required to contribute as much as 45% more than their counterparts. Plaintiffs' (Original) Complaint at 6-7, No. 73-2272-HP, C.D. Cal., dated Sept. 26, 1973.

⁷⁹ Assume *F* is *M's* 60-year-old female counterpart. If her hypothetical analogue retired at age 70, many plans would pay her a lower monthly benefit than they would pay *M's* analogue because *F's* analogue has a greater life expectancy. The amount of money needed to fund benefits for *M's* analogue is \$109,000. Presumably this same amount would be available to fund benefits for *F's* analogue over her life expectancy (equalling approximately \$880 per

Assumptions about longevity that are based solely on sex are as improper when the persons are aged fifty-five as when they are aged sixty-five. If male and female counterparts are entitled to equal monthly benefits when they begin to draw benefits at the normal retirement age, they clearly are entitled to equal monthly benefits if they retire early.

2. *Joint and Survivor Annuities*

Section 205⁸⁰ of the Employee Retirement Income Security Act of 1974⁸¹ (ERISA) requires most plans covered by the Act to offer a retiree a choice between a "straight annuity," in which benefits are guaranteed for the length of his life, and a "joint and survivor" annuity (sometimes called a "co-annuity"), in which benefits are guaranteed for the length of both his life and his spouse's. Many plans that ERISA does not cover also offer joint and survivor annuities.⁸² Assuming that *Manhart* has answered the question of how to calculate the employee's benefits, the problem of how to calculate the spouse's benefits remains. The present practice typically sets the joint and survivor rate in relation to the age and sex of the retiree and his spouse, raising the issue whether this is sex discrimination under title VII.

A threshold issue is the applicability of title VII to joint and survivor annuities because title VII applies only to employees and the spouse of the retiree is not an employee.⁸³ Each employee is entitled, however, to as much protection for his spouse as any other employee, regardless of the employee's sex. The protection afforded by a retirement plan is closely analogous to the protection afforded by the social security system. In *Weinberger v.*

month) and to fund benefits over the longer life expectancy of *F* herself. *F*'s monthly benefit would be approximately \$679.

⁸⁰ 29 U.S.C. § 1055 (1976).

⁸¹ *Id.* §§ 1001-1381.

⁸² These options are often actuarial equivalents. The cost to the plan will be the same regardless of which option is elected. See H. BIEGEL, G. BUCK, D. FARWELL, A. FEFFERMAN, W. FELLERS, W. HARMAN, F. RUDGE, J. ST. JOHN & E. WILLIS, *PENSIONS AND PROFIT SHARING* 101 (3d ed. 1964). Thus, the Court's comment that male employees who elect joint and survivor annuities may regain some of the advantage they will lose by virtue of the judgment in the case, see 435 U.S. at 709 n.14, is less than universally true.

⁸³ The spouse of an employee of a public employer may be able to avoid this obstacle because of the equal protection requirements of the fifth or fourteenth amendments. The Constitution may prohibit disparate treatment of counterpart beneficiaries of a retirement plan: the government is taking action regarding them, and it is immaterial that they are not employees.

Wiesenfeld,⁸⁴ the Supreme Court held that a widower with a dependent child was entitled to the same spousal benefits under the Social Security Act⁸⁵ as a widow in his position would have received. Although quite possibly "men are more likely than women to be the primary supporters of their spouses and children,"⁸⁶ meaning that widowers will need spousal benefits less frequently than will widows, "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."⁸⁷ Likewise, in *Califano v. Goldfarb*⁸⁸ the Court held that a widower was entitled to survivor's benefits from the Old-Age, Survivors, and Disability Insurance Benefits program⁸⁹ on the same basis as a widow. Affirming the three-judge district court, the Court quoted the following language from the lower court opinion:

Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to [her and her husband's] joint welfare when the couple or one of them retired and her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men.⁹⁰

Although in both of these cases the right of the nonworker to receive benefits was at issue, the Court focused on the right of the worker to be free of sex discrimination. There is no reason to believe that the Court will not view the rights of nonworker co-annuitants in the same light. Indeed, a stronger argument can be made for nondiscriminatory treatment of annuitants than for similar treatment of social security beneficiaries because the employee co-annuitant, far from being dead, is also a recipient of benefits.

Assuming that title VII protection applies to joint and survivor annuities, the question becomes whether setting a co-annuity rate by reference only to the age and sex of the employee and his spouse constitutes sex discrimination. Although here the discrimination is against men, who receive lower benefits than their female

⁸⁴ 420 U.S. 636 (1975).

⁸⁵ 42 U.S.C. § 402(g) (1976).

⁸⁶ 420 U.S. at 645.

⁸⁷ *Id.*

⁸⁸ 430 U.S. 199, 216-17 (1977).

⁸⁹ 42 U.S.C. §§ 401-432 (1976).

⁹⁰ 430 U.S. at 204 (citation omitted).

counterparts,⁹¹ the rationale of *Manhart* would seem to control. As the Court wrote:

An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of [the 2,000] is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different."⁹²

In the straight annuity situation, the benefit of a female employee is reduced because she is a woman; in the joint and survivor annuity situation, the benefit of a male employee is reduced because he is a man and his spouse is a woman.

This disparate treatment arguably is the result not of the employee's sex, but of his spouse's sex. Three responses seem persuasive. First, counterparts are entitled—regardless of sex—to equal protection for themselves and their spouses.⁹³ Second, taking into account the sex of an employee's spouse inevitably takes into account the sex of the employee because spouses are of opposite sexes.⁹⁴ If it is unlawful to vary counterparts' benefits because of their sexes, expanding the variables to include the sexes of the counterparts' spouses does not legitimate the practice. Third, a greater reduction in the benefit of a male retiree who elects a joint and survivor annuity than in the benefit of his female counterpart allocates the cost of his spouse's share of the benefit solely to the class of his sex. *Manhart* may be read to hold, however, that the risks of male and female longevity should be spread over the class of all employees. Placing the cost of the joint and survivor annuity on the

⁹¹ Consider an employee who is entitled to a straight annuity of \$1,000 per month. Assume the plan offers and the employee selects the popular "50% joint and survivor annuity," in which payments to a spouse who survives the employee are one-half of the initial installment payments. Under present practices, if the employee is male and he and his wife are aged 65, the initial benefit will be \$870; if the employee is female and she and her husband are aged 65, the initial benefit will be \$940. The female employee's annuity is reduced by a smaller amount than the male employee's because male spouses as a class have a relatively shorter life expectancy. See Brief for the Society of Actuaries and the American Academy of Actuaries as amici curiae at 14, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

⁹² 435 U.S. at 711 (footnote omitted).

⁹³ See text accompanying note 88 *supra*.

⁹⁴ Cf. *Faraca v. Clements*, 506 F.2d 956 (5th Cir.) (finding violation of 42 U.S.C. § 1981 where a state-supported facility refused to hire a white man because his wife was black), *cert. denied*, 422 U.S. 1006 (1975).

class of all employees would be more in keeping with *Manhart*.

A problem of adverse selection arises in the context of co-annuities. If joint and survivor annuity rates were set by reference to the age—but not the sex—of the employee and his spouse, initial benefit payments would be higher for male employees and lower for female employees than they are presently. A male employee might choose the joint and survivor annuity, but a female employee would do better with some other option, if available, such as a lump-sum settlement with which she could buy a co-annuity from a private insurance company at a more favorable rate. Adverse selection of this type will not cause a serious problem, however, because the income tax consequences of receiving such a large amount of taxable income in a single year will make the lump-sum settlement an infrequent occurrence.⁹⁵ If adverse selection does occur often, actuaries will be able to predict its incidence and adjust their planning accordingly. Because adverse selection occurs at retirement, when the employee's benefits ought to be fully funded, the soundness of the retirement plan should not be jeopardized.

3. *Optional Plans, Optional Contributions, Stock Options, and Profit Sharing*

Not all retirement plans require employees to participate, and not all plans require male and female counterparts to participate at the same level. Some plans are completely optional, allowing each employee to decide for himself whether or not to join. Optional plans also may allow the employee to determine his level of participation, that is, how much he will contribute. Some mandatory plans, in which employees are required to participate, allow an individual to make extra contributions.⁹⁶ Some plans substitute stock in a corporation for cash contributions or benefits. *Manhart* affects all of these plans.

An employer may choose to offer his employees the opportunity to participate in a retirement plan at their election. Because membership is not compulsory, an argument can be made that an employee's participation is analogous to his purchasing an annuity from a private insurance company, which apparently may distinguish between male and female counterparts.⁹⁷ Is it sex

⁹⁵ See I.R.C. § 408(d)(1).

⁹⁶ See J. MELONE & E. ALLEN, *supra* note 31, at 58-60.

⁹⁷ Title VII applies to employers, but not to sellers of insurance. The Court stated,

discrimination for an employer to offer his employees the opportunity to join a retirement plan that accepts only disparate contributions from male and female counterparts or that pays them disparate benefits? This article asserts that such plans are discriminatory because title VII requires an employer to provide male and female counterparts with "employment opportunities irrespective of their sex."⁹⁸ An employer need not offer a retirement plan but, if he does, the plan must not discriminate against women because of their sex. This is true even if membership in the plan is optional, because membership is a valuable opportunity: it protects against the risk of providing for the risk of longevity by automatic accumulation for individuals who have difficulty saving money from their take-home pay and by expert investment of savings, and it may provide valuable tax advantages.⁹⁹ An employer should not be allowed to rely on the voluntary nature of his plan as a defense against a claim of discrimination any more than he can (1) defend against discrimination in hiring by arguing that women who do not like the discrimination need not work for him,¹⁰⁰ or (2) defend against discrimination in seniority rights following pregnancy leave by arguing that women may avoid the discrimination by refraining from becoming pregnant.¹⁰¹

Alternatively, an employer may require his employees to participate in a retirement plan, but allow them to contribute extra amounts toward their pensions. Again, it may be argued that an employee's extra contributions are analogous to his purchasing a private annuity and that therefore it is lawful for the plan to allow a man's extra contribution to purchase a higher monthly benefit than a like contribution by his female counterpart. If, as argued above, totally optional plans are prohibited from discriminating against women, it follows that partially optional plans are likewise

"[a]lthough we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." 435 U.S. at 717.

⁹⁸ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). Although this case dealt with discriminatory hiring, the statute clearly mandates equal opportunities for employees as well as for applicants. See 42 U.S.C. § 2000e-2(a)(2) (1976).

⁹⁹ If retirement contributions exceed \$1,500 in one year, they still may remain tax-deductible. In contrast, any amount over \$1,500 deposited into an Individual Retirement Account (IRA) would be taxable. See I.R.C. § 408(a)(1).

¹⁰⁰ See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

¹⁰¹ See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 140 n.2 (1977).

prohibited. Indeed, a stronger argument can be made regarding partially optional plans because while the employee who elects not to join a totally optional plan may establish an Individual Retirement Account (IRA), the employee who is covered by a mandatory plan may not.¹⁰² The employer who maintains a partially optional plan denies employees the alternative of an IRA and therefore should not be allowed to substitute for it an option that discriminates against women. In contrast, a plan that allows each employee to determine his own level of contribution—so that a man might eventually enjoy a higher monthly benefit than a woman who is otherwise his counterpart because he taxed himself higher contributions—is unobjectionable so long as one dollar of a man's contribution buys him the same monthly benefit as his counterpart's dollar.

Instead of maintaining a retirement fund, a corporate employer may permit its employees to purchase stock that, if held until the employee retires, substitutes for a pension. Alternatively, a corporation may allow its employees to purchase stock options that mature when the employee retires. Because male and female counterparts have equal opportunities to purchase the stock or options, such programs resemble defined contribution plans that provide lower periodic benefits for women than for men. The woman who wishes to parcel out her principal and income over her life expectancy will realize a lower periodic benefit than her male counterpart who invests the same amount in stocks or options. The Court's dictum in *Manhart* authorizing severance pay plans appears to protect such plans.¹⁰³ The employee becomes the owner of the stock on the date of his retirement; he occupies the same position as an employee whose company maintains a severance pay plan that provides a lump-sum benefit at retirement. Because male and female counterparts receive exactly the same amount of property in cash or stock when they retire, there is no disparate treatment. A disparate impact argument could be made, asserting that such facially neutral programs would disadvantage women because they would have to elect lower monthly benefits in order to provide for their full life expectancies, but the Court's response to the Department's argument that equal periodic benefits would be unfair to *men* provides an appropriate reply.¹⁰⁴ If a gender-neutral plan with some

¹⁰² See I.R.C. § 219(b)(2).

¹⁰³ See 435 U.S. at 717-18.

¹⁰⁴ See *id.* at 710 n.20; text accompanying note 70 *supra*.

disproportionate impact on men is legal, a plan with a disproportionate impact on women is also valid, and title VII is apparently satisfied. Differences in the way counterpart retirees spend their lump-sum distributions, and in what they receive in return, arise from a factor other than sex—these are free choices made by the individuals involved and the companies with which they chose to deal.

The same reasoning applies to profit-sharing plans. Assuming that male and female counterparts are allocated equal portions of profit, the relevant inquiry is whether the plan pools the risk of longevity or distributes an employee's benefits in a lump sum at retirement. In the former situation, monthly benefits must be equal for counterparts; in the latter, the one-time settlement must be equal. It is immaterial that the contribution is contingent on the firm's profits.

IV. IMPLICATIONS

Whatever Congress and the Supreme Court may say about equality for women, two facts will remain: women outlive men and employers are aware of the longevity figures.¹⁰⁵ If the applications of *Manhart* discussed above are correct, an employer who maintains a defined benefit or defined contribution plan ("insurance plans"¹⁰⁶) will be required to provide equal monthly benefits to counterparts at equal cost to them, and it is inevitable that the employer will realize that women are more costly employees than men. The Court, however, has expressly authorized an employer to maintain a severance pay plan into which he makes equal contributions for each employee, leaving a retiree who wishes to insure against the risk of longevity to "purchase the largest benefit which his or her accumulated contributions could command in the open market."¹⁰⁷ An

¹⁰⁵ Changing life-styles may narrow the gap between male and female longevity, but no significant narrowing can be expected for persons who retire within the next two decades. These persons are unlikely to change their lives drastically and, even if they do, the changes probably would have only a marginal effect on longevity because they occurred so late in life.

¹⁰⁶ So called here because they pool the risk of longevity for a large class of persons.

¹⁰⁷ 435 U.S. at 717-18. The idea may derive from *General Electric Co. v. Gilbert*:

Absent proof of different values, the cost to "insure" against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her

employer who has a severance pay or similar plan ("noninsurance plans"¹⁰⁸) will be obligated only to put equal amounts of money into counterparts' accounts, and the woman will be no more expensive to employ than the man. Women will realize that they can earn greater compensation by working for an employer who has an insurance plan, provided significant numbers of men are covered by the same plan. Men will learn that if their employer maintains an insurance plan, their total compensation is inversely related to the proportion of women who work for their employer. If the economic forces generated by these forces develop fully in a competitive market, the result will be threefold: (1) men will tend not to work for employers who maintain insurance plans, resulting in segregation of the sexes in part of the labor market; (2) employers who maintain noninsurance plans will enjoy a competitive advantage in attracting well-qualified male employees; and (3) employers who maintain insurance plans will be tempted to discriminate against women by paying them less than their true marginal revenue product or by not hiring them at all.¹⁰⁹ Consider the following model, drawn in a competitive market for products and labor.

Employers Plan and Sevplan are in the same business and, except as specified, are identical in all respects. Each has equal numbers

insurance had to cover the "extra" disabilities due to pregnancy.

429 U.S. 125, 139 n.17. Except for Justice Brennan, who did not participate in *Manhart* and who dissented in *Gilbert*, all present members of the Court joined in either this aspect of *Gilbert* or the quotation in the text.

¹⁰⁸ The term "noninsurance plans" is used herein because they do not pool the risk of longevity; each individual's account is separate.

¹⁰⁹ One important element has been omitted from the employee's calculation: his perception of his own longevity. If an employee can be expected to maximize his income by examining the effects of specific features of retirement plans on his lifetime compensation, he can be expected to take into account how long he thinks he will live. For this purpose, employees can be divided into three groups. The first is composed of those who foresee long lives for themselves; they will prefer employers who offer insurance plans. The second group is composed of those who expect to die at a young age; they will prefer employers who pay compensation in the form of wages, and perhaps life insurance. The third group is composed of those who have no opinion on their lifespans or who expect to live an average length of time; they are likely to base their choice of employers on economic considerations. The size of the first two groups will diminish the importance of the elements discussed in the text as the causes of the effects predicted. The existence of those groups, however, will actually make the effects even more likely because it is probable that the number of employees who foresee long lives for themselves will be disproportionately female (women generally outlive men, and fewer women smoke, hang glide, etc.), while the number of employees who foresee short lives for themselves will be disproportionately male. Thus men will have two reasons to avoid employers who offer insurance plans: a man may not live long enough to benefit from such a plan and, even if he does, he may get more total compensation from an employer who offers a noninsurance plan or no plan at all.

of male and female employees, and each can attract qualified workers, turn out a good product, and earn a satisfactory profit by compensating employees at an average rate of \$1 per unit of production. Both maintain retirement programs. Competitive pressure prevents them from passing on to customers the cost of funding the program and, like most businessmen, they are unwilling to take this cost out of profit.¹¹⁰ As a result, the true incidence of the cost of benefits falls on the employees. Employer Sevplan has instituted a severance pay plan, as permitted by *Manhart*, into which he deposits 10% of each employee's wages,¹¹¹ making average take-home pay 90 cents.¹¹² Employer Plan has a noncontributory defined benefit retirement plan that provides equal monthly benefits for male and female counterparts. To keep his employees' take-home pay competitive with his rival's, Employer Plan contributes to his plan an average of 10 cents per employee per unit of production.

Because financing women's benefits costs approximately 14% more than financing men's benefits, 53% of every dollar Employer Plan puts into the retirement plan goes toward women's benefits and 47% goes toward men's benefits. A typical female employee of Employer Plan earns 100.7 cents per unit of production (90 cents wages plus 10.7 cents retirement benefits), while a male employee earns 99.3 cents per unit of production (90 cents wages plus 9.3 cents retirement benefits). This difference is significant over time: producing eight units per hour, a woman would earn \$16,112 in one year (2,000 hours), while her male counterpart would earn only \$15,888. Although their take-home pay in any given year is the same, the value of the woman's retirement account increases by \$224 more than the man's in that year. In contrast, a male employee of Employer Sevplan does not subsidize the benefits of his counterpart. He gets the full value of the 10 cents contributed to the severance

¹¹⁰ In a truly competitive industry there would be no "profits" in an economic sense with which to fund the benefits. The full measure of the "accounting" profits present would be necessary to meet the opportunity cost of the capital invested.

¹¹¹ The model would not be materially changed if Employer Sevplan had no retirement program at all. His cost of employing a woman would still be the same as the cost of employing a man, and each employee would receive the full value, but nothing more, of his compensation.

¹¹² Other factors affecting the total compensation package are ignored in this illustration because they cost employers equal amounts for counterparts. (An exception is health and disability insurance. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)). Male employees can be expected to behave toward employers with and without health and disability insurance programs in the same manner as they will behave toward employers with and without retirement plans operated on insurance principles.

pay plan, making his annual compensation \$16,000. His take-home pay is the same as that of the man who works for Employer Plan, but his retirement account increases by \$112 a year more. Therefore, at the margin men will prefer to work for Employer Sevplan.¹¹³ Moreover, so long as there are enough men working for Employer Plan to contribute a significant subsidy to women's benefits, women will prefer to work for Employer Plan.

Because whether he hires men or women makes no economic difference to Employer Sevplan, the increased supply of male applicants will change the sexual composition of his work force: he will employ more men and fewer women. Women will constitute a larger percentage of Employer Plan's applicant pool because they can earn more money working for him. As these forces develop, males will move from Employer Plan to Employer Sevplan in increasing numbers because, for each new woman Employer Plan hires, the compensation of the remaining men will decrease—they must subsidize a greater number of women.¹¹⁴ This process will not affect Employer Sevplan's retirement program, which is indifferent to sex, but Employer Plan's program, which is operated on insurance principles, will have to change to take account of the increasingly female composition of its membership. Because women's benefits cost more than men's, Employer Plan will have to choose between (1) holding wages and benefits constant by increasing the level of his contribution (he can no longer count on a subsidy from male employees), and (2) holding his contribution constant by decreasing the level of wages or benefits. This choice is only theoretical because, to remain competitive and to earn a satisfactory profit, Employer Plan must maintain a marginal labor cost no greater than Employer Sevplan's. Wages or benefits must fall. If wages remain at 90 cents, pensions will approach the level that 10 cents per employee per unit could purchase for a woman. Ultimately, a female employee of Employer Plan would receive the same monthly benefit from her employer's program as a female employee of Employer Sevplan would receive

¹¹³ Increasing the supply of men to Employer Sevplan will tend to depress the price of men's labor but, so long as Employer Sevplan's compensation exceeds the sum of Employer Plan's compensation plus the cost of changing jobs, men will move from Plan to Sevplan.

¹¹⁴ When Employer Plan's work force was 50% male, each employee earned \$1,664 annually toward retirement. For this \$1,664 women would receive \$1,780 in benefits, while men would receive only \$1,548 in benefits. If his work force became 25% male and current benefit levels applied, each employee would have to earn \$1,722 annually toward retirement. The increase presumably would be funded through a decrease in take-home pay. Men still would receive only \$1,548 in benefits, representing a significant decrease in compensation.

if she purchased an annuity from a private insurance company, and a male employee of Employer Sevplan would receive a higher monthly benefit from his insurance company. The rule of equal contributions and equal monthly benefits would become meaningless.

This analysis shows that pressure from the supply side of the labor market will tend to produce retirement plans that pay women monthly benefits lower than their male counterparts. This pressure will be accompanied by a tendency toward the segregation of male and female workers according to the nature of employers' retirement programs. Consideration of the demand side of the labor market reveals pressure in a similar direction, and this pressure unfortunately creates an economic motive for employers to violate the law of equal employment opportunity.

Employer Sevplan may be economically indifferent as between male and female employees because they are equally costly to him, but Employer Plan knows that because he uses a noncontributory insurance plan he must contribute more on behalf of women at a given level of benefits. To the extent that an employer bears the true cost of retirement benefits by taking it out of profit, or passes it on to customers by raising prices, he can save money and increase profits by substituting men for women. To illustrate with extremes, if a given level of benefits requires a contribution of 9.3 cents per employee per unit of production for an all-male work force, the same level of benefits for an all-female work force would require a contribution of 10.7 cents. Each time a man is substituted for a woman, the employer who bears the true incidence of the cost of retirement benefits increases his profit by 1.4 cents per employee per unit of production, and the employer who passes this savings on to customers can lower his prices and undersell his competitors by a like amount.

Employer Plan is losing male employees and gaining female employees. All other things being equal, he must contribute more to fund a woman's benefits than to fund a man's. In the short run, other things are not equal. The newly hired women probably will be younger than the men they replace. They will be paid at a lower rate, and they are less likely to remain on the job long enough to earn a vested pension. Each of these factors reduces the liability that an employee represents to a retirement plan and, accordingly, reduces the obligation of an employer to make contributions. Thus the replacement of men with women may not immediately increase

Employer Plan's level of contribution, but eventually he will feel the burden of a predominantly female work force. If he believes¹¹⁵—albeit mistakenly in a competitive market—that he bears or is passing on to customers any part of the cost of retirement benefits, he inevitably will be tempted to substitute men for women. Even if he is aware that he is shifting the full cost of benefits back to employees, he still can reduce his short-term obligation to contribute to the plan by substituting men for women. Theoretically, this substitution will allow him to increase wages by the amount he is saving on contributions, and in time competitive forces will probably cause him to do this. Employer Plan will realize, however, an immediate saving because pension contributions are adjusted as quickly as turnover occurs, while wage adjustments occur infrequently. For example, suppose Employer Plan employs 1,200 women and 800 men when he begins to feel pressured by increased retirement contributions. If each employee produces eight units an hour, and if Employer Plan can replace ten women with ten men each month for a year without raising wages, he will save approximately \$14,563 in contributions.¹¹⁶

The combined effect of *Manhart's* holding and dictum places Employer Plan in this position. As men move to Employer Sevplan, however, it may be difficult for Employer Plan to attract well-qualified members of the less expensive sex. Nevertheless, he will continue to feel the pressure of contributing more to his retirement plan on account of his increasing number of female employees. Employer Plan might recast job descriptions and manipulate hiring and promotions so that women are paid less than their true marginal revenue products. Doing this, he would benefit in three ways: (1) he would save on wages by paying some women less than the real value of their labor, (2) he would save on plan contributions because his obligation to contribute is a fraction of an employee's wage, and

¹¹⁵ As the nominal contributor in a noncontributory plan, Employer Plan probably will perceive that *he* is bearing the cost of the plan, regardless of the extent to which this is true.

¹¹⁶ The derivation of this figure is as follows. At a savings of 1.4 cents per unit with each substitution, the monthly saving would be $1.4 \times 8 \text{ units/hour} \times 166.67 \text{ hours/month}$, a net savings of \$18.67 per employee/month. Substituting 10 employees per month per year entails 780 employee-months, resulting in a savings of approximately \$14,563. This figure illustrates savings based solely on the fact that a man is less of a liability to a retirement plan than is his female counterpart. It is likely that Employer Plan would in fact save more than the figure in the text because his new men would also be paid at a lower rate than the women they replace; as new employees, they would be less likely to stay on the job long enough to earn a vested pension; and they might be younger as well.

(3) he would improve his ability to attract well-qualified men because he could offer them faster promotions. To handle the increased number of female employees, Employer Plan probably will have to reduce his plan's benefits or eventually lower his employees' wages, but this will reduce his ability to attract qualified men. In the short run, it would be easier for him to hire or promote a man instead of a woman or to reclassify the woman's new job so that it pays less than the actual market value of her labor.

In reality¹¹⁷ few employers are likely to establish or to convert to

¹¹⁷ The Court noted in *Manhart* that the Department had had equal contributions since 1975 and that there was no evidence that it could not compete effectively for sale employees. 435 U.S. at 716 n.30. The trial court had issued the injunction only two weeks after the rates were equalized, however, and this was a rather short period in which to measure such an effect.

William Frey's analysis, see note 58 *supra*, also bears on this question. Frey draws an important distinction between the short-term and the long-term effects of the *Manhart* decision and applies the distinction to both the supply of labor and the demand for it. The short-term effect on supply will be the result of the temporary inelasticity of the supply of male labor. For a number of reasons, men will not change their jobs quickly: male employees may not realize that they are subsidizing women's benefits; a man may not be able to find a comparable job with an employer who does not require a subsidy; an older male employee may have invested too much in his employer's plan to justify changing jobs. Thus in the short run, to the extent that the real cost of retirement benefits falls on employees, men will be subsidizing women. As for the short-term effect on the demand for labor, an employer will know that women are more costly employees, but he is unlikely to risk wholesale replacement because of his fear of a title VII action. Even a scofflaw probably would not replace his female employees immediately because the cost of training their replacements would likely exceed any portion of the extra cost of women's benefits which fell on him.

Offsetting forces make *Manhart*'s long-term effect on the supply of labor difficult to predict. Men will prefer to work for employers who do not require them to subsidize women's benefits. A male employee of a firm that provided no retirement plan at all would have to purchase an annuity from a private insurance company with money on which he had paid income tax. The cost of taxes and of paying for the insurance company's profit might well make a man indifferent between an employer who offered no retirement plan at all and one who offered a noncontributory insurance plan. In contrast, women definitely will prefer to work for employers who have insurance plans and who employ substantial numbers of men, because the male-to-female subsidy will increase women's compensation. Of course, the greater the number of women who work for an employer with an insurance plan, the greater the cost to the men who work for the same company and, accordingly, the greater the men's motivation to change jobs. Thus, as this article notes, pressure from the supply side will tend to segregate the labor market in the long run. As for the long-term effect on demand, employers will hire the cheaper of two employees. To the extent that the extra cost of women's extra benefits falls on employers, those with insurance plans will prefer men to women. Because the Equal Pay Act prohibits employers from paying women less than men for equal work, this preference can be expressed only by hiring fewer women. The very jobs women will want the most—with employers who provide insurance plans—will be the most difficult for them to obtain because the employers will not want the extra costs their employment carries.

Frey recommends approaching the problem from the demand, rather than from the supply, side. He suggests that Congress either prohibit insurance companies from distinguishing

severance pay plans of the type suggested in *Manhart* because employees, unwilling to receive so much taxable income in a single year,¹¹⁸ will resist them. Tax laws, of course, can be changed, but legislation making severance pay plans more attractive is unnecessary because IRAs appear to be completely legal under the dictum of *Manhart* and less subject to employee objections. If the sum of employer and employee contributions to a retirement plan is less than \$1,500 annually for any given employee, the employer may follow one of two courses of action without the severance pay plan's adverse tax consequences to the employee: (1) any employer may shift money used for retirement contributions into wages and advise employees to open their own IRAs, and (2) some employers¹¹⁹ may open IRAs on behalf of their employees and directly deposit retirement contributions. Given the economic and legal incentives to do this—reducing the cost of female employees and eliminating any temptation (felt strongly perhaps by rising managers who want to increase profits) to discriminate against women and to face the attendant risk of liability—some employers can be expected to convert to IRAs and many employers who are instituting retirement plans for the first time will be likely to prefer IRAs to insurance programs. These problems may be avoided.

V. ALTERNATIVES

Faced with a Janus of their own creation, the courts can take one of three approaches to the conflict between the legal rules and the economic forces set in motion by *Manhart*. First, the courts may choose to ignore the problem, either because they hope that factors other than a desire to maximize income will motivate employers and employees, or because they actually are indifferent to segregation along sexual lines in insurance and noninsurance plans.

between men and women or establish a compulsory, tax-supported, national pension program in place of existing private plans. Either suggestion would achieve its purpose. The sexual composition of a given work force would affect neither the supply of male labor nor the cost of compensating employees: men could not earn more compensation from some employers than from others, and employers would not pay out more in pension contributions for women than for men. Neither of these recommendations seems likely to pass Congress at the present time, however. Also, any benefit that would result might well be outweighed by the political cost of centralizing pensions or regulating insurance companies. While one may recognize the force of Frey's economic analysis, which shows that repudiating *Manhart's* dictum is not a complete solution, one may nevertheless prefer a partial solution that seems possible at once.

¹¹⁸ See I.R.C. § 408(d)(1).

¹¹⁹ See *id.* § 408(k).

Second, the courts could limit *Manhart* severely. The case holds that counterparts' contributions to a joint contribution defined benefit plan must be equal. It seems inescapable that counterparts' contributions to any other form of retirement plan also must be equal, for there appears to be no basis for distinguishing among employee contributions to the various types of retirement plans. The courts, however, may draw a line at benefits. They may choose to define equality in terms of total benefits, not monthly benefits. Indeed, *General Electric Co. v. Gilbert*¹²⁰ arguably requires this result by suggesting that a fringe benefit program would be discriminatory if it "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program."¹²¹ Of course, because no economic or actuarial difference exists between a plan with disparate contributions and equal monthly benefits and a plan with equal contributions and disparate monthly benefits, any employer whose plan was banned by *Manhart* easily could achieve precisely the same effect by equalizing contributions but reducing the rate at which benefits for women accrue in the future.

Third, the courts can repudiate the dictum in *Manhart*. The Supreme Court's rationale does not require that severance pay and IRA¹²² plans be treated differently from insurance plans. A severance pay plan instituted to provide a terminated employee with a financial cushion while he looks for another job certainly should provide equal distributions for male and female counterparts. A severance pay plan designed as a substitute for a retirement plan need not be permitted to effect disparate treatment of the sexes, for there is no significant difference between a severance pay plan and a conventional retirement plan.

A retirement plan protects against both the risk of longevity and the risk of providing for the risk of longevity by saving and prudently investing money for an employee and by guaranteeing an income for life to a retiree. A severance pay plan purports to protect only against the risk of providing for the risk of longevity; it saves

¹²⁰ 429 U.S. 125 (1976).

¹²¹ *Id.* at 138, quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974).

¹²² Title VII's potential impact on IRA plans appears limited to cases in which the employer deposits money for the employee. Even with the *Manhart* dictum repudiated, if an employer offers no retirement benefit plan, each employee apparently can on his own initiative place up to \$1,500 annually into an IRA. Counterparts ultimately would receive different monthly benefits from the proceeds of identical accounts.

and prudently invests, but it does not guarantee an income for life. By approving severance pay plans that accumulate equal amounts of money for male and female counterparts, the Supreme Court has implied that there is a relevant distinction between the risk of longevity and the risk of providing for the risk of longevity. It would seem, however, that no valid distinction exists. Why would a person want protection against the risk of providing for the risk of longevity, why would he be concerned about amassing funds to support himself in retirement, unless he also wanted protection against the risk of longevity itself, unless he were concerned about the possibility of living long enough to need the money? Indeed, how could one protect against the risk of providing for the risk of longevity, how could one save and invest, without estimating needs during retirement—without taking into account the risk of longevity?

In terms of its effect on employees, a severance pay plan would be no different from a defined contribution plan in which counterparts' contributions are equal and the woman receives a lower monthly benefit than the man. In a severance pay plan an employee does, however, have a legal right to receive all of the assets in his account upon retirement, while an employee in a conventional retirement plan does not. For several reasons this difference seems an insufficient basis for allowing disparate treatment of women. First, because some retirement plans allow for lump-sum settlements, the right is often not grounds for distinction. Second, the right is largely illusory because of the tax consequences of exercising it. Third, and most important, emphasis on this right ignores the fact that the real contributors to a severance pay plan, as well as to an insurance plan, may be the employer, the employees, or the customers. To the extent that the real incidence of the cost of benefits is passed on to customers or taken out of profit, men in severance pay plans would bear none of the cost of their pensions, while women would be required to bear a part of the cost of theirs. If this practice is unfair in insurance plans, it is equally unfair in noninsurance severance pay plans. Approving severance pay plans exalts form over substance.

Holding severance pay plans to the same standards as conventional insurance plans would present two minor problems, but both can be handled easily. First, genuine severance pay plans intended to protect an employee between jobs must be distinguished from severance pay plans that truly are retirement plans. The line between the two could be drawn easily because the former would

typically contain a relatively small amount of money, rarely more than a year's compensation, while the latter would contain the large balance necessary to fund many years of retirement benefits. Employer-funded IRAs always would be classed as retirement plans. Second, an employer expressly would have to contribute more money to a woman's severance pay plan account than to her counterpart's. This should not be objectionable because disparate contributions occur in effect in noncontributory defined benefit plans that provide equal monthly benefits for counterparts, and unequal employer contributions must occur in fact if defined contribution plans are to provide equal monthly benefits.

Repudiating *Manhart's* dictum would not avoid entirely a conflict between law and economics; a man could still earn greater compensation from an employer with no retirement plan than from an employer with one. Yet disapproval of the dictum certainly would mitigate the conflict. And if men find the risk of providing for the risk of longevity to be real enough, the conflict between law and economics will be eliminated: rather than incur the greater costs associated with the absence of a retirement plan, men will be willing to absorb whatever loss belonging to a retirement plan with women might entail. Perhaps most important, by repudiating the dictum the courts would allow women to enjoy in fact the equal treatment that the holding of the case seems to promise.